TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907

No. 178.

See No. 179.

EMPIRE STATE CATTLE COMPANY, W. S. WAITE & T. WAITE, ET AL., PETITIONERS,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITION FOR CERTIORARI FILED DECEMBER 30, 1907.
CERTIORARI AND RETURN FILED FEBRUARY 11, 1908.

(20,498.)

(20,498.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

No. 533.

EMPIRE STATE CATTLE COMPANY, W. E. WAITE, E. F. WAITE, ET AL., PETITIONERS,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

INDEX.

	Original.	Print.
Citation and Acknowledgment of Service	1	1
Writ of Error and Clerk's Return	3	2
Petition	5	3
Answer	19	9
Exhibit A (Contract for Shipment of 2 Cars of Cattle, May 25, 1903)	23	13
Exhibit B (Contract for Shipment of 11 Cars of Cattle, May 25, 1903)	25	15

	Original.	Print.
Exhibit C (Contract for Shipment of 8 Cars of Cattle, May 25, 1903)	27	17
Reply	31	19
Order Consolidating Causes for Trial	36	21
Jury Impanelled; Trial January 16, 1905	37	22
Trial January 17, 1905	38	22
Trial January 18, 1905	39	23
Trial January 19, 1905	40	23
Trial January 20, 1905	41	24
Trial January 21, 1905	42	24
Defendant's Demurrer to the Evidence	43	24
Trial January 23, 1905	44	25
Trial January 24, 1905	45	25
Verdict and Judgment, January 25, 1905	46	26
Defendant's Request for Peremptory Instruction and Exception to Ruling Thereon	48	27
Plaintiffs' Request for Peremptory Instruction and Exception to Ruling Thereon	49	27
Order Extending Time for Settling Bill of Exceptions	58	28
Order Extending Time for Defendant to Serve Amendments to Bill of Exceptions	59	28
Bill of Exceptions	60	29
Stipulations as to the Citizenship of the Parties	61	29
Stipulation that Defendant has its General Offices at Topeka, Kansas	62	30
Testimony for Plaintiffs	63	31
G. W. Cloyd	63	31
W. H. Frost	72	37
John T. Shy	158	96
W. H. Frost, Recalled	166	101
Thomas B. Tomb	167	102
Notice of Claim of W. H. Frost	180	111
Stipulation of W. H. Frost for Pasturing Cattle, June 10, 1903	181	113
Notice of Claim of Empire State Cattle Co	181	113
Stipulation as to Service of Notice of Claims	183	114
Notice to Produce Bonds Given by Plaintiffs	184	116
J. D. Carr	185	116
Agreement as to Way-Bills	190	120
Way-Bill Dated May 25, 1903	191	121
W. H. Frost, Recalled	192	123
Way-Bill dated May 26, 1903	194	125
Bond of the Empire State Cattle Co., to Defendant	196	127
Stipulation as to Depositions	199	130
Albert Newton, Deposition of	200	130
James E. Hurley	258	172
Stipulation as to Telegrams	266	178
Telegram J. H. Garside to E. A. A., 5/26/03	268	179
Telegram E. A. A. to J. H. G., 5/26/03	268	179
Telegram E. A. A. to J. H. G., 5/26/03	269	180
Telegram J. E. Hurley to F. C. Fox, May 27	269	180
Telegram W. K. Etter to J. E. Hurley, May 27, 1903	269	180
Telegram J. E. Hurley to W. K. Etter, May 27, 1903	269	180
Telegram C. T. McLellan to J. E. H. G. O., May 27, 1903	269	180

	Original.	Print.
Telegram J. E. Hurley to H. Miller, Gen'l Supt., May 27, 1903	270	181
Telegram J. E. Hurley to C. W. Cook, W. J. Healy, May 27, 1903	270	181
Telegram J. E. Hurley to F. C. Fox, May 27, 1903	270	181
Telegram W. K. Etter to J. E. Hurley, May 27, 1903	270	181
Telegram Henry Miller to J. E. Hurley, May 27, 1903	271	182
Telegram J. E. Hurley to C. W. Cook, W. J. Healy, May 27, 1903	271	182
Telegram A. T. Perkins to C. T. McLellan, 5/27/03	271	182
Telegram J. H. Garside to E. A. Austin, 5/27/03	271	182
Telegram E. A. A. to J. O'Byrne, 5/27/03	271	182
Telegram dated 5/27/03	272	182
Telegram E. A. A. to HBM Yd. LE M N, 5/27/03	272	183
Telegram J. H. G. to E. A. A., 5/27/03	272	183
Telegram A. T. Perkins to J. H. G.	272	183
Telegram E. A. A. to J. H. G., 5/27/03	272	183
Telegram E. A. A. to J. H. G., May 27, 1903	272	183
Telegram E. A. A. to J. H. G., 5/27/03	273	183
Telegram E. A. A. to J. H. G., 5/27/03	273	184
Telegram E. A. A. to J. H. G., 5/27/03	273	184
Telegram E. A. A. to J. H. G., 5/27/03	273	184
Telegram E. A. A. to J. H. G., 5/27/03	273	184
Telegram E. A. A. to J. H. G., 5/27/03	274	184
Telegram E. A. A. to L. E. M., 5/27/03	274	185
Telegram J. E. Hurley to H. G. Clark, 5/28/03	274	185
Telegram J. E. Hurley to E. A. Gould, May 28, 1903	274	185
Telegram J. E. Hurley to H. G. Clark, May 28, 1903	275	185
Telegram H. G. Clark to J. E. Hurley, May 28, 1903	275	185
Telegram J. E. Hurley to C. T. McLellan, May 28 1903	275	185
Telegram J. E. Hurley to H. G. Clark, May 28, 1903	275	186
Telegram W. K. Etter to J. E. Hurley, May 28, 1903	275	186
Telegram J. E. Hurley to H. Miller, Genl. Supt., May 28, 1703	276	186
Telegram J. E. Hurley to H. G. Clark, May 28, 1903	276	186
Telegram F. C. Fox to J. E. Hurley, May 28, 1903	276	186
Telegram J. E. Hurley to H. G. Clark, May 28, 1903	276	187
Telegram E. A. Gould to J. E. Hurley, May 28, 1903	276	187
Telegram J. E. Hurley to E. A. Gould, May 28, 1903	277	187
Telegram J. E. Hurley to C. T. McLellan, May 28, 1903	277	187
Telegram J. E. Hurley to F. C. Fox, May 28, 1903	277	188
Telegram J. E. Hurley to H. Miller, May 28, 1903	277	188
Telegram H. G. Clark to J. E. Hurley, May 28, 1903	277	188
Telegram E. A. Gould to J. E. Hurley, May 28, 1903	278	188
Telegram H. G. Clark to J. E. Hurley, May 28, 1903	278	188
Telegram J. E. Hurley to H. G. Clark, May 28, 1903	278	189
Telegram J. E. Hurley to C. T. McLellan, May 28, 1903	278	189
Telegram J. E. Hurley to F. C. Fox, May 29, 1903	278	189
Telegram H. G. Clark to J. E. Hurley, May 28, 1903	279	189
Telegram C. W. Kouns to J. E. Hurley, May 28, 1903	279	189
Telegram J. E. Hurley to C. T. McLellan, H. W. Sharp, May 28, 1903	279	190

	Original.	Print.
Telegram E. A. A. to C. L. M., 5/28/03	279	190
Telegram E. A. A. to H. W. S., 5/28/03	279	190
Telegram E. A. A. to L. E. M. & H. B. M. 5/28/03	280	190
Telegram E. A. A. to L. E. M., 5/28/03	280	190
Telegram E. A. A. to H. B. M., 5/28/03	280	190
Telegram E. A. A. to H. B. M., 5/28/03	280	191
Telegram J. E. Hurley to F. C. Fox, 5/28/03	280	191
Telegram L. E. M. to C. F. S., W. S. M., E. R., Fisk, 5/28/03	280	191
Telegram L. E. M. to C. F. S. & Connor, 5/28/03	281	191
Telegram E. A. A. to L. E. M., 5/28/03	281	191
Telegram F. C. Fox to D. D. B., 5/28/03	281	191
Telegram E. A. A. to L. E. M., 5/28/03	281	192
Telegram H. G. Clark to J. E. Hurley, May 29, 1903	281	192
Telegram H. W. Sharp to J. E. Hurley, E. A. Austin, May 29, 1903	281	192
Telegram J. E. Hurley to C. T. McLellan, H. W. Sharp, May 29, 1903	282	192
Telegram F. C. Fox to J. E. Hurley, May 28, 1903	282	193
Telegram J. E. Hurley to F. C. Fox, May 29, 1903	282	193
Telegram J. E. Hurley to H. G. Clark, May 28, 1903	282	193
Telegram J. E. Hurley to C. T. McLellan, H. W. Sharp, May 29, 1903	283	193
Telegram C. T. McLellan, to J. E. Hurley May 29th	283	194
Telegram J. E. Hurley to F. C. Fox, May 29, 1903	283	194
Telegram H. G. Clark to J. E. Hurley, May 29, 1903	283	194
Telegram J. E. Hurley to H. G. Clark, May 29, 1903	283	194
Telegram H. G. Clark to J. E. Hurley, May 29, 1903	284	194
Telegram W. K. Etter to J. E. Hurley, May 30, 1903	284	194
James E. Hurley, Resumed	284	195
D. D. Denham	314	216
Exhibit A (Claim of Minnesota & Dakota Cattle Co., for Loss and Damage)	316	217
Personal Expense Account of Charles Stube	317	218
Personal Expense Account of M. Mullen	318	218
T. B. Jennings, Deposition of	320	219
W. E. King, Deposition of	327	223
Theron Samuel Cafferty, Deposition of	330	225
L. A. Allen	332	226
Drawing showing Position of Exchange Building and Shipping Division, etc	342	235
Nova Z. Douthitt	386	267
Telegram C. W. Cook to N. Douthitt, May 27, 1903	389	268
Telegram N. Douthitt to C. W. Cook, May 27, 1903	389	269
William M. Kendrick	410	283
William A. Dyal, Deposition of	420	290
C. T. McLellan	423	292
W. H. Frost, Recalled	431	298
Exhibits to Deposition of P. Connor	435	300
A (Statements of River Stages, May 12 to June 10, 1903)	435	300
B (Copies of River Forecasts and Warnings Issued at Kansas City)	436	301
Patrick Connor, Deposition of	438	304
R. E. Ball	467	324

	Original.	Print.
Consent of Minnesota & Dakota Cattle Co., that Cattle May be Pastured, June 10, 1903	468	325
Stipulation as to Taking Depositions at Evarts, S. D.	471	326
Stipulation for Withdrawal of Depositions in Cases Pending in State Court, etc.	472	327
Rufus Cleveland, Deposition of	473	328
James W. Nichols, Deposition of	492	340
Phillip DuFran, Deposition of	495	342
W. C. Sparks	500	345
C. T. McLellan, Recalled	502	347
William Welch, Deposition of	505	348
William Welch, Second Deposition of	526	362
Lee Elliott, Deposition of	543	373
Louis LaPlant, Sr., Deposition of	553	380
Geo. D. Mathieson, Deposition of	556	382
Charles Stube	560	384
M. Mullen	593	407
J. D. Carr, Recalled	600	413
Samuel W. Moore, Deposition of	604	415
Gardiner Lathrop, Deposition of	615	422
Defendant's Demurrer to the Evidence and Exception to Ruling Thereon	623	427
Testimony for Defendant	625	428
S. M. Clay	625	428
J. M. Clay	638	437
R. L Clay	646	442
F C. Fox	647	443
James H. Garside	652	447
Ed Haven	666	456
G. A. Roberts	677	464
D. Farley	691	473
S. S. Brown	697	477
John J. Sullivan	719	493
Ed. Davis	740	508
W. H. Hilderbrand	754	517
A. S. Coppel	757	520
G. A. Roberts	760	521
D. Farley, Recalled	763	524
Stipulations as to Objections to Depositions	770	529
Harry P. Child, Deposition of	771	529
Telegram T. B. Jennings to H. P. Child, May 30th	785	538
Telegram T. B. Jennings to H. P. Child, May 30th	785	538
J. W. S. Hutchings, Deposition of	791	542
Exhibit C (Unloading Certificates, May 30, 1903)	800	548
Exhibit D (Unloading Certificate, May 29, 1903)	802	550
Exhibit B (Unloading Certificate, May 30, 1903)	803	551
William Fletcher	805	552
H. S. Swingley	823	564
Ore Cable	841	576
W. A. Coombs	846	579
H. W. Sharp	865	592
Resolution XIV of Central Association of Railroad Officers, Feby. 12, 1895	888	608
W. A. Coombs, Recalled	902	619
Testimony for Plaintiffs in Rebuttal	907	622

	Original	Print.
L. A. Allen	907	622
R. P. Isitt	917	629
Lester Woolf	924	634
M. Mullen	925	635
W. A. Frost	927	636
W. H. Brown	928	637
Recital that Record Contains all of the Evidence	928	637
Plaintiff's Requests for Instructions and Exceptions to Rulings Thereon	928	637
Defendant's Request for Peremptory Instruction and Exception of Plaintiffs to Ruling Thereon	938	644
Verdict	938	645
Opinion on Requests for Peremptory Instructions	939	645
Certificate of Judge to Bill of Exceptions	953	656
Record Entry of Filing of Bill of Exceptions, etc	954	656
Assignment of Errors	956	657
Bond on Writ of Error	958	658
Clerk's Certificate to Transcript	960	660
Stipulation as to Contents of Record and Hearing of Cause	961	660
Stipulation as to Record to be Printed	962	661
Stipulation to Omit Photograph from Printed Record	966	664
Clerk's Certificate to Printed Record	967	665
Caption to Supplemental Transcript of Proceedings in U. S. Circuit Court of Appeals	1	665
Appearance of Counsel for Plaintiffs in Error	2	666
Appearance of Mr. R. F. Walker as Counsel for Defendant in Error	2	666
Appearance of Mr. Gardiner Lathrop and Mr. C. Angevine as Counsel for Defendant in Error	3	666
Argument Commenced	4	667
Order of Submission	4	668
Opinion U. S. Circuit Court of Appeals	6	668
Judgment U. S. Circuit Court of Appeals	12	675
Motion of Plaintiffs in Error for Order Enlarging Time to File Petition for Rehearing	13	675
Order Enlarging Time to File Petition for Rehearing	14	676
Petition for Rehearing	15	679
Order Denying Petition for Rehearing	22	687
Clerk's Certificate to Supplemental Transcript of Proceedings	23	687
Writ of certiorari and return		689

1 The United States of America.

To The Atchison, Topeka and Santa Fe Railway Company—Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this Citation bears date, pursuant to a writ of error, filed in the Clerk's office of the Circuit Court of the United States for the First Division of the Judicial District of Kansas, wherein Empire State Cattle Company, a corporation, W. W. Waite, E. F. Waite, W. H. Frost, P. H. Kellogg, C. L. Millet and J. D. Carr are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable John C. Pollock, Judge of the Circuit Court of the United State for the District of Kansas, this 12" day of May in the year of our Lord one thousand nine hundred and five.

JOHN C. POLLOCK.
United States District Judge,
for the District of Kansas.

Service of the above acknowledged this 12th day of May 1905.

A. A. HURD,
O. J. WOOD,
C. ANGEVINE,
Attys for Deft. in Error.

2 No. 8155. United States Circuit Court, First Division of the Judicial District of Kansas. Empire State Cattle Company et al vs. The Atchison Topeka and Santa Fe Railway Co. Citation.. Filed May 12, 1905. Geo. F. Sharitt, Clerk.

3 United States of America—ss.

The President of the United States,

To the Honorable the Judges of the Circuit Court of the United States for the First Division of the Judicial District of Kansas, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, at the January Term, 1905, thereof, between Empire State Cattle Company, a corporation; W. W. Waite, E. F. Waite, W. H. Frost, P. H. Kellogg, E. L. Millet and J. D. Carr, plaintiffs and The Atchison Topeka and Santa Fe Railway Company, defendant, a manifest error hath happened, to the great damage of the said Empire State Cattle Company, a corporation, W. W. Waite, E. F. Waite, W. H. Frost, P. H. Kellogg, E. L. Millet and J. D Carr as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Eighth Circuit, together with this writ, so that you have the said record and proceedings aforesaid, at the city of St. Louis, Missouri, and filed in the office of the Clerk of the United States Circuit Court of Appeals, for the Eighth Circuit, on or before the 11th day of July 1905, to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 12" day of May in the year of our Lord, one thousand nine hundred and five.

The Seal of the Circuit Court of the United States Dist. of Kansas. 1862.

Issued at office in the City of Topeka with the seal of the Circuit Court of the United States for the First Division of the Judicial District of Kansas, dated as aforesaid.

GEO. F. SHARITT,
Clerk Circuit Court United States, First Division of the Judicial District of Kansas.

Allowed by JOHN C. POLLOCK, Judge.

4 Return to Writ.

United States of America,
First Division of the Judicial
District of Kansas—ss.

In obedience to the command of the within writ, I herewith transmit to the United States Circuit Court of Appeals for the Eighth Circuit, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

The seal of the Circuit Court of the United States Dist. of Kansas 1862.

In Witness Whereof, I hereunto subscribe my name, and affix the seal of said Circuit Court, at office in the City of Topeka this 1st day of June A. D. 1905.

GEO. F. SHARITT,
Clerk of Said Court.

No. 8155. United States Circuit Court, First Division of the Judicial District of Kansas. Empire State Cattle Co. et al vs. A. T. & S. F. Ry. Co. Writ of Error to the Circuit Court of the United States for the First Division of the Judicial District of Kansas. Filed 12" day of May 1905. Geo. F Sharitt, Clerk.

5 In the Circuit Court of the United States for the District of Kansas, First Division.

Empire State Cattle Company, a corporation, W. W. Waite, E. F. Waite, W. H. Frost, P. H. Kellogg, C. L. Millet and J. D. Carr, Plaintiffs,

vs.

Atchison, Topeka & Santa Fe Railway Company, a corporation, Defendant,

Petition.

Plaintiffs state that during all the times hereinafter mentioned said plaintiff Empire State Cattle Company was and is a corporation duly created and existing under and by virtue of the Laws of the State of South Dakota and having its principal office in said State of South Dakota, and that said Empire State Cattle Company was, has been and is a citizen and inhabitant of said State of South Dakota.

Plaintiffs further state that said plaintiffs W. W. Waite and E. F. Waite during all the times hereinafter mentioned were and are a partnership existing under the firm name and

style of Waite Brothers, and that said W. W. Waite and E. F. Waite were, have been and are residents, citizens and inhabitants of said state of South Dakota.

Plaintiffs further state that said plaintiffs W. H. Frost and P. H. Kellogg, C. L. Millett and J. D. Carr were, have been and are also residents citizens and inhabitants of said State of South Dakota.

Plaintiffs further state that the defendant Atchison, Topeka & Santa Fe Railway Company during all the times hereinafter mentioned was and still is a corporation duly created as a Railway Company under the laws of the State of Kansas, and has been such corporation since the year 1895, and that ever since said year 1895 said defendant was, has been and still is a citizen of said State of Kansas, and that said defendant has its chief head office and place of business at Topeka,
6 in Shawnee County in said First Division of said District of Kansas, and that therefore defendant has had and still has its habitation and residence at said Topeka in said Shawnee county, Kansas.

Plaintiffs further state that during all the times hereinafter mentioned said defendant, in connection with its other lines of railway, maintained a railway from Atchison, Kansas, by way of Topeka, Kansas, to Amarillo, Texas, and that over said line, in connection with its other lines said defendant was and is a common carrier engaged as a railway company in the transportation, for hire, of passengers, freight and live stock, and that defendant as such railway and common carrier owed the duty to carry all freight and live stock safely and with due and reasonable care over its said railway.

Plaintiffs further state that on May 25th, 1903, they were the owners of 798 head of cattle at Hereford, Texas, and that on said last day they shipped from said Hereford, Texas, said 798 head of cattle for transportation by railway from said Hereford, Texas, to Everetts, South Dakota; that said shipment was made over three lines of railway, to-wit: from Hereford, Texas to Amarillo, Texas, over the Pecos & Northern Texas Railway; from Amarillo, Texas to Atchison, Kansas, over the defendant company's railway, and from Atchison, Kansas, to Everetts, S. D. over such connecting line of railway as should receive said cattle from said defendant Railway Company.

Plaintiffs further state that said 798 head of cattle were delivered to defendant at said Amarillo, Texas for shipment over the said line of defendant's railway to Atchison, Kansas, and

to be there delivered by defendant to said connecting railway company, and that said defendant, on May 25th, 1903, accepted from plaintiffs said 798 head of cattle for shipment, as aforesaid, from said Amarillo, Texas, to said Atchison, Kansas, over the line of railway of defendant.

Plaintiffs further state that defendant as such railway company and common carrier transported and carried said 798 head of cattle from Amarillo, Texas, to Strong City, Kansas, which was and is a station on defendant's line of railway between Amarillo, Texas and Atchison, Kansas, and at
7 said Strong City, Kansas, on May 26th, 1903, said 798 head of cattle were by defendant unloaded to be fed, and that said 798 head of cattle having been fed at said Strong City on the night of said May 26th, 1903, the same were ready to be reloaded and for transportation and carriage thereof to be continued on the morning [on] May 27th, 1903; that at and prior to the morning of May 27th, 1903, and in consequence of the continuous rains which had prevailed over Colorado, Kansas, Nebraska, Iowa and Missouri an unprecedented flood had commenced in the waters of the Kaw (Kansas) and Missouri rivers extending from the source of the Kaw River to its mouth, and extending down the Missouri river from its source to the point where said Kaw river [expties] into said Missouri river; that said 798 head of cattle were detained by defendant, at Strong city, Kansas from the morning of said May 27th, 1903, to May 29th, 1903, during the time of which detention defendant two times loaded and unloaded from the cars in which they were being transported said cattle of plaintiffs; that during all the time of said detention of said cattle at Strong City, Kansas, the said flood in both said Kaw and Missouri rivers was daily and hourly getting higher, as defendants officers and agents well knew, and that on said 29th day of May, 1903, defendant again reloaded said cattle at Strong City, and, instead of continuing their transportation to said Atchison, Kansas, by way of Topeka, Kansas, on its regular line, deviated on its, the defendants own motion, the transportation of said cattle by carrying them to Kansas City, and that on the arrival of said cattle at Kansas City on the morning of May 30th, 1903, defendant, instead of leaving said cattle on the up-lands where they would have been safe from the continued rise of the said flood in said Kaw River, deposited said 798 head of cattle in pens along by the side of the said Kaw River near the mouth thereof, and where, as defendant and its officers and agents well knew, the waters of said flood in said Kaw River for several days had been continually rising, and at which point in said Kaw River on said

May 30th, and 31st, 1903, said flood reached its climax and extended far back from the ordinary channel of said Kaw River from each side thereof so as to fill and cover the
8 said pens in which defendant so deposited said 798 head of cattle of plaintiffs.

Plaintiffs further state that on May 31st, 1903, defendant in order to save said cattle from being drowned, drove the said 798 head thereof into the viaducts extending over said pens and above the waters, which in consequence of said flood had submerged said pens, and that in so driving said cattle into said viaducts defendant mixed and intermingled said 798 head with 2200 head of other cattle that were in said pens at said time, and that said 798 head of cattle and said other bunch of 2200 head of cattle remained in said viaducts from said May 31st, 1903, to June 7th, 1903.

Plaintiffs further state that said waters so made by said flood extended, from said May 31st, 1903, to June 7th, 1903, back from said pens, a distance of three quarters of a mile and more and were of a depth of from 8 to 15 feet, and that in consequence of said waters and of the placing of said cattle in said viaducts, it was impossible to feed or water said cattle during said period of seven days; that by reason of the location of said cattle and the mixing of the same with said 2200 head it was impossible for either defendant or plaintiffs to sufficiently feed and water said 798 head of cattle.

Plaintiffs further state that by reason of said insufficient feeding and watering of said 798 head of cattle 99 head thereof died; that all of said 798 head of cattle both at the time of their shipment at Hereford Texas, and the time they were so shipped from Strong City, Kansas, were in good condition and were each worth the sum and price of $25.00 and that by the death of said 99 head of cattle plaintiffs sustained a loss of $2475.00.

Plaintiffs further state that by reason of the driving of said cattle in and onto said viaducts, 8 head were so badly injured and crippled as to render them totally valueless, whereby plaintiffs lost the further sum of $200.00.

Plaintiffs further state that after deducting from said bunch of 798 head said 99 head and said 8 crippled cattle there remained 690 head, but that said 690 head were so injured and damaged by reason of the said insufficiency of feed and
9 water for the same as to cause a diminution in the value of each of said 690 head in the sum of $10.00 per head, so that the plaintiffs lost on said 690 head the further sum of $6900.00.

Plaintiffs further state that by reason of the said deviation and diminution in the value of said cattle at Kansas City, plaintiffs, were put to a total expense and outlay of the sum of $300.00 in looking after and caring for said cattle.

Plaintiffs further state that said 798 head of cattle were so shipped by plaintiffs from Hereford, Texas to Everetts, S. D. to be placed on pastures in said South Dakota, and that by reason of said detentions and deviations in the shipment of said cattle by defendant, and by reason of the several negligencies of defendant in the transportation of said cattle of plaintiffs, the remnant of said cattle did not reach the pastures of said South Dakota until som-time in the month of July, 1903, and that by reason of the failure of plaintiffs to get said 798 head of cattle into the said pastures in South Dakota at the time they would and should have reached said pastures if defendant had properly transported and carried the same, said cattle have been rendered unfit and incapable of properly enduring the rigors of the coming winter in said South Dakota, and that by reason thereof the remnant of said herd of cattle were and are further damaged and injured in the sum of $2500.00.

Plaintiffs further state that it was the duty of said defendant as such railway company and common carrier to exercise due and reasonable care in the carriage and transportation of said cattle from Amarillo, Texas, to said Atchison, Kansas, but that defendant was guilty of negligence in the following particulars to-wit:

(1) Defendant did not exercise due and reasonable care, but was negligent in the detention of said cattle at Strong City from May 27th, 1903, to May 29th, 1903, and in not carrying and transporting on May 27th 1903, said cattle from said Strong City, Kansas, to Atchison, Kansas, by way of Topeka, Kansas, so that said cattle might have been, by defendant at said Atchison, Kansas, delivered to the continuing and connecting carrier at that point.

10 (2) Defendant did not exercise due and reasonable care in the transportation and carriage of said cattle but was negligent in not detaining said cattle at Strong City, Kansas, on said May 29th, 1903, until the said unprecedented flood in said Kaw River had subsided so that the transit of said cattle might be safely resumed without liability to damage or injury thereto.

(3) Said defendant did not exercise due and reasonable care, but was negligent and acted wrongfully and without plaintiffs consent in the deviation of the shipment of said

cattle by defendant to Kansas City from which last point and city defendant had and has no connecting line extending to Atchison, Kansas.

(4) Defendant did not exercise due and reasonable care in the transportation and carriage of said cattle by carelessly and negligently endeavoring to head off the flood of said Kaw River by landing and depositing said cattle in the pens on the bank of said Kaw River at the mouth thereof several days after the rise and increase of the flood of said Kaw River. And plaintiffs say that defendant, by its agents and servants in charge of the transportation of said cattle of plaintiffs had actual knowledge of said flood from said May 27th, 1903, and well knew of said flood and of the continued rise and increase thereof on said May 30th, 1903, when said defendant so deposited said cattle of plaintiffs in said pens by the side of said Kaw River at the mouth thereof.

(5) That defendant having wrongfully transported said cattle to Kansas City, as aforesaid, carelessly and negligently failed and neglected to move or cause to be moved the same from their position of peril, aforesaid, at Kansas City, Missouri, as defendant had reasonable time and opportunity to do before the arrival at said Kansas City of said flood, but the same were overtaken by said flood.

(6) Defendant did not exercise due and reasonable care, but was negligent in not properly or sufficiently feeding or watering said cattle before loading the same at said Strong City, Kansas, and while said cattle were in the viaducts at Kansas City.

Plaintiffs further state that said several injuries, damages and losses to and of said cattle hereinbefore specified and set out were each and all caused by the said several negli-
11 gencies and want of due and reasonable care in the transportation and carriage of said cattle by defendant.

The premises considered, plaintiffs say that they have been damaged by the said negligencies and want of care on the part of defendant in the sum of fifteen thousand ($15,000.00) dollars, for which sum together with the costs of this suit plaintiffs pray judgment.

BOTSFORD, DEATHERAGE & YOUNG,
Attorneys for Plaintiffs.

Indorsed: No. 8155. Empire State Cattle Co. et al., Plaintiffs, vs. Atchison, Topeka & Santa Fe Railway Co. Petition. Filed Nov. 13, 1903. Geo. F. Sharitt, clerk. Botsford, Deatherage & Young, Attys. for Plaintiffs.

* * * * * * * * * *

19 In the Circuit Court of the United States for the District of Kansas, First Division.

Empire State Cattle Company, a corporation W. W. Waite, E. F. White, W. H. Frost, P. H. Kellogg, C. L. Millet and J. D. Carr, Plaintiffs

vs.

The Atchison, Topeka and Santa Fe Railway Company, Defendant.

Answer.

Now comes the defendant in the above-entitled cause, and for answer to the plaintiffs' petition filed therein, denies each and every material allegation therein contained, except as hereinafter expressly admitted or stated.

2. For a second and further defense the defendant says that it is a corporation duly created and existing under the laws of the State of Kansas, and as such is engaged in the operation of a line of railroad into and through the States of Illinois, Iowa, Missouri, Kansas, Colorado California, and Texas, and into and through the Territories of Oklahoma, Indian Territory, New Mexico, and Arizona; but denies that it is engaged in the operation of a line of railroad to or from the station of Hereford in the State of Texas; but alleges that it received the cattle mentioned in Plaintiffs' petition from a connecting carrier, The Pecos & Northern Texas Railway Company, to be transported over a portion of defendant's line of railroad and delivered to a connecting carrier to be forwarded to the destination of said cattle, upon the terms and under the provisions of three (3) certain written and printed contracts executed and entered into between said plaintiffs, by their duly authorized agent W. H. Frost, who was at the time in charge of said cattle, and said The Pecos & Northern Texas Railway Company; copies of which said written and printed contracts are hereto attached, made a part of this answer, and marked respectively Exhibits A, B and C, and upon

20 no other terms and conditions than those fully expressed in said written and printed contracts. That at the time of making the said contracts this defendant operated a line of railroad connecting with the railroad of the Southern Kansas Railway Company of Texas, at Higgins, on the State line of Texas, which latter line of railway connected with the railway of The Pecos & Northern Texas Railway company aforesaid, and extending thence to the city of Topeka, in the State of Kansas, and to the city of Kansas City in the State of Missouri, and also a line of railroad extending from said city of Topeka, to the city of Atchison, in the State of Kansas.

That at said city of Atchison, it formed a connection with the railroad of the Kansas City, St. Joseph & Council Bluffs Railroad Company, a line of railroad constituting a part of what is known as the Burlington Route, which latter road extended northward and connected with certain lines of railroad connecting with the Chicago, Milwaukee and St. Paul Railway, which extended to the point of destination. That the defendant's line of railway connected also at Kansas City, Missouri, with several lines of railway extending northward, including the Missouri Pacific Railway which connected with other lines of railway and with the Chicago, Milwaukee & St. Paul Railway extending to the point of destination, and that over either of said routes or lines of railway, by way of Atchison, Kansas, or Kansas City, Missouri, through or joint rates existed between the point of origin and point of destination of said shipment of cattle, and either of said routes or lines to Atchison, Kansas, or to Kansas City, Missouri, might well be selected by said defendant to transport said cattle and to make delivery thereof to some connecting line in the route. That it received said cattle at the said station of Higgins for transportation, under and in pursuance of the foregoing contracts, over its line or lines of railroad, to be delivered to a connecting carrier for transportation and to be delivered at the point of destination. That while said animals were being transported over its line of railway and before they arrived at said city of Topeka, this defendant was informed by the Kansas City, St. Joseph & Council Bluffs Railroad Company that it could not receive said cattle at Atchison, Kansas, and could not transport the same, on account of a washout on the line of its road, and that it would decline and refuse to receive
21 the same for such transportation. That there existed no adequate or sufficient stock yards at said city of Atchison in which to hold the same at that point until delivery could be made there to said connecting line, or to some other connecting line, and in the meantime the said line of the defendant between the cities of Topeka and Atchison became impassable on account of water rising above the railroad tracks so that such line could not be used by this defendant, and it could not safely make delivery to a connecting line at Atchison. That thereupon it entered into negotiations with The Missouri Pacific Railway Company to receive said cattle at Kansas City, Missouri, and transport the same northward and deliver the same to some connecting carrier for delivery to the Chicago, Milwaukee and St. Paul Railway Company, which last named company could transport said cattle to the place of destination. That said defendant was advised by said The Missouri Pacific Railway Company that it could and would receive said cattle upon their arrival at Kansas City, and thereupon this

defendant proceeded to and did transport said cattle to Kansas City, Missouri, for delivery to said The Missouri Pacific Railway Company, and upon arrival of said cattle at said Kansas City did deliver said cattle to the Union Stock Yards at said city, and placed them in that portion of the said stock yards where cattle are usually placed when the same are to be reloaded for shipment over said The Missouri Pacific Railway Company's lines, which is the usual and customary manner of handling live stock shipments through Kansas City, to hold the same until said Missouri Pacific Railway Company would be able to load and transport said cattle. That said cattle arrived at Kansas City Stock Yards on the evening of May 29th and the morning of May 30th, 1903. That before said cattle could be removed from said stock yards at Kansas City the waters of the Kaw river and Missouri river at and adjacent to Kansas City suddenly arose to an extraordinary and unprecedented height and overflowed their banks and inundated said Kansas City Stock Yards and destroyed the tracks of all railroads entering Kansas City. That said flood was unusual, extraordinary, and unprecedented, and constituted in law an act of God. That all the injury to said cattle
[or] any of them, and all damages sustained by plaintiff
22 on account of the injury to said cattle was proximately caused by an act of God in the nature of an unusual, extraordinary and unprecedented flood on the 30th and 31st days of May, 1903, and was not proximately caused by any negligent act or omission on the part of said defendant railway company or any of its officers, agents, employes or servants.

Defendant further says that the said plaintiffs wholly failed and neglected to give notice in writing of their claim for damages on account of the loss and injury to said cattle to any officer of said defendant company, or to its nearest station agent, or to the nearest station agent of the last carrier making delivery of said cattle, before said stock were removed from the place of destination above mentioned, or from the place of delivery of the same to the consignee, and before said stock were slaughtered or intermingled with other stock, and failed and neglected to make written claim for such damages to the defendant company within ninety one days after said loss and injury to said cattle occurred as a condition precedent to said plaintiffs' right to recover damages for such loss and injury to said cattle; as provided in the eighth paragraph of the shipping contracts under which said cattle were transported.

Defendant therefore prays judgment for costs.

A. A. HURD
O. J. WOOD
Attorneys for Defendant.

[23]

EXHIBIT A.

ORIGINAL.

Form 67 Regular. Read this Contract carefully, as numerous changes have been made. No.....

LIVE STOCK CONTRACT (LIMITED LIABILITY.)

The Pecos & Northern Texas Railway Company.

RULES AND REGULATIONS FOR THE TRANSPORTATION OF LIVE STOCK.

NOTICE—This Railway has Two Rates on Live Stock.

The rate given under this contract is lower than the rate made by the Railway Company and connections for the transportation of stock at carrier's risk, and without limitation of liability, and is based upon the conditions and agreements found in this contract and upon the valuations therein fixed. The shipper by accepting this contract is deemed to accept the lower rate upon the terms and conditions specified as part of this contract.

No station agent or station master of this Company has any power or authority to bind this Company in regard to the shipment of Live Stock, except by written contract; nor to agree for the Company that cars shall be furnished at his or any other station for shipment of Live Stock at any special date, or that any particular kind or class of cars will be furnished for such purpose, or that Live Stock will be forwarded on any particular train, or be delivered at destination at any special time or for any particular market, or to transport stock beyond the line of this Company's road. No one but a general officer of the Company, and he only in writing, has power to make such contract.

No. of Cars.	Initials.
53908	A. T.
53882	"

THIS AGREEMENT, Made at ..... Hereford, Tex. ..... Station, ... May 25 ....., 190 3 , between and on behalf of the above named Railway Company, hereinafter called the Company, and the connecting carriers severally, of the first part, and ..... W. H. Frost ..... of ..... Hereford ..... , hereinafter called the shipper, of the second part:

WITNESSETH, THAT, WHEREAS, the Company transports live stock as per rules and regulations, all of which are made a part of this contract;

NOW, THEREFORE, in consideration of the foregoing and of the mutual covenants and conditions hereinafter contained, the Company agrees to transport for the shipper, upon its own road only, the live stock described below, as herein provided, viz.:

..... 2 ..... cars, said to contain ..... 70 ..... head of ..... cattle ..... , from ..... Hereford, Tex. ..... Station, on the Company's road consigned to ..... P. H. Kellogg ..... at ..... Evarts, S. D. ..... to be carried by said Company to said place of destination, if the same be upon the line of road of said Company, but if such place of destination be beyond the line of road of said Company, then to deliver or tender such shipment at the connecting point on the line of its road to the connecting carrier, to be forwarded to the place of destination, and on so delivering to such connecting carrier all liability whatever of the Company for carriage of or on account of said stock shall be thereby ended, it being understood that the Company assumes no obligation whatever on account of the carriage of said stock beyond its road, and that the Company shall not be liable for any damage to, injury of or delay of said stock, or of anything whatever that may happen to the same after such delivery or tender of delivery in case such connecting carrier shall refuse to receive the same. Each carrier in the route shall receive such stock when delivered to it and transport the same over its road to the succeeding carrier in the route, and it is distinctly understood

This Bill of Lading is given used on Sta

shipper or to the stock in case the other carrier or carriers shall refuse to carry or deliver the stock on the payment of said rates, but shall only be liable to pay to the shipper, on thirty days' notice in writing from the shipper, the amount which he may have been compelled to pay in excess of the rate given, which shall be in full satisfaction and discharge of the guarantee of the Company of the through rate. It is understood and agreed that such guarantee shall not in any wise be construed to extend the liability of the Company on account of said stock beyond the delivery or tender thereof, as hereinbefore stated.

In considereation of the foregoing, it is further mutually agreed between the parties hereto as follows:

FIRST. That the Live stock covered by this contract is not to be transported within any specific time nor delivered at destination at any particular hour, nor in season for any particular market.

SECOND. The Company agrees to stop cars at any of its stations for watering and feeding where it has facilities for so doing whenever requested to do so in writing by the owner or attendant in charge, and the party of the second part agrees not to confine his stock for longer period than 28 consecutive hours without unloading the same for rest, feeding and water, for a period of at least five consecutive hours, provided he is not prevented from doing so by storms or other accidental causes.

THIRD. The shipper hereby represents and agrees that his live stock does not exceed in value the prices below named, and it is understood that the rate given is based upon such limit of valuation and that in case of loss or damage from any cause for which the Company may be liable, payment will be made therefor on the basis of the actual cash value at the time and place of shipment, but in no case to exceed the following, which is understood not to exceed to be the value as held by the shipper, and which is the highest value accepted for the lower rate, animals of a higher value being charged a higher rate, to-wit:

Each horse or pony, gelding, mare or stallion, mule or jack, per head,	$100		Each calf ..... per head		$10
Each ox, bull or steer	"	50	Each hog	"	10
Each cow	"	30	Each sheep or goat	"	3

FOURTH. The shipper agrees at his own cost and expense to properly bed the cars in which the stock are to be transported, and in all respects to put them in proper condition for shipment of said stock, and also agrees before the cars in which said stock is to be transported leave said first named station, that he will carefully examine the same, and that if any defect or deficiency whatever be found in any of said cars, that he will at once report the fact to the station agent of the Company and demand, in writing, another car or cars in lieu thereof; and if the shipper shall fail to make such demand, it shall then be conclusively presumed that said cars and each of them are in all respects suitable for transportation of said stock, and the shipper agrees to assume and hold the Company not liable for any damage that may occur to the stock on account of any defect in the cars or any of them, which were not so reported to the Company's said agent.

The shipper further agrees to see that the cars are securely fastened, so as to prevent the escape of stock therefrom, and that he will not hold the Company responsible for any loss or damage that may result from failure or neglect on his part, or of his agents or employés, to do so; and also agrees to assume all risk of injury or loss of or to said stock because of any defect in said cars, or because of the stock being wild, unruly, weak, or maiming each other or themselves, or because of heat, suffocation or other results of being crowded in the cars, or of being injured or destroyed by fire on any account whatever, and especially because of the burning of hay, straw or other material used in bedding or feeding the stock, or for any other purpose; and for any injury or damage to said stock while in transit, it shall be presumed that the same resulted from overloading, or from the neglect or inattention of the shipper or his employés, for which the Company shall in no respect be liable.

FIFTH. That at his or their own risk and expense, the shipper will load the stock at the first named station, take care of, feed and water and attend to same while they may be in the stock yards of the Company or lots where awaiting shipment, and while the same is being loaded, transported, unloaded and reloaded, and to load, unload and reload the same at feeding and transfer or other points wherever the same may be unloaded for any purpose whatever, and will properly attend to and care for the stock while in the cars in transit or otherwise, and hereby agrees that the Company shall not be liable for any loss or damages to said stock while being so in the shipper's charge, and so cared for and attended to by the shipper or his or their employés as aforesaid; and in cases where the Company shall furnish laborers to assist in the loading, unloading or reloading of said stock, it is understood they are furnished for the accommodation of the shipper, and they shall be entirely subject to the shipper's orders, and shall be deemed *the shipper's* employes while so engaged, and the Company shall in no wise be liable for their acts or negligence.

SIXTH. The shipper hereby assumes and releases the Company from risk of injury or loss which may be sustained by reason of any delay in such transportation of said stock or injury thereto, caused by any mob, strike, threatened or actual violence to real or personal property, or by the refusal of the Company's employés to work or otherwise, or by failure of machinery, engines or cars, or injury to tracks or yards, storms, washouts, escape or robbery of any of said stock, overloading cars, fright to animals, or crowding one upon another, or from any and all other causes whatever; the liability of the carrier or any fact essential thereto in any instance or case shall not be presumed, but the burden of establishing such liability is assumed by the shipper in the event of a suit.

SEVENTH. The shipper further agrees that at the end of every division or wherever the train conductor shall be changed, on request of the conductor, the party in charge of the stock (and if there be more than one, all of them) shall make out and sign a statement (causing the signature or signatures to be witnessed by some third party) showing fully the condition of the stock, the damage, if any, thereto, and the time and place and cause thereof, and the delays, if any, on such division, and the time and cause thereof, and everything unusual or exceptional that may have occurred to the stock, specifying all his complaints as to the manner in which the train and stock were handled on such division, and to deliver the same to the conductor on that division; and whenever the same shall be unloaded at any station, before they leave such station, the party in charge (and if more than one, all of them) shall make, sign and deliver to the station master a statement of the condition of said stock and of anything unusual or exceptional that may have occurred at such station, specifying all complaints as to the manner in which the stock have been handled or treated at such station, and the shipper shall be conclusively estopped from denying the truth of such statements or any or every of them, and the failure to deliver any and every of such statements herein provided shall conclusively bar and discharge any right of action of the shipper for loss or damages to said stock from whatever cause.

EIGHTH. In order that any loss or damage to be claimed by the shipper may be fully and fairly investigated and the fact and nature of such claim or loss preserved beyond dispute and by the best evidence, it is agreed that as a *condition precedent* to his right to recover any damages for any loss or injury to his said stock during the transportation thereof, or at any place or places where the same may be loaded or unloaded for any purpose on the Company's road, or previous to loading thereof for shipment, the shipper or his agent in charge of the stock will give *notice in writing* of his claim therefor to some officer of said Company, or to the nearest station agent, or if delivered to consignee at a point beyond the Company's road, to the nearest station agent of the last carrier making such delivery, before such stock shall have been removed from the place of destination above mentioned, or from the place of delivery of the same to the consignee, and before such stock shall have been slaughtered or intermingled with other stock, and will not move such stock from said station or stock yards until the expiration of three hours after the giving of such notice; and a failure to comply in every respect with the terms of this clause shall be a complete bar to any recovery of any and all such damages. The written notice herein provided for can not and shall not be waived by any person except a general officer of the Company, and he only in writing. Nor shall any such damage be recoverable unless written claim therefor shall be presented to the Company within ninety-one days after the same may have occurred.

NINTH. It is further agreed that no suit or action against the Company for the recovery of any damages accruing or arising out of said shipment or of any contract pertaining to the same, or the furnishing of facilities for such shipment, shall be sustained in any court of law or equity unless such suit or action shall be commenced within six months next after the loss or damage shall have occurred. The failure to institute suit within said time shall be deemed conclusive evidence against the validity of such claim or cause of action, and shall be a complete bar to such suit.

In the event this agreement for institution of suit within six months should be held invalid, then no such suit or action shall be maintainable unless instituted within two years next after the occurrence of the loss or damage, and the expiration of such two years shall be a complete bar to any recovery of damages.

TENTH. And whereas the through rate made for the said transportation to destination, and guaranteed by the above named Company, is the rate fixed by said Company and the companies or carriers operating the connecting lines of railroad to the point of destination in their tariffs or schedules for similar shipments at owner's risk, under and in view of the limitations and exemptions contained in this agreement, and is less than the rate fixed where such shipments are made without limitation of liability, or at carrier's risk:

It is further understood and agreed that each and all of the provisions, limitations and exemptions in this contract applicable to or in favor of the Company, shall also apply to and inure separately in favor of each of the several connecting carriers to the point of destination, and that each of such carriers shall only be obligated to transport said stock over its own road and deliver to the next connecting carrier, and the last carrier to the place of destination, under the provisions of this agreement, and no carrier or carriers shall be liable, in any event, for any loss or damage which may occur upon the road or roads, connecting or otherwise, of any other carrier or carriers; that each of the connecting carriers shall transport said stock over its own road under said through rate, in accordance with the provisions of this agreement, and that this agreement is entered into by the above named Company in its own behalf and as agent, for and, severally and not jointly, on behalf of, each of the connecting carriers operating roads forming part of the route over which said stock may be shipped to the point of destination above mentioned; that no other contract shall be required or be executed to cover the movement of the shipment over the line of any carrier in the route, it being understood that this contract is hereby adopted by the shipper and each of such carriers as the several contracts between said shipper and each of such carriers respectively, provided for their mutual rights and obligations.

ELEVENTH. The shipper shall hold the carrier harmless from any and all claims for injuries to persons accompanying said cattle for said shipper, resulting from the carrier's or employés negligence or otherwise, and will indemnify it for any damages it may be required to pay by reason thereof, or any expense it may be put to or damages it may be required to pay by reason of the introduction of said cattle into a country, territory or state against the quarantine or other laws of the United States or of any state, territory, people or community. In case the carrier shall be obliged to pay damages on account of the loss of or injury to said cattle, it shall be subrogated to the shipper's right to any insurance thereon.

It is also expressly agreed that the Company shall not be liable for any delay or damage sustained by the stock or any expense incurred by the shipper by reason of any enforcement or attempted enforcement by government officers of quarantine regulations, either state or federal, whether such officers act lawfully or unlawfully, and the shipper further agrees that the Company shall not be liable for any mistake or inaccuracy in any information furnished by the Company or any of its agents or officers as to quarantine regulations, state or federal, it being expressly understood that if any such information is furnished by the Company, it is furnished as pure gratuity, and without any warrant or guarantee of its accuracy.

TWELFTH. *It is distinctly understood and agreed that all prior understandings or Agreements concerning the furnishing of cars or facilities for said shipment or concerning the transportation of said stock or said shipment, are hereby merged and contained in this written agreement, and this written agreement contains all the terms, conditions and provisions relating in any manner to the shipment or transportation of said stock.*

THIRTEENTH. *In making this contract the shipper expressly acknowledges that he has had the option of making this shipment under the tariff rates either at carrier's risk or at a limited liability, and that he has selected the rate and liability, named herein, and expressly accepts and agrees to all the stipulations herein named.*

FOURTEENTH. If the whole or any part of any provision of this instrument shall be adjudged void by a tribunal of competent jurisdiction, the remaining provisions or parts of provisions, in themselves valid, shall not be affected thereby, but shall be as valid and enforceable as if the invalid provision or part of provision had not been inserted herein.

The signature of the shipper or his agent hereto is and shall be conclusive evidence that said second party fully understands and assents to all the provisions and conditions of the foregoing contract.

THE PECOS & NORTHERN TEXAS RAILWAY COMPANY.
And Connecting Carriers.

W. H. Frost ..... Shipper.

By ..... Agent.

By J. S. Jones ..... Its Agent.

Witness ..... (To be other than either of the contractors.)

NOTE.—Agents must see that this contract is signed by the shipper, or in his name by his authorized agent, before commencing to load any of said stock, and that all blanks are properly filled in, and point of destination inserted must not be beyond a line of road in the Sante Fe, unless special instructions otherwise provide.

NOT NEGOTIABLE.

Subject to corrections as to rate, weight and classification so as to conform to the rates, rules and regulations of the Railroad Commissioners of Texas, when traffic, and so as to conform to the rates, rules and regulations filed with the Interstate Commerce Commission, when used on Interstate Traffic.

DROVER'S RETURN PASS.

GOOD FOR CONTINUOUS PASSAGE ONLY.

Return transportation on this contract is available only for the parties that actually accompanied the stock shipment and whose autograph signature or signatures are secured hereon by Agent at shipping point, who will cancel the remaining blank lines.

Furthermore it will not be good for Return Passage until countersigned by Stock Agent or Agent at the station where the stock is unloaded or leaves our line.

Passenger Conductors Will Punch Here.

O O O O O

Agent at Point of Return Will Stamp or Insert Date Below.

From

Date

NO STOP-OVER ALLOWED.

PASS

Countersignature:

Stock Agent or Agents.

Return transportation will be for continuous passage only. No stop-over allowed, and the journey must be commenced on the day the contract is executed for return passage.

This contract will not be accepted for return passage, and conductor will take it up and collect full fare if any alteration, addition or erasure has been made hereon, or if presented by any other than the original holder or holders, whose signature or signatures are hereon. The holder or holders will write his or their signatures below as required.

Hall—4-03—5M—22671

No. 28

(Form 67 Regular.)

ORIGINAL.

LIVE STOCK CONTRACT.

Hereford, Tex.

TO

Atchison, Kas.

May 25 1903

Shipper W H. Frost

Consignee P H. Kellogg

Forwarding Agent's Stamp.

Freight Conductors Will Punch Here. O

Pass

parties in charge and accompanying stock.

J. S. Jones Agent.

The Agent at the station where the stock is loaded must enter on the back of the Contract the name or names only of the owners or employés in charge who are entitled to pass free with the stocks without regard to passes required by number of cars. Agents must know correct names are entered, and run a pen through remaining lines.

Where a shipment is destined to any point on the lines of The Atchison, Topeka & Santa Fe Railway Company, Gulf, Colorado & Santa Fe Railway Company, The Atchison, Topeka & Santa Fe Railway Company, Coast Lines, Southern California Railway Company, Southern Kansas Railway Company of Texas, The Pecos Valley & Northeastern Railway Company, The Pecos & Northern Texas Railway Company, Pecos River Railroad Company, the Agent of this Company may fill out this pass to such point of destination, but in so filling out such pass this Company acts only as the agent of such other company or companies, and it is distinctly understood by the shipper that the same shall not render this Company liable for any damage or injury to person or property occurring on the lines of such other company or companies.

[24]

We, the undersigned, owners or in charge of the live stock mentioned in the within contract, in consideration of the free pass granted, issued by the within named Company, over its and connecting lines, hereby agree that the within named Company, and each and every connecting carrier which may honor said pass shall not be liable to either of us for any injury or damage of any kind suffered by us or either of us while in charge of said live stock or while in course of transportation or on our return passage.

And whereas travel by freight trains is necessarily more dangerous than upon passenger trains, we hereby assume all the risks incident thereto and of the manner in which such trains are operated, and we hereby further agree to observe the following regulations, and we hereby release said Company, and each and every connecting carrier which may honor said pass, from all liability for any injury or damage suffered by any of us, if injured while violating any of said regulations, and to identify ourselves and each of us whenever required to do so by any conductor:

FIRST. Remain in a safe place in the caboose attached to the cars while the train is in motion.

SECOND. Get on and off said caboose only while the same is still or stationary.

THIRD. Will not get on or be on any freight car while switching is being or is to be done at stations or other places.

FOURTH. Will not walk or stand on any track or station or other places at night without a lantern, and will not be upon or attempt to cross any track while switching is being or is about to be done thereon, but will first use every effort to ascertain whether it is safe to go upon or cross such track or tracks.

FIFTH. Will be advised that freight trains do not stop at stations or other places where it is usually made safe to alight from trains, but are advised of the fact that freight trains frequently stop upon bridges and at places along the line of the road where it is not safe to alight from the caboose without first ascertaining by examining the surrounding ground that it is safe to alight thereat, and will therefore not attempt to alight from the caboose or car whenever the train may stop for any purpose without first making careful examination from the steps of the caboose (with a lighted lantern if at night time) and ascertain the condition of the ground, and first determine by every available means that it is safe to step down from the caboose or car at such place or places, and in this respect will not rely, except at our own risk, on any assurance or statement of the conductor or other Railway employé.

In consideration of the foregoing and of the free transportation, we and each of us hereby agree to assume all the risks of injury from alighting from the caboose or car on account of the condition of the ground or on any account, and agree that in case of any accident, wreck, mishap or other casualty, howsoever caused, in which we or either of us may or shall receive any personal injury, the one so injured shall notify ***in writing*** the Company or carrier upon whose road the accident or casualty may have happened, through his home agent or through the nearest and most convenient local agent of such Company or carrier, of such injury, and of the time, place and all the circumstances and extent thereof, and of the names and addresses of witnesses, within thirty days after the happening of such injury, and as *a condition precedent* to the right to maintain any suit or action or recovery on account of such alleged injury; and it is understood that such notice in writing cannot be waived by such home or local agent of the Company or carrier; and we and each of us further agree that we or either of us shall not have any cause or right of action or maintain any action for any injury except that of which notice as aforesaid shall be given to said Company or carrier, as aforesaid, and that no Company or carrier shall be liable for or on account of any injury or damage occurring on the road of any other Company or carrier.

.....

.....

.....

Parties in charge of and accompanying live stock.

.....J. S. Jones.....

Witness.

NOTE.—The agent must witness the signatures to the above release of all parties going in charge of the stock herein contracted for. If the agent making return passes or any conductor suspects the person presenting this contract is not the party who signed above, he will require him to write his name in his presence and compare the signatures.

I..... hereby declare the valuation of live stock covered by within contract does not exceed, for

Each horse, pony, gelding, mare, stallion, mule or jack, per head	$
Each ox, bull or steer, per head	$ $30.00
Each cow, per head	$
Each calf, per head	$
Each hog, per head	$
Each sheep or goat, per head	$

and the reduced rates as given are based upon such valuation.

.....W. H. Frost.....

Shipper.

Agents must in no case issue contract covering transportation of live stock or parties in charge beyond some line in the Santa Fe. In shipments to or from Texas points, agents should see that shipper fills in, in his own hand, the valuation per animal in the above blank space therefor.

OWNER'S RISK OF EXPENSE OR DELAY BY REASON OF QUARANTINE REGULATIONS.

FOR RULES GOVERNING THE FREE PASSAGE OF MEN IN CHARGE OF LIVE STOCK, SEE CURRENT TARIFFS AND CIRCULARS.

[25]

EXHIBIT B.

ORIGINAL.

Form 67 Regular. Read this Contract carefully, as numerous changes have been made. No.....

LIVE STOCK CONTRACT (LIMITED LIABILITY.)

The Pecos & Northern Texas Railway Company.

RULES AND REGULATIONS FOR THE TRANSPORTATION OF LIVE STOCK.

NOTICE—This Railway has Two Rates on Live Stock.

The rate given under this contract is lower than the rate made by the Railway Company and connections for the transportation of stock at carrier's risk, and without limitation of liability, and is based upon the conditions and agreements found in this contract and upon the valuations therein fixed. The shipper by accepting this contract is deemed to accept the lower rate upon the terms and conditions specified as part of this contract.

No station agent or station master of this Company has any power or authority to bind this Company in regard to the shipment of Live Stock, except by written contract; nor to agree for the Company that cars shall be furnished at his or any other station for shipment of Live Stock at any special date, or that any particular kind or class of cars will be furnished for such purpose, or that Live Stock will be forwarded on any particular train, or be delivered at destination at any special time or for any particular market, or to transport stock beyond the line of this Company's road. No one but a general officer of the Company, and he only in writing, has power to make such contract.

No. of Cars.	Initials.
5148	P. V.
143	S W S
4404	Hx
53439	A T
53804	"
53027	"
5043	P V
53236	A T
52041	"
4661	Hx
1844	S W S

THIS AGREEMENT, Made at ..... Hereford, Tex ..... Station.

..... May 25 ....., 1903 ..., between and on behalf of the above named Railway Company, hereinafter called the Company, and the connecting carriers severally, of the first part, and ..... W. H. Frost .....

of ..... Hereford, Tx ....., hereinafter called the shipper, of the second part:

WITNESSETH, THAT, WHEREAS, the Company transports live stock as per rules and regulations, all of which are made a part of this contract:

NOW, THEREFORE, in consideration of the foregoing and of the mutual covenants and conditions hereinafter contained, the Company agrees to transport for the shipper, upon its own road only, the live stock described below, as herein provided, viz.:

..... 11 ..... cars, said to contain ..... 418 ..... head of ..... cattle .....

....., from ..... Hereford, Tex ..... Station, on the Company's road

consigned to ..... C. L. Millett ..... at ..... Evarts, S. D. .....

to be carried by said Company to said place of destination, if the same be upon the line of road of said Company, but if such place of destination be beyond the line of road of said Company, then to deliver or tender such shipment at the connecting point on the line of its road to the connecting carrier, to be forwarded to the place of destination, and on so delivering to such connecting carrier all liability whatever of the Company for carriage of or on account of said stock shall be thereby ended, it being understood that the Company assumes no obligation whatever on account of the carriage of said stock beyond its road, and that the Company shall not be liable for any damage to, injury of or delay of said stock, or of anything whatever that may happen to the same after such delivery or tender of delivery in case such connecting carrier shall refuse to receive the same. Each carrier in the route shall receive such stock when delivered to it and transport the same over its road to the succeeding carrier in the route, and it is distinctly understood that the responsibility of each carrier shall not begin until it receives said stock from the consignor or from the connecting carrier, and shall cease when it delivers the same to the connecting carrier, or, if the last carrier, at the place of destination.

It is also understood and agreed that the Company shall not be held liable for any damages whatever that may accrue to the shipper or to the stock in case the other carrier or carriers shall refuse to carry or deliver the stock on the payment of said rates, but shall only be liable to pay to the shipper, on thirty days' notice in writing from the shipper, the amount which he may have been compelled to pay in excess of the rate given, which shall be in full satisfaction and discharge of the guarantee of the Company of the through rate. It is understood and agreed that such guarantee shall not in any wise be construed to extend the liability of the Company on account of said stock beyond the delivery or tender thereof, as hereinbefore stated.

In consideration of the foregoing, it is further mutually agreed between the parties hereto as follows:

FIRST. That the live stock covered by this contract is not to be transported within any specific time nor delivered at destination at any particular hour, nor in season for any particular market.

SECOND. The Company agrees to stop cars at any of its stations for watering and feeding where it has facilities for so doing whenever requested to do so in writing by the owner or attendant in charge, and the party of the second part agrees not to confine his stock for longer period than 28 consecutive hours without unloading the same for rest, feeding and water, for a period of at least five consecutive hours, provided he is not prevented from doing so by storms or other accidental causes.

THIRD. The shipper hereby represents and agrees that his live stock does not exceed in value the prices below named, and it is understood that the rate given is based upon such limit of valuation and that in case of loss or damage from any cause for which the Company may be liable, payment will be made therefor on the basis of the actual cash value at the time and place of shipment, but in no case to exceed the following, which is understood not to exceed to be the value as held by the shipper, and which is the highest value accepted for the lower rate, animals of a higher value being charged a higher rate, to-wit:

Each horse or pony, gelding, mare or stallion, mule or jack, per head,	$100	Each calf ..... per head	$10
Each ox, bull or steer	" 50	Each hog	" 10
Each cow	" 30	Each sheep or goat	" 3

FOURTH. The shipper agrees at his own cost and expense to properly bed the cars in which the stock are to be transported, and in all respects to put them in proper condition for shipment of said stock, and also agrees before the cars in which said stock is to be transported leave said first named station, that he will carefully examine the same, and that if any defect or deficiency whatever be found in any of said cars, that he will at once report the fact to the station agent of the Company and demand, in writing, another car or cars in lieu thereof; and if the shipper shall fail to make such demand, it shall then be conclusively presumed that said cars and each of them are in all respects suitable for transportation of said stock, and the shipper agrees to assume and hold the Company not liable for any damage that may occur to the stock on account of any defect in the cars or any of them, which were not so reported to the Company's said agent.

The shipper further agrees to see that the cars are securely fastened, so as to prevent the escape of stock therefrom, and that he will not hold the Company responsible for any loss or damage that may result from failure or neglect on his part, or of his agents or employés, to do so; and also agrees to assume all risk of injury or loss of or to said stock because of any defect in said cars, or because of the stock being wild, unruly, weak, or maiming each other or themselves, or because of heat, suffocation or other results of being crowded in the cars, or of being injured or destroyed by fire on any account whatever, and especially because of the burning of hay, straw or other material used in bedding or feeding the stock, or for any other purpose; and for any injury or damage to said stock while in transit, it shall be presumed that the same resulted from overloading, or from the neglect or inattention of the shipper or his employés, for which the Company shall in no respect be liable.

FIFTH. That at his or their own risk and expense, the shipper will load the stock at the first named station, take care of, feed and water and attend to same while they may be in the stock yards of the Company or lots where awaiting shipment, and while the same is being loaded, transported, unloaded and reloaded, and to load, unload and reload the same at feeding and transfer or other points wherever the same may be unloaded for any purpose whatever, and will properly attend to and care for the stock while in the cars in transit or otherwise, and hereby agrees that the Company shall not be liable for any loss or damages to said stock while being so in the shipper's charge, and so cared for and attended to by the shipper or his or their employés as aforesaid; and in cases where the Company shall furnish laborers to assist in the loading, unloading or reloading of said stock, it is understood they are furnished for the accommodation of the shipper, and they shall be entirely subject to the shipper's orders, and shall be deemed the shipper's employes while so engaged, and the Company shall in no wise be liable for their acts or negligence.

SIXTH. The shipper hereby assumes and releases the Company from risk of injury or loss which may be sustained by reason of any delay in such transportation of said stock or injury thereto, caused by any mob, strike, threatened or actual violence to real or personal property, or by the refusal of the Company's employés to work or otherwise, or by failure of machinery, engines or cars, or injury to tracks or yards, storms, washouts, escape or robbery of any of said stock, overloading cars, fright to animals, or crowding one upon another, or from any and all other causes whatever; the liability of the carrier or any fact essential thereto in any instance or case shall not be presumed, but the burden of establishing such liability is assumed by the shipper in the event of a suit.

SEVENTH. The shipper further agrees that at the end of every division or wherever the train conductor shall be changed, on request of the conductor, the party in charge of the stock (and if there be more than one, all of them) shall make out and sign a statement (causing the signature or signatures to be witnessed by some third party) showing fully the condition of the stock, the damage, if any, thereto, and the time and place and cause thereof, and the delays, if any, on such division, and the time and cause thereof, and everything unusual or exceptional that may have occurred to the stock, specifying all his complaints as to the manner in which the train and stock were handled on such division, and to deliver the same to the conductor on that division; and whenever the same shall be unloaded at any station, before they leave such station, the party in charge (and if more than one, all of them) shall make, sign and deliver to the station agent a statement of the condition of said stock and of anything unusual or exceptional that may have occurred at such station, specifying all complaints as to

This Bill of Lading is given subject to corrections as to rate, weight and classification so as to conform to the rates, rules and regulations filed with the Interstate Commerce Commission and used on State Traffic, and so as to conform to the rates, rules and regulations filed with the Interstate Commerce

52041	"
4661	Hx
1844	S W S

shall only be liable to pay to the shipper, on thirty days' notice in writing from the shipper, the amount which he may have been compelled to pay in excess of the rate given, which shall be in full satisfaction and discharge of the guarantee of the Company of the through rate. It is understood and agreed that such guarantee shall not in any wise be construed to extend the liability of the Company on account of said stock beyond the delivery or tender thereof, as hereinbefore stated.

In consideration of the foregoing, it is further mutually agreed between the parties hereto as follows:

FIRST. That the live stock covered by this contract is not to be transported within any specific time nor delivered at destination at any particular hour, nor in season for any particular market.

SECOND. The Company agrees to stop cars at any of its stations for watering and feeding where it has facilities for so doing whenever requested to do so in writing by the owner or attendant in charge, and the party of the second part agrees not to confine his stock for longer period than 28 consecutive hours without unloading the same for rest, feeding and water, for a period of at least five consecutive hours, provided he is not prevented from doing so by storms or other accidental causes.

THIRD. The shipper hereby represents and agrees that his live stock does not exceed in value the prices below named, and it is understood that the rate given is based upon such limit of valuation and that in case of loss or damage from any cause for which the Company may be liable, payment will be made therefor on the basis of the actual cash value at the time and place of shipment, but in no case to exceed the following, which is understood not to exceed to be the value as held by the shipper, and which is the highest value accepted for the lower rate, animals of a higher value being charged a higher rate, to-wit:

Each horse or pony, gelding, mare or stallion, mule or jack, per head,		$100	Each calf..... per head		$10
Each ox, bull or steer.....	"	50	Each hog.....	"	10
Each cow.....	"	30	Each sheep or goat.....	"	3

FOURTH. The shipper agrees at his own cost and expense to properly bed the cars in which the stock are to be transported, and in all respects to put them in proper condition for shipment of said stock, and also agrees before the cars in which said stock is to be transported leave said first named station, that he will carefully examine the same, and that if any defect or deficiency whatever be found in any of said cars, that he will at once report the fact to the station agent of the Company and demand, in writing, another car or cars in lieu thereof; and if the shipper shall fail to make such demand, it shall then be conclusively presumed that said cars and each of them are in all respects suitable for transportation of said stock, and the shipper agrees to assume and hold the Company not liable for any damage that may occur to the stock on account of any defect in the cars or any of them, which were not so reported to the Company's said agent.

The shipper further agrees to see that the cars are securely fastened, so as to prevent the escape of stock therefrom, and that he will not hold the Company responsible for any loss or damage that may result from failure or neglect on his part, or of his agents or employés, to do so; and also agrees to assume all risk of injury or loss of or to said stock because of any defect in said cars, or because of the stock being wild, unruly, weak, or maiming each other or themselves, or because of heat, suffocation or other results of being crowded in the cars, or of being injured or destroyed by fire on any account whatever, and especially because of the burning of hay, straw or other material used in bedding or feeding the stock, or for any other purpose; and for any injury or damage to said stock while in transit, it shall be presumed that the same resulted from overloading, or from the neglect or inattention of the shipper or his employés, for which the Company shall in no respect be liable.

FIFTH. That at his or their own risk and expense, the shipper will load the stock at the first named station, take care of, feed and water and attend to same while they may be in the stock yards of the Company or lots where awaiting shipment, and while the same is being loaded, transported, unloaded and reloaded, and to load, unload and reload the same at feeding and transfer or other points wherever the same may be unloaded for any purpose whatever, and will properly attend to and care for the stock while in the cars in transit or otherwise, and hereby agrees that the Company shall not be liable for any loss or damages to said stock while being so in the shipper's charge, and so cared for and attended to by the shipper or his or their employés as aforesaid; and in cases where the Company shall furnish laborers to assist in the loading, unloading or reloading of said stock, it is understood they are furnished for the accommodation of the shipper, and they shall be entirely subject to the shipper's orders, and shall be deemed the shipper's employes while so engaged, and the Company shall in no wise be liable for their acts or negligence.

SIXTH. The shipper hereby assumes and releases the Company from risk of injury or loss which may be sustained by reason of any delay in such transportation of said stock or injury thereto, caused by any mob, strike, threatened or actual violence to real or personal property, or by the refusal of the Company's employés to work or otherwise, or by failure of machinery, engines or cars, or injury to tracks or yards, storms, washouts, escape or robbery of any of said stock, overloading cars, fright to animals, or crowding one upon another, or from any and all other causes whatever; the liability of the carrier or any fact essential thereto in any instance or case shall not be presumed, but the burden of establishing such liability is assumed by the shipper in the event of a suit.

SEVENTH. The shipper further agrees that at the end of every division or wherever the train conductor shall be changed, on request of the conductor, the party in charge of the stock (and if there be more than one, all of them) shall make out and sign a statement (causing the signature or signatures to be witnessed by some third party) showing fully the condition of the stock, the damage, if any, thereto, and the time and place and cause thereof, and the delays, if any, on such division, and the time and cause thereof, and everything unusual or exceptional that may have occurred to the stock, specifying all his complaints as to the manner in which the train and stock were handled on such division, and to deliver the same to the conductor on that division; and whenever the same shall be unloaded at any station, before they leave such station, the party in charge (and if more than one, all of them) shall make, sign and deliver to the station master a statement of the condition of said stock and of anything unusual or exceptional that may have occurred at such station, specifying all complaints as to the manner in which the stock have been handled or treated at such station, and the shipper shall be conclusively estopped from denying the truth of such statements or any or every of them, and the failure to deliver any and every of such statements herein provided shall conclusively bar and discharge any right of action of the shipper for loss or damages to said stock from whatever cause.

EIGHTH. In order that any loss or damage to be claimed by the shipper may be fully and fairly investigated and the fact and nature of such claim or loss preserved beyond dispute and by the best evidence, it is agreed that as a *condition precedent* to his right to recover any damages for any loss or injury to his said stock during the transportation thereof, or at any place or places where the same may be loaded or unloaded for any purpose on the Company's road, or previous to loading thereof for shipment, the shipper or his avent in charge of the stock will give *notice in writing* of his claim therefor to some officer of said Company, or to the nearest station agent, or if delivered to consignee at a point beyond the Company's road, to the nearest station agent of the last carrier making such delivery, before such stock shall have been removed from the place of destination above mentioned, or from the place of delivery of the same to the consignee, and before such stock shall have been slaughtered or intermingled with other stock, and will not move such stock from said station or stock yards until the expiration of three hours after the giving of such notice; and a failure to comply in every respect with the terms of this clause shall be a complete bar to any recovery of any and all such damages. The written notice herein provided for can not and shall not be waived by any person except a general officer of the Company, and he only in writing. Nor shall any such damage be recoverable unless written claim therefor shall be presented to the Company within ninety-one days after the same may have occurred.

NINTH. It is further agreed that no suit or action against the Company for the recovery of any damages accruing or arising out of said shipment or of any contract pertaining to the same, or the furnishing of facilities for such shipment, shall be sustained in any court of law or equity unless such suit or action shall be commenced within six months next after the loss or damage shall have occurred. The failure to institute suit within said time shall be deemed conclusive evidence against the validity of such claim or cause of action, and shall be a complete bar to such suit.

In the event this agreement for institution of suit within six months should be held invalid, then no such suit or action shall be maintainable unless instituted within two years next after the occurrence of the loss or damage, and the expiration of such two years shall be a complete bar to any recovery of damages.

TENTH. And whereas the through rate made for the said transportation to destination, and guaranteed by the above named Company, is the rate fixed by said Company and the companies or carriers operating the connecting lines of railroad to the point of destination in their tariffs or schedules for similar shipments at owner's risk, under and in view of the limitations and exemptions contained in this agreement, and is less than the rate fixed where such shipments are made without limitation of liability, or at carrier's risk:

It is further understood and agreed that each and all of the provisions, limitations and exemptions in this contract applicable to or in favor of the Company, shall also apply to and inure separately in favor of each of the several connecting carriers to the point of destination, and that each of such carriers shall only be obligated to transport said stock over its own road and deliver to the next connecting carrier, and the last carrier to the place of destination, under the provisions of this agreement, and no carrier or carriers shall be liable, in any event, for any loss or damage which may occur upon the road or roads, connecting or otherwise, of any other carrier or carriers; that each of the connecting carriers shall transport said stock over its own road under said through rate, in accordance with the provisions of this agreement, and that this agreement is entered into by the above named Company in its own behalf and as agent, for and, severally and not jointly, on behalf of, each of the connecting carriers operating roads forming part of the route over which said stock may be shipped to the point of destination above mentioned; that no other contract shall be required or be executed to cover the movement of the shipment over the line of any carrier in the route, it being understood that this contract is hereby adopted by the shipper and each of such carriers as the several contracts between said shipper and each of such carriers respectively, provided for their mutual rights and obligations.

ELEVENTH. The shipper shall hold the carrier harmless from any and all claims for injuries to persons accompanying said cattle for said shipper, resulting from the carrier's or employés negligence or otherwise, and will indemnify it for any damages it may be required to pay by reason thereof, or any expense it may be put to or damages it may be required to pay by reason of the introduction of said cattle into a country, territory or state against the quarantine or other laws of the United States or of any state, territory, people or community. In case the carrier shall be obliged to pay damages on account of the loss of or injury to said cattle, it shall be subrogated to the shipper's right to any insurance thereon.

It is also expressly agreed that the Company shall not be liable for any delay or damage sustained by the stock or any expense incurred by the shipper by reason of any enforcement or attempted enforcement by government officers of quarantine regulations, either state or federal, whether such officers act lawfully or unlawfully, and the shipper further agrees that the Company shall not be liable for any mistake or inaccuracy in any information furnished by the Company or any of its agents or officers as to quarantine regulations, state or federal, it being expressly understood that if any such information is furnished by the Company, it is furnished as pure gratuity, and without any warrant or guarantee of its accuracy.

TWELFTH. *It is distinctly understood and agreed that all prior understandings or Agreements concerning the furnishing of cars or facilities for said shipment or concerning the transportation of said stock or said shipment, are hereby merged and contained in this written agreement, and this written agreement contains all the terms, conditions and provisions relating in any manner to the shipment or transportation of said stock.*

THIRTEENTH. *In making this contract the shipper expressly acknowledges that he has had the option of making this shipment under the tariff rates either at carrier's risk or at a limited liability, and that he has selected the rate and liability, named herein, and expressly accepts and agrees to all the stipulations herein named.*

FOURTEENTH. If the whole or any part of any provision of this instrument shall be adjudged void by a tribunal of competent jurisdiction, the remaining provisions or parts of provisions, in themselves valid, shall not be affected thereby, but shall be as valid and enforceable as if the invalid provision or part of provision had not been inserted herein.

The signature of the shipper or his agent hereto is and shall be conclusive evidence that said second party fully understands and assents to all the provisions and conditions of the foregoing contract.

W. H. Frost
Shipper.

By .....
Agent.

Witness .....
(To be other than either of the contractors.)

THE PECOS & NORTHERN TEXAS RAILWAY COMPANY.
And Connecting Carriers.

By J. S. Jones
Its Agent.

NOTE.—Agents must see that this contract is signed by the shipper, or in his name by his authorized agent, before commencing to load any of said stock, and that all blanks are properly filled in, and point of destination inserted must not be beyond a line of road in the Sante Fe, unless special instructions otherwise provide.

NOT NEGOTIABLE.

subject to corrections as to rate, weight and classification so as to conform to the rates, rules and regulations of the Railroad Commissioners of Texas, when traffic, and so as to conform to the rates, rules and regulations filed with the Interstate Commerce Commission, when used on Interstate Traffic.

[16]

[26]

We, the undersigned, owners or in charge of the live stock mentioned in the within contract in consideration of the free pass granted, issued by the within named Company, over its and connecting lines, hereby agree that the within named Company, and each and every connecting carrier which may honor said pass shall not be liable to either of us for any injury or damage of any kind suffered by us or either of us while in charge of said live stock or while in course of transportation or on our return passage.

And whereas travel by freight trains is necessarily more dangerous than upon passenger trains, we hereby assume all the risks incident thereto and of the manner in which such trains are operated, and we hereby further agree to observe the following regulations, and we hereby release said Company, and each and every connecting carrier which may honor said pass, from all liability for any injury or damage suffered by any of us, if injured while violating any of said regulations, and to identify ourselves and each of us whenever required to do so by any conductor:

FIRST. Remain in a safe place in the caboose attached to the cars while the train is in motion.

SECOND. Get on and off said caboose only while the same is still or stationary.

THIRD. Will not get on or be on any freight car while switching is being or is to be done at stations or other places.

FOURTH. Will not walk or stand on any track or station or other places at night without a lantern, and will not be upon or attempt to cross any track while switching is being or is about to be done thereon, but will first use every effort to ascertain whether it is safe to go upon or cross such track or tracks.

FIFTH. Will be advised that freight trains do not stop at stations or other places where it is usually made safe to alight from trains, but are advised of the fact that freight trains frequently stop upon bridges and at places along the line of the road where it is not safe to alight from the caboose without first ascertaining by examining the surrounding ground that it is safe to alight thereat, and will therefore not attempt to alight from the caboose or car whenever the train may stop for any purpose without first making careful examination from the steps of the caboose (with a lighted lantern if at night time) and ascertain the condition of the ground, and first determine by every available means that it is safe to step down from the caboose or car at such place or places, and in this respect will not rely, except at our own risk, on any assurance or statement of the conductor or other Railway employé.

In consideration of the foregoing and of the free transportation, we and each of us hereby agree to assume all the risks of injury from alighting from the caboose or car on account of the condition of the ground or on any account, and agree that in case of any accident, wreck, mishap or other casualty, howsoever caused, in which we or either of us may or shall receive any personal injury, the one so injured shall notify ***in writing*** the Company or carrier upon whose road the accident or casualty may have happened, through his home agent or through the nearest and most convenient local agent of such Company or carrier, of such injury, and of the time, place and all the circumstances and extent thereof, and of the names and addresses of witnesses, within thirty days after the happening of such injury, and as *a condition precedent* to the right to maintain any suit or action or recovery on account of such alleged injury; and it is understood that such notice in writing cannot be waived by such home or local agent of the Company or carrier; and we and each of us further agree that we or either of us shall not have any cause or right of action or maintain any action for any injury except that of which notice as aforesaid shall be given to said Company or carrier, as aforesaid, and that no Company or carrier shall be liable for or on account of any injury or damage occurring on the road of any other Company or carrier.

.....

.....

.....

Parties in charge of and accompanying live stock.

..... J. S. Jones .....

Witness.

NOTE.—The agent must witness the signatures to the above release of all parties going in charge of the stock herein contracted for. If the agent making return passes or any conductor suspects the person presenting this contract is not the party who signed above, he will require him to write his name in his presence and compare the signatures.

I ..... hereby declare the valuation of live stock covered by within contract does not exceed, for

Each horse, pony, gelding, mare, stallion, mule or jack, per head	$ .....
Each ox, bull or steer, per head	$ $30.00
Each cow, per head	$ .....
Each calf, per head	$ .....
Each hog, per head	$ .....
Each sheep or goat, per head	$ .....

and the reduced rates as given are based upon such valuation.

..... W. H. Frost .....

Shipper.

Agents must in no case issue contract covering transportation of live stock or parties in charge beyond some line in the Santa Fe. In shipments to or from Texas points, agents should see that shipper fills in, in his own hand, the valuation per animal in the above blank space therefor.

OWNER'S RISK OF EXPENSE OR DELAY BY REASON OF QUARANTINE REGULATIONS.
FOR RULES GOVERNING THE FREE PASSAGE OF MEN IN CHARGE OF LIVE STOCK, SEE CURRENT TARIFFS AND CIRCULARS.

[17]

[27]

EXHIBIT C.

ORIGINAL.

Form 67 Regular. Read this Contract carefully, as numerous changes have been made. No. .....

LIVE STOCK CONTRACT (LIMITED LIABILITY.)

The Pecos & Northern Texas Railway Company.

RULES AND REGULATIONS FOR THE TRANSPORTATION OF LIVE STOCK.

NOTICE—This Railway has Two Rates on Live Stock.

The rate given under this contract is lower than the rate made by the Railway Company and connections for the transportation of stock at carrier's risk and without limitation of liability, and is based upon the conditions and agreements found in this contract and upon the valuations therein fixed. The shipper by accepting this contract is deemed to accept the lower rate upon the terms and conditions specified as part of this contract.

No station agent or station master of this Company has any power or authority to bind this Company in regard to the shipment of Live Stock, except by written contract, nor to agree for the Company that cars shall be furnished at his or any other station for shipment of Live Stock at any special date, or that any particular kind or class of cars will be furnished for such purpose, or that Live Stock will be forwarded on any particular train, or be delivered at destination at any special time or for any particular market, or to transport stock beyond the line of this Company's road. No one but a general officer of the Company, and he only in writing, has power to make such contract.

THIS AGREEMENT, Made at ..... Hereford, Tx. ..... Station.

No. of Cars.	Initials.
405	S W S
3080	"
5004	Hx
4666	"
5361	P. V.
5070	"
5272	"
4320	S W S

.....May 25....., 1903...., between and on behalf of the above named Railway Company, hereinafter called the Company, and the connecting carriers severally, of the first part, and.....W. H. Frost..... of.....Hereford, Texas....., hereinafter called the shipper, of the second part:

WITNESSETH, THAT, WHEREAS, the Company transports live stock as per rules and regulations, all of which are made a part of this contract;

NOW, THEREFORE, in consideration of the foregoing and of the mutual covenants and conditions hereinafter contained, the Company agrees to transport for the shipper, upon its own road only, the live stock described below, as herein provided, viz.:

.....8.....cars, said to contain.....304.....head of .....cattle....., from.....Hereford, Texas.....Station, on the Company's road consigned to .....Empire State C. Co.....at.....Evarts, S. D..... to be carried by said Company to said place of destination, if the same be upon the line of road of said Company, but if such place of destination be beyond the line of road of said Company, then to deliver or tender such shipment at the connecting point on the line of its road to the connecting carrier, to be forwarded to the place of destination, and on so delivering to such connecting carrier all liability whatever of the Company for carriage of or on account of said stock shall be thereby ended, it being understood that the Company assumes no obligation whatever on account of the carriage of said stock beyond its road, and that the Company shall not be liable for any damage to, injury of or delay of said stock, or of anything whatever that may happen to the same after such delivery or tender of delivery in case such connecting carrier shall refuse to receive the same. Each carrier in the route shall receive such stock when delivered to it and transport the same over its road to the succeeding carrier in the route, and it is distinctly understood that the responsibility of each carrier shall not begin until it receives said stock from the consignor or from the connecting carrier, and shall cease when it delivers the same to the connecting carrier, or, if the last carrier, at the place of destination.

It is also understood and agreed that the Company shall not be held liable for any damages whatever that may accrue to the shipper or to the stock in case the other carrier or carriers shall refuse to carry or deliver the stock on the payment of said rates, but shall only be liable to pay to the shipper, on thirty days' notice in writing from the shipper, the amount which he may have been compelled to pay in excess of the rate given, which shall be in full satisfaction and discharge of the guarantee of the Company of the through rate. It is understood and agreed that such guarantee shall not in any wise be construed to extend the liability of the Company on account of said stock beyond the delivery or tender thereof, as hereinbefore stated.

In consideration of the foregoing, it is further mutually agreed between the parties hereto as follows:

FIRST. That the live stock covered by this contract is not to be transported within any specific time nor delivered at destination at any particular hour, nor in season for any particular market.

SECOND. The Company agrees to stop cars at any of its stations for watering and feeding where it has facilities for so doing whenever requested to do so in writing by the owner or attendant in charge, and the party of the second part agrees not to confine his stock for longer period than 28 consecutive hours without unloading the same for rest, feeding and water, for a period of at least five consecutive hours, provided he is not prevented from doing so by storms or other accidental causes.

THIRD. The shipper hereby represents and agrees that his live stock does not exceed in value the prices below named, and it is understood that the rate given is based upon such limit of valuation and that in case of loss or damage from any cause for which the Company may be liable, payment will be made therefor on the basis of the actual cash value at the time and place of shipment, but in no case to exceed the following, which is understood not to exceed to be the value as held by the shipper, and which is the highest value accepted for the lower rate, animals of a higher value being charged a higher rate, to-wit:

Each horse or pony, gelding, mare or stallion, mule or jack, per head,	$100	Each calf.....per head	$10
Each ox, bull or steer.....	" 50	Each hog.....	" 10
Each cow	" 30	Each sheep or goat.....	" 3

FOURTH. The shipper agrees at his own cost and expense to properly bed the cars in which the stock are to be transported, and in all respects to put them in proper condition for shipment of said stock, and also agrees before the cars in which said stock is to be transported leave said first named station, that he will carefully examine the same, and that if any defect or deficiency whatever be found in any of said cars, that he will at once report the fact to the station agent of the Company and demand, in writing, another car or cars in lieu thereof; and if the shipper shall fail to make such demand, it shall then be conclusively presumed that said cars and each of them are in all respects suitable for transportation of said stock, and the shipper agrees to assume and hold the Company not liable for any damage that may occur to the stock on account of any defect in the cars or any of them, which were not so reported to the Company's said agent.

The shipper further agrees to see that the cars are securely fastened, so as to prevent the escape of stock therefrom, and that he will not hold the Company responsible for any loss or damage that may result from failure or neglect on his part, or of his agents or employés, to do so; and also agrees to assume all risk of injury or loss of or to said stock because of any defect in said cars, or because of the stock being wild, unruly, weak, or maiming each other or themselves, or because of heat, suffocation or other results of being crowded in the cars, or of being injured or destroyed by fire on any account whatever, and especially because of the burning of hay, straw or other material used in bedding or feeding the stock, or for any other purpose; and for any injury or damage to said stock while in transit, it shall be presumed that the same resulted from overloading, or from the neglect or inattention of the shipper or his employés, for which the Company shall in no respect be liable.

FIFTH. That at his or their own risk and expense, the shipper will load the stock at the first named station, take care of, feed and water and attend to same while they may be in the stock yards of the Company or lots where awaiting shipment, and while the same is being loaded, transported, unloaded and reloaded, and to load, unload and reload the same at feeding and transfer or other points wherever the same may be unloaded for any purpose whatever, and will properly attend to and care for the stock while in the cars in transit or otherwise, and hereby agrees that the Company shall not be liable for any loss or damages to said stock while being so in the shipper's charge, and so cared for and attended to by the shipper or his or their employés as aforesaid; and in cases where the Company shall furnish laborers to assist in the loading, unloading or reloading of said stock, it is understood they are furnished for the accommodation of the shipper, and they shall be entirely subject to the shipper's orders, and shall be deemed the shipper's employes while so engaged, and the Company shall in no wise be liable for their acts or negligence.

SIXTH. The shipper hereby assumes and releases the Company from risk of injury or loss which may be sustained by reason of any delay in such transportation of said stock or injury thereto, caused by any mob, strike, threatened or actual violence to real or personal property, or by the refusal of the Company's employés to work or otherwise, or by failure of machinery, engines or cars, or injury to tracks or yards, storms, washouts, escape or robbery of any of said stock, overloading cars, fright to animals, or crowding one upon another, or from any and all other causes whatever; the liability of the carrier or any fact essential thereto in any instance or case shall not be presumed, but the burden of establishing such liability is assumed by the shipper in the event of a suit.

SEVENTH. The shipper further agrees that at the end of every division or wherever the train conductor shall be changed, on request of the conductor, the party in charge of the stock (and if there be more than one, all of them) shall make out and sign a statement (causing the signature or signatures to be witnessed by some third party) showing fully the condition of the stock, the damage, if any, thereto, and the time and place and cause thereof, and the delays, if any, on such division, and the time and cause thereof, and everything unusual or exceptional that may have occurred to the stock, specifying all his complaints as to the manner in which the train and stock were handled on such division, and to deliver the same to the conductor on that division; and whenever the same shall be unloaded at any station, before they leave such station, the party in charge (and if more than one, all of them) shall make, sign and deliver to the station master a statement of the condition of said stock and of anything unusual or exceptional that may have occurred at such station, specifying all complaints as to the manner in which the stock have been handled or treated at such station, and the shipper shall be conclusively estopped from denying the truth of such statements or any or every of them, and the failure to deliver any and every of such statements herein provided shall conclusively bar and discharge any right of action of the shipper for loss or damages to said stock from whatever cause.

EIGHTH. In order that any loss or damage to be claimed by the shipper may be fully and fairly investigated and the fact and nature of such claim or loss preserved beyond dispute and by the best evidence, it is agreed that as a *condition precedent* to his right to recover any damages for any loss or injury to his said stock during the transportation thereof, or at any place or places where the same may be loaded or unloaded for any purpose on the Company's road, or previous to loading thereof for shipment, the shipper or his agent in charge of the stock will give *notice in writing* of his claim therefor to some officer of said Company, or to the nearest station agent, or if delivered to consignee at a point beyond the Company's road, to the nearest station agent of the last carrier making such delivery, before such stock shall have been removed from the place of destination above mentioned, or from the place of delivery of the same to the consignee, and before such stock shall have been slaughtered or intermingled with other stock, and will not move such stock from said station or stock yards until the expiration of three hours after the giving of such notice; and a failure to comply in every respect with the terms of this clause shall be a complete bar to any recovery of any and all such damages. The written notice herein provided for can not and shall not be waived by any person except a general officer of the Company, and he only in writing. Nor shall any such damage be recoverable unless written claim therefor shall be presented to the Company within ninety-one days after the same may have occurred.

NINTH. It is further agreed that no suit or action against the Company for the recovery of any damages accruing or arising out of said shipment or of any contract pertaining to the same, or the furnishing of facilities for such shipment, shall be sustained in any court of law or equity unless such suit or action shall be commenced within six months next after the loss or damage shall have occurred. The failure to institute suit within said time shall be deemed conclusive evidence against the validity of such claim or cause of action, and shall be a complete bar to such suit.

In the event this agreement for institution of suit within six months should be held invalid, then no such suit or action shall be maintainable unless instituted within two years next after the occurrence of the loss or damage, and the expiration of such two years shall be a complete bar to any recovery of damages.

TENTH. And whereas the through rate made for the said transportation to destination, and guaranteed by the above named Company, is the rate fixed by said Company and the companies or carriers operating the connecting lines of railroad to the point of destination in their tariffs or schedules for similar shipments at owner's risk, under and in view of the limitations and exemptions contained in this agreement, and is less than the rate fixed where such shipments are made without limitation of liability, or at carrier's risk:

It is further understood and agreed that each and all of the provisions, limitations and exemptions in this contract applicable to or in favor of the Company, shall also apply to and inure separately in favor of each of the several connecting carriers to the point of destination, and that each of such carriers shall only be obligated to transport said stock over its own road and deliver to the next connecting carrier, and the last carrier to the place of destination, under the provisions of this agreement, and no carrier or carriers shall be liable, in any event, for any loss or damage which may occur upon the road or roads, connecting or otherwise, of any other carrier or carriers; that each of the connecting carriers shall transport said stock over its own road under said through rate, in accordance with the provisions of this agreement, and that this agreement is entered into by the above named Company in its own behalf and as agent, for and, severally and not jointly, on behalf of, each of the connecting carriers operating roads forming part of the route over which said stock may be shipped to the point of destination above mentioned; that no other contract shall be required or be executed to cover the movement of the shipment over the line of any carrier in the route, it being understood that this contract is hereby adopted by the shipper and each of such carriers as the several contracts between said shipper and each of such carriers respectively, provided for their mutual rights and obligations.

ELEVENTH. The shipper shall hold the carrier harmless from any and all claims for injuries to persons accompanying said cattle for said shipper, resulting from the carrier's or employés negligence or otherwise, and will indemnify it for any damages it may be required to pay by reason thereof, or any expense it may be put to or damages it may be required to pay by reason of the introduction of said cattle into a country, territory or state against the quarantine or other laws of the United States or of any state, territory, people or community. In case the carrier shall be obliged to pay damages on account of the loss of or injury to said cattle, it shall be subrogated to the shipper's right to any insurance thereon.

It is also expressly agreed that the Company shall not be liable for any delay or damage sustained by the stock or any expense incurred by the shipper by reason of any enforcement or attempted enforcement by government officers of quarantine regulations, either state or federal, whether such officers act lawfully or unlawfully, and the shipper further agrees that the Company shall not be liable for any mistake or inaccuracy in any information furnished by the Company or any of its agents or officers as to quarantine regulations, state or federal, it being expressly understood that if any such information is furnished by the Company, it is furnished as pure gratuity, and without any warrant or guarantee of its accuracy.

TWELFTH. *It is distinctly understood and agreed that all prior understandings or Agreements concerning the furnishing of cars or facilities for said shipment or concerning the transportation of said stock or said shipment, are hereby merged and contained in this written agreement, and this written agreement contains all the terms, conditions and provisions relating in any manner to the shipment or transportation of said stock.*

THIRTEENTH. *In making this contract the shipper expressly acknowledges that he has had the option of making this shipment under the tariff rates either at carrier's risk or at a limited liability, and that he has selected the rate and liability, named herein, and expressly accepts and agrees to all the stipulations herein named.*

FOURTEENTH. If the whole or any part of any provision of this instrument shall be adjudged void by a tribunal of competent jurisdiction, the remaining provisions or parts of provisions, in themselves valid, shall not be affected thereby, but shall be as valid and enforceable as if the invalid provision or part of provision had not been inserted herein.

The signature of the shipper or his agent hereto is and shall be conclusive evidence that said second party fully understands and assents to all the provisions and conditions of the foregoing contract.

THE PECOS & NORTHERN TEXAS RAILWAY COMPANY.
And Connecting Carriers.

.....W. H. Frost.....
Shipper.

By .....J. S. Jones.....
Its Agent.

By .....
Agent.

Witness .....
(To be other than either of the contractors.)

NOTE.—Agents must see that this contract is signed by the shipper, or in his name by his authorized agent, before commencing to load any of said stock and that all blanks are properly filled in, and point of destination inserted must not be beyond a line of road in the Sante Fe, unless special instructions otherwise provide.

NOT NEGOTIABLE.

This Bill of Lading is given subject to corrections as to rate, weight and classification so as to conform to the rates, rules and regulations of the Railroad Commissioners of Texas, when used on State Traffic, and so as to conform to the rates, rules and regulations filed with the Interstate Commerce Commission, when used on Interstate Traffic.

29 Indorsed: No. 8155. Circuit Court U. S. District of Kansas. Empire State Cattle Co. et al. vs. The A. T. & S. F. Ry. Co. Answer. Filed April 22, 1904. Geo. F. Sharitt, Clerk.

* * * * * * * * *

31 In the United States Circuit Court for the District of Kansas. First Division.

Empire State Cattle Company, a corporation, et al.
Plaintiffs,
vs.
Atchison, Topeka & Santa Fe Railway Company,
Defendant.

Reply.

Now at this day again come the plaintiffs in the above entitled cause and for reply to the answer of defendant herein said plaintiffs deny generally each and every allegation, averment and matter of whatsoever kind in said answer, and in each and every paragraph therein contained, and having fully replied, plaintiffs pray judgment as in and by their petition herein.

For further reply plaintiffs say that on June 8th, 1903, and just as the said flood mentioned in plaintiffs petition and defendant's answer herein, was subsiding at said Kansas City, and while plaintiff's cattle mentioned in the petition herein, were still in the possession of defendant, and after plaintiffs and defendant knew that a large number of plaintiff's cattle had died by reason of the matters set up in plaintiff's petition herein, and after plaintiffs and defendant both knew that the residue of plaintiff's herd had been greatly damaged, as mentioned in the petition herein, but before either plaintiffs or defendant knew the exact number of cattle that died, or either the exact or full extent of the injury to the residue of said herd, plaintiffs delivered to defendant at Kansas City, Missouri, to W. A. Combs, Assistant General Live Stock Agent of defendant, a notice, in writing, notifying defendant that plaintiffs would claim damages for injuries to said cattle mentioned in plaintiff's petition, such damages resulting from the negligence of defendant, its officers, servants, agents and employees in the handling and shipping of said cattle.

Plaintiffs further state that thereupon defendants notified plaintiffs that the residue of said herd of cattle of
32 plaintiffs could not be safely transported to the point of their destination in South Dakota without being

[28]

We, the undersigned, owners or in charge of the live stock mentioned in the within contract, in consideration of the free pass granted, issued by the within named Company, over its and connecting lines, hereby agree that the within named Company, and each and every connecting carrier which may honor said pass shall not be liable to either of us for any injury or damage of any kind suffered by us or either of us while in charge of said live stock or while in course of transportation or on our return or

first pastured in some good pasture so that said cattle could recuperate from their feeble condition so as to be able to be transported, as aforesaid, to said destination, that thereafter, on June 10th, 1903, plaintiffs served on defendant at said Kansas City, through said W. A. Combs, Assistant General Live Stock Agent, a notice and consent that said defendant might, temporarily, before continuing the shipment of said cattle to said destination, put said cattle, or the residue thereof, upon pastures, and consenting that defendant might do so at the instance, risk and expense of defendant, and that in giving said consent all rights were reserved to plaintiffs, as they existed before said consent was given, that no right under the contract of shipment and no right to damages either to said cattle or delays in their shipment, was waived.

Plaintiffs further state that thereafter repeated demands were made at said Kansas City by defendant through its general attorneys at said Kansas City to plaintiffs to consent to take said cattle from said defendant and relieve defendant from further shipment of said cattle, but that plaintiffs steadfastly declined so to do, and that on or about the 1st day of July, 1903, defendant took the remnant of said herd to defendant's pastures at Emporia, Kansas, and kept said cattle on defendant's pastures at Emporia, Kansas, until July 15th, 1903, when defendant resumed the transportation of said cattle over defendant's line of railway to the point of destination, in connection with the connecting carriers; that at the time defendant resumed the shipment of said cattle from Defendant's pastures at Emporia, Kansas, defendant requested plaintiffs to give, and plaintiffs gave defendant a certain obligation, in writing, whereby plaintiffs bound themselves to defendant to pay defendant's certain charges which defendant claimed should be paid by plaintiffs if in any proper litigation in court it should be held that plaintiffs were liable to pay said charges which said charges were for the keeping of said cattle in the Stock Yards in Kansas City and in said pastures of defendant at Emporia,
33 Kansas.

Plaintiffs further say that afterwards on July, 25th, 1903, they gave defendant an itemized list of the damages claimed by plaintiff as stated in the petition herein; that plaintiffs prior to said July 25th, 1903, were unable to give defendant said itemized list, but that during all said period from June 1st, 1903, to July 25th, 1903, defendant had full knowledge of the injuries to plaintiff's cattle complained of

in the petition herein, and had frequent and continuous negotiations with plaintiffs with reference to said cattle and the damage and injury thereto.

Wherefore, plaintiffs say that defendant waived the giving by plaintiffs to defendant of any other notice than those that were given, as above mentioned.

Wherefore, plaintiffs pray judgment.

BOTSFORD, DEATHERAGE & YOUNG,
Attorneys for Plaintiffs.

Indorsed: No. 8155. Empire State Cattle Co. et al. vs. A. T. & S. F. R. R. Co. Reply. Filed April 29, 1904. Geo. F. Sharitt, Clerk. Botsford, Deatherage & Young, for Plaintiff.

* * * * * * * * *

36 United States of America,
District of Kansas—ss.

At a term of the Circuit Court of the United States of America for the District of Kansas (First Division) began and held at the city of Kansas City, Kansas, in said District on Monday the 9th day of January A. D. 1905, proceedings were had and appear of record in words and figures as follows, to-wit:

Monday, January 16, 1905.

Empire State Cattle Company, et al.,
8155. vs.
Atchison, Topeka and Santa Fe Railway Co.

The Minnesota & Dakota Cattle Company, a corporation,
8157. vs.
Atchison, Topeka & Santa Fe Railway Company, a Corporation.

By consent of parties, it is ordered by the court that the above entitled cases be tried together, and the jury is directed to find a separate verdict in each of said cases.

37 United States of America,
District of Kansas—ss.

At a term of the Circuit Court of the United States of America, for the District of Kansas, (First Division) began and held at the city of Kansas City, Kansas, in said District on Monday the 9th day of January A. D. 1905, proceedings were had, and appear of record in words and figures as follows, to-wit:—

Monday, January 16, 1905.

Empire State Cattle Company, et al
8155 vs.
Atchison, Topeka & Santa Fe Railway Company.

Now comes the plaintiff herein by Botsford, Deatherage & Young its attorneys, and the defendant by A. A. Hurd, O. J. Wood, Angevine & Cubbison, its attorneys, and also come a jury to-wit:—F. E. McClain, Geo. H. Goudy, J. H. C. Brewer, W. H. Harchbarger, T. J. Beall, H. H. Kern, Ed Speakman, E. W. Glenn, E. L. Cummings, Geo. Bell, H. D. Alcott and S. N. Perry, twelve good and lawful men of the body of the First Division of the District of Kansas, who being duly impaneled and sworn to well and truly try the matters submitted to them in this action, and a true verdict give according to the law and evidence, and thereupon the trial of this case is proceeded with, and not being concluded at the time of adjournment, the jurors are admonished by the court as to their duties herein and the further hearing postponed until tomorrow.

38 United States of America,
District of Kansas—ss.

At a term of the Circuit Court of the United States of America, for the District of Kansas, (First Division) began and held at the city of Kansas City, Kansas, in said District on Monday the 9th day of January A. D. 1905, proceedings were had, and appear of record in words and figures as follows, to-wit:—

Tuesday, January 17, 1905.

Empire State Cattle Company, et al
8155 vs
Atchison, Topeka & Santa Fe Railway Company.

Now come the parties herein same as on yesterday, and the jurors empaneled herein being called and all being present, the trial of this cause is proceeded with, and not being concluded at the hour of adjournment the jurors are admonished by the court as to their duties herein and the further hearing postponed until tomorrow.

39 United States of America,
District of Kansas—ss.

At a term of the Circuit Court of the United States of America, for the District of Kansas, (First Division) began and held at the city of Kansas City, Kansas, in said Dis-

trict on Monday the 9th day of January A. D. 1905, proceedings were had, and appear of record in words and figures as follows, to-wit:—

Wednesday, January 18, 1905.

Empire State Cattle Company, et al
8155 vs.
Atchison, Topeka & Santa Fe Railway Company.

Now come the parties herein same as on yesterday, and the jurors empaneled herein being called, and all being present, the trial of this cause is proceeded with, and not being concluded at the hour of adjournment, the jurors are admonished by the court as to their duties herein and the further hearing postponed until tomorrow.

40 United States of America,
District of Kansas—ss.

At a term of the Circuit Court of the United States of America, for the District of Kansas, (First Division) began and held at the city of Kansas City, Kansas, in said District on Monday the 9th day of January A. D. 1905, proceedings were had, and appear of record in words and figures as follows, to-wit:—

Thursday, January 19, 1905.

Empire State Cattle Company, et al
8155 vs.
Atchison, Topeka & Santa Fe Railway Company.

Now come the parties herein same as on yesterday, and the jurors empaneled herein being called, and all being present, the trial of this cause is proceeded with, and not being concluded at the hour of adjournment, the jurors are admonished by the court as to their duties herein and the further hearing postponed until tomorrow.

41 United States of America,
District of Kansas—ss.

At a term of the Circuit Court of the United States of America, for the District of Kansas, (First Division) began and held at the city of Kansas City, Kansas, in said District on Monday the 9th day of January A. D. 1905, proceedings were had, and appear of record in words and figures as follows, to-wit:

Friday, January 20, 1905.

Empire State Cattle Company, et al.
8155. vs.
Atchison, Topeka & Santa Fe Railway Company.

Now come the parties herein same as on yesterday, and the jurors empaneled herein being called, and all being present, the trial of this cause is proceeded with, and not being concluded at the hour of adjournment the jurors are admonished by the court as to their duties herein and the further hearing postponed until tomorrow.

42 United States of America,
District of Kansas—ss.

At a term of the Circuit Court of the United States of America for the District of Kansas, began and held at the city of Kansas City, Kansas, in said District, on Monday the 9th day of January A. D. 1905, proceedings were had and appear of record in words and figures as follows, to-wit:

Saturday, January 21, 1905.

Empire State Cattle Company, et al., Plaintiffs,
8155. vs.
Atchison, Topeka and Santa Fe Railway Company, Defendant.

Now come the parties herein same as on yesterday, and the jurors empaneled herein being called, and all being present, the trial of this cause is proceeded with, and not being concluded at the hour of adjournment the jurors are admonished by the court as to their duties herein and the further hearing postponed until Monday morning.

43 In the Circuit Court of the United States for the District of Kansas, First Division.

The Empire State Cattle Company, Plaintiff,
vs.
The Atchison Topeka & Santa Fe Railway Company, Defendant.

Demurrer to Evidence.

The defendant demurs to the evidence introduced by the plaintiff for the reason that such evidence is insufficient to warrant a verdict for the plaintiff.

The defendant therefore prays the court to render judgment in favor of the defendant.

A. A. HURD,
ANGEVINE & CUBBISON,
THOMAS REYNOLDS,
Attorneys for Defendant.

Indorsed: No. 8155. The Empire State Cattle Company vs. The Atchison, Topeka & Santa Fe Ry. Co. Demurrer to evidence. Filed Jany. 21, 1905. Geo. F. Sharitt, Clerk.

44 United States of America,
District of Kansas—ss.

At a term of the Circuit Court of the United States of America for the District of Kansas, began and held at the city of Kansas City, Kansas, in said District, on Monday the 9th day of January A. D. 1905, proceedings were had and appear of record in words and figures as follows, to-wit:

Monday, January 23, 1905.

Empire State Cattle Company, et al., Plaintiffs,
8155. vs.
Atchison, Topeka and Santa Fe Railway Company, Defendant.

Now come the parties herein same as on Saturday last, and the jurors empaneled herein being called, and all being present, the trial of this cause is proceeded with, and not being concluded at the hour of adjournment the jurors are admonished by the court as to their duties herein and the further hearing postponed until tomorrow.

45 United States of America
District of Kansas—ss.

At a term of the Circuit Court of the United States of America for the District of Kansas, begun and held at the city of Kansas City, Kansas, in said District, on Monday the 9th day of January A. D. 1905, proceedings were had and appear of record in words and figures as follows to-wit:

Tuesday, January 24, 1905.

Empire State Cattle Company et al., Plaintiffs,
8155 vs.
Atchison, Topeka and Santa Fe Railway Company, Defendant.

Now come the parties herein same as on yesterday, and the jurors empaneled herein being called and all being present, the trial of this cause is proceeded with and not being con-

cluded at the hour of adjournment, the jurors are admonished by the court as to their duties herein and the further hearing postponed until to-morrow.

46 United States of America
District of Kansas—ss.

At a term of the Circuit Court of the United States of America, for the District of Kansas, began and held at the city of Kansas City, Kansas, in said District on Monday the 9th day of January A. D. 1905, proceedings were had and appear of record in words and figures as follows, to-wit:

Wednesday, January 25, 1905.

Empire State Cattle Company, a corporation, W. W. Waite, E. F. Waite, W. H. Frost, P. H. Kellogg, C. L. Millett and J. D. Carr, Plaintiffs,
8155 vs.
Atchison, Topeka & Santa Fe Railway Company, Defendant.

Now on this January 25th, 1905, again come the parties to the said suit by their attorneys, also comes the jury, and the evidence of the parties herein having been concluded, defendant prays the court to peremptorily instruct the jury to return a verdict for the defendant, which prayer, is granted by the court and said peremptory instruction to return a verdict in favor of the defendant and against the plaintiffs is by the court granted and given to which said action of the court in granting and giving such peremptory instruction, plaintiffs at the time excepted. Thereupon pursuant to said peremptory instruction of the court, the jury made and returned in open court the following verdict:

"In the Circuit Court of the United States for the District of Kansas.

Empire State Cattle Company, a corporation, W. W. Waite, E. F. Waite, W. H. Frost, P. H. Kellogg, C. L. Millett and J. D. Carr, Plaintiffs,
Case No. 8155 vs.
Atchison, Topeka & Santa Fe Railway Company, a corporation, Defendant.

We, the jury in the above entitled case, duly im-
47 paneled and sworn, upon our oaths find for the defendant.

F. E. McLAIN, Foreman."

And thereupon all and singular the premises being seen and heard, it is considered, ordered and adjudged that the plaintiffs take nothing by their suit, and that the defendant go hence without day, with its costs in this behalf laid out and expended. And thereupon, on the application of the plaintiffs in this cause, it is by the court ordered that the plaintiffs be given sixty days from this date in which to prepare and file a bill of exceptions in this cause.

48 In the Circuit Court of the United States for the District of Kansas, First Division.

The Empire State Cattle Company, Plaintiff,
vs.
The Atchison, Topeka & Santa Fe Railway Company, Defendant.

1. The defendant requests the court to instruct the jury to return a verdict for the defendant.

Given and excepted to by Plffs.

J. C. P. Judge.

Indorsed: No. 8155. Instruction requested by defendant. Filed Jany. 25, 1905. Geo. F. Sharitt, clerk.

49 In the Circuit Court of the United States for the District of Kansas, First Division.

Empire State Cattle Company et al., Plaintiffs,
vs.
The Atchison, Topeka & Santa Fe Railway Company, Defendants.

Plaintiffs pray the court to instruct the Jury as follows:

The Jury is instructed to find a verdict for the plaintiffs and against the defendant.

Refused and Excepted to by Plaintiffs.

J. C. P. Judge.

Indorsed: No. 8155. Instruction requested by plaintiff. Filed Jany. 25, 1905. Geo. F. Sharitt, clerk.

* * * * * * * * *

58 In the Circuit Court of the United States for the District of Kansas, First Division.

The Empire State Cattle Company et al., Plaintiffs
vs.
The Atchison, Topeka and Santa Fe Railway Company, Defendant.

Now on this 9th day of March, 1905, before said court in open session appear the said parties by their respective attorneys, and thereupon it is made to appear to the Court that the said defendant was served on February 17, 1905, with a bill of exceptions herein, and the defendant desiring further time, it is now by consent of parties ordered that the time for settling, serving, signing and filing the said bill of exceptions be and the same is hereby extended for an additional period of sixty (60) days from and after the termination of the sixty days heretofore given for filing said bill of exceptions, which leave was given on January 25, 1905.

It is further ordered by the court that the defendant have until and including March 31, 1905, within which to prepare and to serve plaintiff's attorneys with amendments to said bill of exceptions, and that thereafter the matter of settling, certifying and signing said bill of exceptions may be brought before the court on five days notice from either party.

JOHN C. POLLOCK, Judge.

Indorsed: No. 8155. Order extending time for Bill of Exceptions. Filed Mch. 9, 1905. Geo. F. Sharitt, Clerk.

59 In the Circuit Court of the United States for the District of Kansas, First Division.

The Empire State Cattle Company, Plaintiff
vs.
The Atchison, Topeka & Santa Fe Railway Company, Defendant.

Now on this 1st day of April A. D. 1905, it is ordered by the court by consent of both parties that the Defendant have until and including the 10th day of April, 1905, within which to prepare and serve plaintiff's attorneys with amendments to the Bill of Exceptions prepared and served in this case, and that, except as herein modified the order made in this case on March 9th, 1905, remain as then ordered.

JOHN C. POLLOCK, Judge.

Indorsed: No. 8155. Order. Filed April 1, 1905. Geo. F. Sharitt, Clerk.

60 In the Circuit Court of the United States for the District of Kansas First Division.

Empire State Cattle Company et al., Plaintiffs,
No. 8155. vs.
Atchison Topeka & Santa Fe Railway Company, Defendant.

and

Minnesota & Dakota Cattle Company, Plaintiff,
No. 8157. vs.
Atchison Topeko & Santa Fe Railway Company, Defendant.

Bill of Exceptions.

Mr. J. S. Botsford, of Botsford, Deatherage & Young, appeared on behalf of plaintiffs Empire State Cattle Company, et al. No. 8155.

Mr. R. E. Ball, appeared on behalf of plaintiff, Minnesota & Dakota Cattle Company, No. 8157.

Mr. C. Angevine and Mr. Thos. H. Reynolds appeared on behalf of defendant, Atchison Topeka & Santa Fe Railway Company.

61 Now Be It Remembered, that at the January Term, A. D. 1905, of the Circuit Court of the United States, within and for the District of Kansas, and the First Division, thereof, and on Monday the sixteenth day of January, 1905, the above entitled causes having been consolidated, for the purposes of this trial, came on to be heard before the Hon. John C. Pollock, Judge.

And thereupon a jury having been duly empaneled, charged and sworn to try said causes, the following proceedings were had towit:

The said plaintiffs in order to maintain the issues upon their part offered and introduced evidence as follows:

Mr. Botsford—We offer in evidence a stipulation in regard to the status of the parties. I will read it:

"It is agreed by and between the above parties that said plaintiff Empire State Cattle Company for more than five years last past has been and still is a corporation duly created and existing under and by virtue of the laws of South Dakota, and that said cattle company and said plaintiffs, W. W. Waite, E. F. Waite, W. H. Frost, P. H. Kellogg, C. L. Millet and J. D. Carr, during said five years have been and are all resident citizens of the state of South Dakota.

It is further agreed that during said last five years said defendant was, has been and still is a corporation duly created and existing under the laws of the state of Kansas, and a resident citizen of that state, and this stipulation may be used at the trial of said cause to prove the diverse citizenship of said parties, as aforesaid.

BOTSFORD DEATHERAGE & YOUNG,
Attorneys for Plaintiffs.

62 A. A. HURD,
Attorney for Defendant.

Dated this April 4th, 1904.

By the Court: A like stipulation in regard to the other party?

Mr. Ball: Yes sir, I had the stipulation but misplaced it, and the stenographers notes show a like stipulation in the other case as to the corporation and citizenship, and which said stipulation is in words and figures as follows:

"It is agreed that the above plaintiff for more than five years last past has been and is a corporation created under the laws of the state of Minnesota and a resident citizen of that state, and that during the same period said defendant has been and is a corporation created under the laws of the state of Kansas, and a resident citizen of that state, and this stipulation may be used at the trial of said cause to prove the diverse citizenship of said parties, as aforesaid.

Dated April 4th, 1904.

R. E. BALL,
Attorney for Plaintiff.
A. A. HURD,
Attorney for Defendant.

Mr. Botsford: And let it also go into the record that the Atchison, Topeka & Santa Fe Railway Company has its head offices at Topeka, Shawnee County, State of Kansas, in this division.

[—] Can we have that agreed to Mr. Angevine?

Mr. Angevine: I think so. Yes.

Mr. Botsford: If there is no objection it will go into the record.

Mr. Angevine: Yes sir. Make your statement.

Mr. Botsford: It is admitted by the parties that the head offices of the defendant, The Atchison Topeka & Santa
63 Fe Railway Company, is and for more than five years has been continuously at Topeka, Shawnee County, Kansas.

Mr. Reynolds: Change that word head to general, the head office is where the president is, the general offices of the company are at Topeka, all right.

Mr. Botsford: That is the general head offices as far as the state of Kansas.

Mr. Angevine: It is the general office.

G. W. Cloyd, sworn, testified on behalf of the plaintiffs as follows, on

Direct Examination.

Q. By Mr. Botsford: What is your name? A. G. W. Cloyd.

Q. Where do you live? A. Harbin, Texas.

Q. What is your age? A. 32.

Q. How long have you lived in Texas? A. I was raised in Texas, born in Texas.

Q. What were you engaged in during the last week of May, 1903? A. The last week of May?

Q. Yes? A. I believe I was in charge of a shipment of cattle for W. H. Frost.

Q. From where to where was that shipment made? A. From Hereford, Texas, to Evarts, South Dakota.

Q. How many train loads at that time? A. I had one myself and another one following.

Q. What did you say? A. I say I had one in charge, one load in charge and another one following, as well
64 as I remember.

Q. How many cars were in your train, Mr. Cloyd? A. I think 25.

Q. How many in the other? A. I don't know.

Q. Who did you represent in accompanying that shipment? A. W. H. Frost.

Q. Is he in the court room now, Mr. Frost? A. Yes sir.

Q. Who accompanied the other train load? A. Why Mr. Frost and Mr. Newton, I believe is his name.

Q. Which one of these trains went first? A. Mine.

Q. How much time in advance of the other?

Mr. Angevine: Objected to by the defendant as mere speculation on his part; we object to it.

By the Court: State any fact in regard to the issue, if you know.

Q. Mr. Botsford: When did you leave? A. I left Hereford about 5.30 in the afternoon.

Q. What day? A. On the 25th.

Q. What day of the week was that, if you remember? A. Monday as well as I remember.

Q. You may state over what road you proceeded with the train, or the train was taken; was that 5:30 in the evening or in the morning? A. In the evening.

Q. Just read the other question following that—over what road now was the train taken? A. I came over the Pecos Valley to Amarillo it was then.

Q. What time did you reach Amarillo? A. I think somewhere about eight o'clock.

Q. The same evening? A. The same evening. [A.] I left Amarillo as soon as I could get new contracts.

Q. Well at what time do you say that was? A. It was I reckon, took somewhere in the neighborhood of 45
65 minutes to get ready to get out.

Q. Now where did you go from Amarillo? A. I went from Amarillo to Strong City.

Q. Over what road? A. Over the Santa Fe.

Q. When did you reach Strong City? A. I reached Strong City the evening of the 26th about 5:30, as well as I remember.

Q. How long did your train remain at Strong City? A. It remained there until the next evening on the 27th, yes sir, 27th, about 8:30.

Q. What was done with the cattle of your train on the arrival at Strong City? A. They were fed and watered.

Q. Where? A. At Strong City.

Q. In the cars or out of the cars? A. No sir, in the pens.

Q. Who unloaded them into the pens?

Mr. Angevine: Objected to by the defendant as immaterial under the contracts; the contracts are admitted to be correct, it says who was to do it.

Mr. Botsford: We want to show that the railroad company manipulated these cattle all along the line.

By the Court: As to the legal effect, I think the fact [fact] may be shown as to the legal effect.

Defendant then and there duly excepting.

Q. Who unloaded the cattle? A. It was the men in charge of the pens there I suppose.

Mr. Angevine: Don't tell what you suppose.

Q. Mr. Botsford: Did you give any directions yourself in regard to the cattle, to unload them or otherwise? A. None that I know of.

Q. Now what was done with those cattle after they
66 were put into the pens? A. What was done with them after they were put into the pens, they were fed and watered.

Q. They were fed and watered, who fed and watered them?

Mr. Angevine: Objected to by the defendant as immaterial under the pleadings in this case.

Objection overruled, defendant then and there duly excepting.

A. The men in the yard there.

Q. Was there anybody else with you in connection with this train? A. Yes sir.

Q. Who else? A. A young fellow by the name of Keiser, W. H. Keiser.

Q. Was he with you all the time there, and the cattle were there? A. Yes sir.

Q. Was Mr. Keiser or you consulted by those people in charge of the yards there, in regard to unloading, feeding and watering them in any way, if so, in what way? A. None that I remember of.

Q. Did you and Mr. Keiser aid or assist in watering or feeding the cattle.

Mr. Angevine: Objected to by the defendant as immaterial under the pleadings.

By the Court: Objection overruled; defendant then and there duly excepting.

A. Why, I, of course, I overseen the feeding and watering of them, seen they were fed and watered.

Q. Did you participate in the act of feeding? A. No sir no more than I turned on a lot of water for them something of that kind.

Q. Now when did the cattle finish feeding and
67 watering there? A. I don't know as I noticed exactly the time, somewhere up in the night though.

Q. Were they ready at that time for shipment to be resumed? A. Yes sir.

Q. What time in the night, Tuesday night? A. Tuesday night, I don't understand the question exactly.

Q. What time Tuesday night had they been fed and watered so that they could, transportation could be continued. A. It was somewhere, I suppose somewhere between nine and ten o'clock, we got through feeding and watering them.

Q. At night? A. At night.

Q. Now did you see Mr. Frost and Mr. Newton while you were there at Strong City? A. I did.

Q. When did you first see them there? A. I don't believe I hardly remember now where I saw Mr. Frost the first time, I think I saw him the next morning, as well as I remember.

Q. Did you see them when they came in with their train? A. No sir.

Q. Did they come in with their train? A. Yes sir.

Q. Do you know about what time that night? A. No sir.

Q. Did you see them during the night, or did you see them before the next morning? A. No sir, not that I remember of.

Q. Well where were the cattle of their train when you saw them? A. They were in the pens.

Q. Were they in the same pens with the cattle of your train or in different pens? A. Of course, they have separate pens you know, they were all kept separate, but in the same yards together.

Q. I understand, but were the cattle of the two trains mixed together in the same pens or were they put in
68 different pens of the yard? A. They were put in different pens, as well as I remember.

Q. Now when were the cattle of the train which Mr. Frost and Newton was with fed and watered? A. I do not understand the question.

Q. When were the cattle of the train which Mr. Frost and Newton was with, fed and watered, if you know? A. No sir, I don't know anything about when they were fed and watered.

Q. State if you know, whether they were fed and watered while you were there, that is from your own personal knowledge. A. I think they were; I could not be positive about it.

Q. State whether or not your train was loaded more than once at Strong City before they went out? A. Part of them were.

Q. When was that? A. That was on the morning of the 27th.

Q. That would be Wednesday morning would it not? A. That would be Wednesday morning.

Q. How many cattle of your train was loaded at that time. A. I think somewhere about seven or eight cars, probably may be not so many, may be a few more, I do not remember exactly.

Q. What was done after they were loaded up those seven or eight cars? A. They were unloaded again back into the pens.

Q. Who did the loading and unloading? A. The men in the yards.

Q. Were they the same men unloaded before? A. Yes sir.

Q. Did you direct the loading or unloading? A. I did not.

Q. Were you consulted about it in any way? A.
69 Nothing more than only told me that I would load out in the morning of the 27th at eight o'clock; the agent notified me or some one I don't remember now who it was I would load out Wednesday morning the 27th about eight o'clock.

Q. When was that notice given to you? A. I believe it was the night before as well as I remember.

Q. Let me understand you, you say they gave you notice on Tuesday night? A. [A.] Tuesday night after I got in and got through feeding.

Q. Stated they would load out when? A. The next morning at eight o'clock.

Q. Was that all what was said at the time that the notice was given? A. I think that was all.

Q. When was it Wednesday morning that those seven or eight cars were loaded, what hour? A. It was in the neighborhood of eight o'clock, it might have been a few minutes later.

Q. Were you consulted in any way about unloading them again? A. I don't know that I was.

Q. Was your consent asked in any way? A. As well as I remember the agent cam down and said the stock would be unloaded on account of the washout or something I don't remember what.

Q. Was that all was said? A. I think that is all was said.

Q. Now then state to the jury Mr. Cloyd whether these cattle were loaded again before the time that they were finally loaded out? A. No sir, they were not.

Q. What time Wednesday evening did the train leave Strong City? A. About 8:30 if I remember right.

Q. You may state whether that train went through to its destination at Evarts, South Dakota? A. It did.

70 Q. When did it reach Evarts, South Dakota?

Mr. Angevine: Objected to by the defendant as immaterial and not within the issues in this case, and not a part of the cattle in this case.

By the Court: Objection sustained.

Plaintiffs then and there duly excepting.

Q. You were with the train all the way from Strong City, were you? A. Yes sir.

Q. Do you know what time the train load reached Atchison?

Mr. Angevine: Objected to by defendant as incompetent, irrelevant and immaterial under the issues in this case, it now

appears from the testimony of this witness that the cattle in question were not a part of the shipment complained of, and were not of the cattle caught in the flood—we object to it as immaterial.

By the Court: The objection is sustained.

Mr. Ball: It seems to me the second train was already at Strong City and had been for some time acording to the testimony of this witness, when this train pulled out; it may become material, how soon, at that time or reasonably possible to get from Strong City to Atchison; how long a haul it was, the same length of haul that that train—

By the Court: I think he better inquire in reference to the other train, what was done with this train.

Plaintiffs then and there duly excepting.

Q. State whether your train arrived at Evarts, South Dakota on June 1st, 1903.

Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial, as it appears that this train load of stock now inquired about was not a part of the stock caught in the flood and is not the stock complained of in
71 this suit.

By the Court: Objection sustained; plaintiffs then and there duly excepting.

Q. Were you present when these two train loads of cattle were bought by Mr. Frost? A. Well I was at the pen of course, when they were received; I do not know who he got them of or when he got them.

Q. They were both shipped from Hereford, were they? A. Yes sir.

Q. Both destined to Evarts, South Dakota? A Yes sir.

Q. Your train was not caught in any flood anywhere was it? A. No sir.

Mr. Angevine: We move to strike out all the testimony of this witness concerning the train of stock which he accompanied, for the reason that it appears it was not part of the cattle described in the petition and the testimony, as incompetent irrelevant and immaterial.

By the Court: Overruled, defendant then and there duly excepting.

Q. Did you continue in the employ of Mr. Frost, this plaintiff after the arrival of the cattle at Evarts? A. No sir.

Q. What was done with them after their arrival.

Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial, and not the cattle in controversy.

By the Court: He has not shown himself qualified to speak as to the other cattle; if you show he was there when the cattle were caught in the flood.

Q. Do you know where the pastures of this plaintiff
72 were, Mr. Cloyd? A. I do not.

Q. Were you there when this second train load arrived there? A. I was not.

Q. Did you ever see them after you saw them at Strong City? the train load in question? A. No sir.

Cross-examination waived.

W. H. Frost sworn testified on behalf of the plaintiff as follows on

Direct Examination.

Q. By Mr. Botsford: What is your name? A. W. H. Frost.

Q. Where do you live? A. Ft. Pierre, South Dakota.

Q. You are the W. H. Frost, named in the pleadings as one of the plaintiffs? A. Yes sir.

Q. State who owned these cattle in controversy in this case? A. The Empire State Cattle Company.

Q. State whether or not these other plaintiffs, W. W. Waite, E. F. Waite, yourself, P. H. Kellogg, C. L. Millett, and J. D. Carr, were part owners also of the cattle? A. Yes sir members of the company.

Q. State to the court and jury where you bought these cattle; two train loads of cattle.

Mr. Angevine: Objected to by the defendant as immaterial it appears only one train load was involved in the flood.

Mr. Botsford: The purchase and transportation of them are all one contract or transaction.

Mr. Angevine: They are separate contracts.

73 By the Court: I think so. I suppose it is for the purpose of fixing the value of the cattle—I think it better be confined to the cattle really in dispute.

Defendant then and there duly excepting.

Q. Mr. Botsford: When and where did you buy that train load of cattle in controversy Mr. Frost? A. The bulk of them about a hundred miles south of Hereford I think in [—] County.

Q. How many cattle was there in this train? A. I think the contracts will show 798 head.

Q. Did you count the cattle at the time? A. I counted them as they were carried.

Q. You say from your recollection that is the correct number? A. Yes sir.

Q. Where were those cattle shipped from? A. They were loaded out at Hereford.

Mr. Angevine: You say the cattle were bought about a hundred miles from where? A. Yes sir—south of Hereford.

Mr. Botsford: Well where were the cattle taken to from Hereford and at what time? A. They were loaded out I think about—

Mr. Angevine: Objected to by the defendant as wholly immaterial when they were loaded out, there is no complaint made of anything beyond Strong City in their petition.

By the Court: That is true.

Mr. Angevine: That is not an issue in dispute, the contract is made part of the answer and not denied and there is no issue on that point.

By the Court: I think it is proper, answer.

Defendant then and there duly excepting.

A. Witness: About 9:30.

74 Q. What day? A. Monday the 25th day of May, 1903.

Q. How many cars were those cattle in, on this train? A. 21.

Q. Where were these cars taken to after leaving Hereford? A. Taken over the line of the Pecos Valley to Amarillo.

Q. Did you give the hour Mr. Frost, was that hour in the morning or in the evening? A. In the evening.

Q. When did you reach Amarillo? A. I should think half past 11 the same evening.

Q. How long did you remain at Amarillo? A. About an hour I should think.

Q. Then where were the cars taken? A. They were taken then over the line of the Atchison Topeka and Santa Fe to Strong City, and unloaded.

Q. Who, if anybody accompanied you with the cattle? A. A young fellow by the name of Albert Newton.

Q. When did you reach Strong City? A. We reached Strong City about half past 11 o'clock I think the 26th of May.

Q. In the morning or in the evening? A. In the evening.

Q. What if anything became of the cattle on their arrival at Strong City? A. They were unloaded.

Q. By whom? A. The crew that was there.

Q. The crew was where? A. At the yards.

Q. State what was done with the cattle after they were unloaded into the yards? A. That is all was done with them at that time.

Q. Were they fed and watered while they were there. A. They were fed and watered the next morning.

75 Q. What time the next morning? A. It was about nine o'clock I should think, eight or nine o'clock.

Q. You may state to the court and jury when the cattle had finished being fed and watered and ready for transportation to be resumed? A. They could have been loaded out at eleven o'clock.

Q. Eleven o'clock which day? A. The 27th.

Q. Wednesday? A. Yes sir.

Q. 11 o'clock in the morning you mean? A. Yes sir.

Q. State what was done with the cattle there Wednesday? A. Nothing done until evening.

Q. What was done in the evening? A. They were then loaded out for transportation.

Q. Were they all re-loaded at that time? A. I think they were all loaded at that time.

Q. What was done with them after they were all loaded? A. They pulled down on the side track and set on the track awhile and then ordered back.

Q. Who loaded the cattle? A. The crew which was there at the yards.

Q. What time do you say they were loaded. A. It was in the evening some time about four o'clock, I should think four or five o'clock.

Q. How long did you remain down on that track. A. About an hour.

Q. What was done then? A. Backed up and unloaded again.

Q. State whether you were consulted at any of these times when the cattle were unloaded or re-loaded and

76 unloaded again? A. No sir, I was not.

Q. What time were they unloaded that time. A. They were unloaded about seven o'clock, six or seven o'clock somewhere along there.

Q. The same evening? A. The same evening.

Q. Where were they put when they were unloaded that time. A. Put back into the yards.

Q. State whether Mr. Cloyd was there with his train while you were there? A. No sir he was not there.

Q. Were you there while his train was loaded out? A. Yes sir.

Q. How long did the cattle remain in the pens there, your train, after they were unloaded the second time? A. They were reloaded again the next day I forget what time.

Q. Was it in the forenoon or in the afternoon? A. It was in the forenoon I think.

Q. Was the entire train loaded up? A. No sir.

Q. What portion of it? A. About that I don't know just how many I think about half.

Q. How long were they in loading up this half? A. Perhaps they consumed a half an hour.

Q. After they were loaded up what was done with them then. A. They began to unload again, and I asked them what the trouble was, and they said—

Q. What was the response? A. They said they had orders to unload.

Q. Where were the cattle put when they were unloaded that [that] time? A. Put back in the yards.

Q. Who did that loading, or unloading I should say? A. The crew which was there.

77 Q. The same crew which had been engaged— A. I suppose it was the same crew, I was not acquainted with any of them.

Q. Were you consulted in that unloading and loading up again by anybody? A. No sir.

Q. Was this man Newton under you there? A. Yes sir.

Q. Was he employed by you to accompany the train through? A. Yes sir.

Q. When were the cattle again loaded, if they were afterwards loaded out. A. They were then loaded on the morning of the 29th.

Q. That would be Friday morning? A. That would be Friday morning.

Q. What time in the morning were they loaded up that time? A. They commenced loading about half past seven I should think seven or eight o'clock.

Q. What was done with the cattle at that time when they were loaded? A. They were loaded and run down on the sidetrack.

Q. How long did they remain on the sidetrack? A. About three hours.

Q. What was done with them then? A. They were pulled out.

Q. What time Friday was that they pulled out? A. About one or half past.

Q. What was the next place you reached on the line? A. The next stopping place was Emporia.

Q. What time did you get to Emporia? A. I don't know just exactly, it must have been three o'clock somewhere about that time.

Q. In the afternoon? A. In the afternoon.

Q. You may state where you came to after leaving
78 Emporia? A. The next place, the next stop was Kansas City.

Q. When did you reach Kansas City? A. Kansas City, the morning of the 30th, Saturday, about somewhere about seven o'clock I should think.

Q. Had you been consulted up to that time as to these cattle on the train by the crew or any office of the company? A. No sir.

Q. When did you first know you were going to Kansas City. A. When we got to Kansas City; I will correct that, the first station I think the other side, I remember the station was Argentine, going through there that I knew then where I was, but up to that time I had no knowledge where I was or which way we were going.

Q. When you shipped these cattle at Hereford did you receive bills or papers of any kind indicating the routing of the cattle? A. I received nothing but contracts.

Q. Are these the contracts? [A.] (Showing paper to witness.) A. Yes sir.

Q. Were those words Hereford Texas, to Atchison, Kansas, May 25th, shipper W. H. Frost, on the paper when they were delivered to you by the agent of the company at Hereford, Texas? A Yes sir.

Q. Was there anything said between you and the agent at the time those contracts were delivered as to what company was to take these cattle at Atchison, Kansas.

Mr. Angevine: Objected to by defendant as incompetent, irrelevant and immaterial and an attempt to vary by parole testimony a written contract, and the rule is universal that a written contract cannot be varied nor enlarged by parol.

By the Court: Does the contract speak in reference to what railway company shall carry them?

79 Mr. Angevine: No sir.

Mr. Botsford: I do not understand the inquiry, as to what conversation occurred between him, as to the routing of these cattle, nor the line on which he said they were to be taken contradicts anything in this contract.

By the Court: That is a question; it is contended here and I understand the authorities go to the extent that in a contract of this character, which is made, and in the contract it is not specified where, or what route they shall go over, that that leaves the carrier free to select, the succeeding connecting carrier.

Mr. Botsford: That would be true if there was not anything said about it; suppose the station agent said by way of Burlington from Atchison, that does not contradict anything in the contract.

By the Court: At this time I will exclude it.

The plaintiffs then and there duly excepting.

Q. Mr. Botsford: State whether or not these cattle came from Hereford, Texas, to Kansas, in the same cars? A. Yes sir.

Q. What was done with those cattle on their arrival in Kansas City? A. They were unloaded at the stock yards.

Q. When? A. About seven o'clock I could not tell you the exact hour.

Q. Seven o'clock in the morning or in the evening? A. In the morning.

Q. What day? A. Saturday morning, 30th of May.

Q. Where were those cattle as relates to the stock yards when they were unloaded from the cars, were they driven into the stock yards, along side of them or how,—the cars.

80 A. They were run in the stock yards.

Q. How is that? A. They were run into the yards at the chutes.

Q. What was the hour you say they were unloaded? A. Along about seven o'clock.

Q. In the morning? A. Six a. m.

Q. State how long those cattle remained in the stock yards? A. They remained there until about the 13th or 14th of June.

Q. All the while during that period? A. Yes sir except a week they were up on the viaduct.

Q. Now when were they taken up there, from the stock yards on the viaduct? A. They were taken up Sunday morning the 31st.

Q. What time? A. I should think ten or eleven o'clock about that time.

Q Why were they taken up on the viaducts? A. On account of the water coming into the yards.

Q. What would have happened to the cattle there if they had not been taken up on the viaducts. A. I should think they would have drowned without a doubt.

Q. How high was the water in the stock yards at the time they were taken up on the viaducts? A. I could not say I should think it was eight feet anyway when they were taken up.

Q. That is out of the stock yards? A. It was probably two feet, that is my recollection of it at that time.

Q. When did the water get to be eight feet deep there. A. I left there about a little after noon.

Q. Which afternoon? A. Sunday afternoon; I did not get down again until Tuesday morning.

81 Q. How deep was the water there at the time you left Sunday and how deep was it Tuesday morning. A. It was about four feet deep Sunday morning when I left.

Q. When? A. Sunday morning.

Q. How deep was it Tuesday morning? A. Tuesday morning it must have been eight feet deep I should think at least.

Q. How far back towards the bluffs did the water extend from the stock yards on Tuesday morning. A. It was up to the 12th street viaduct, I know that we took a boat over there to the yards.

Q. What means was there on Monday or Tuesday of getting to the stock yards, by people who lived on the [ypland] on either side of the Missouri or Kansas side? A. There was only by boats.

Q. What time before Tuesday after those cattle were put up there were they fed and watered. A. They were fed on Saturday.

Mr. Angevine: Objected to by the defendant as immaterial under the contract, it is the business of the plaintiff to feed the cattle after unloading, and it is immaterial under the pleadings and the defendants could not be held liable for not feeding them.

By the Court: Answer this question and then we will adjourn.

A. Saturday morning.

By the Court: Adjourn court until tomorrow morning at ten o'clock.

82 Tuesday Morning, January 17th, 1905.

Court convened, all present as before.

Mr. W. H. Frost—continued.

By Mr. Botsford: What time Saturday morning? A. I think they were finished feeding about noon.

Q. State whether the cattle, whether your cattle, in being driven up on the viaducts were driven up with any other cattle? A. Yes sir they were.

Q. Whose cattle.

Mr. Angevine: Objected to as immaterial whose cattle they were, the ownership of the other cattle cannot be a question.

By the Court: Objection overruled, defendant then and there duly excepting.

A. They were the cattle belonging to the Minnesota and Dakota Cattle Company.

Q. How many were there; about how many? A. I could not say myself.

Q. How many cattle altogether after those were intermingled with the others or about how many? A. Why we estimated about three thousand and upward.

Q. Were there any other cattle beside the cattle of the Minnesota and Dakota Cattle Company and your cattle, taken out of the yards into the viaducts, and if so, about how many? A. Yes sir there was.

Q. About how many? A. I should think between two and three hundred head, what they call hold-overs.

Q. Call them what? A. Hold-overs.

Q. What do you mean by that? A. Cattle held over in the pens, unsold.

Q. Do you know how long they had been in the pens? A. No sir.

83 Q. Do you know whether they were in the pens when your cattle, and the Minnesota & Dakota Cattle Company's were put in there? A. No sir, I could not say.

Q. Do you know whether there was any other cattle in the yards when your two bunches were put in there? A. No sir.

Q. If I understand you, you say there was three bunches the Minnesota and Dakota Cattle Company's cattle and your cattle and two or three hundred others, were all put up on the viaduct, is that correct? A. Yes sir.

Q. State whether these three bunches of cattle during the time they were up there on the viaducts mixed and mingled together. A. They were all thrown together.

Q. What time on Tuesday were the cattle fed or any of them, how many of them, if there was any of them fed. A. I think they commenced to feed or at least try to feed about noon is my recollection of it.

Q. Were you down there at the time? A. I was not down there at that time.

Q. Were you there during that day? A. I remember now of trying to get up there up on the 16th street viaduct.

Q. Do you know of your own personal knowledge?

Mr. Angevine: Wait a moment. The defendant moves to strike out of the testimony of the witness as to the feeding

of the stock on Tuesday, the witness shows or says he has no personal knowledge of the matter.

By the Court: He might have some knowledge of the matter from what was seen around there, I will let it stand.

The defendant then and there duly excepting.

84 Q. State what you know about feeding or watering of the cattle on Tuesday? A. I could see from one point of observation that hay was being passed by boat from the warehouse to the viaducts and from that I drew my conclusion they were being fed.

Q. How close were the warehouses to the viaducts? A. I could not just exactly say, it was my recollection possibly about two hundred feet.

Q. Where were you at this time where was the point of observation what you saw? A. Up on the street.

Q. Up on the bluff on 16th street. A. I think it was 16th street.

Q. Do you know how many cattle were fed out of these three bunches mingled together? A. No sir, not of my own knowledge.

Q. Now in feeding those cattle there was it practical for anybody to separate those three bunches and determine whether they were feeding your cattle or feeding the cattle of the Minnesota and Dakota Cattle Company or those other two or three hundred head, was it? A. No sir.

Q. What was the ages of your cattle? A. Two year old steers.

Q. What was the ages of the Minnesota & Dakota Cattle Company? A. Theirs were two year old steers, they were shown to me by Mr. Steube, my recollection is there was one or two car loads of yearlings.

Q. In their bunch? A. In their bunch.

Q. Were yours all two year olds? A. Ours were all two year olds.

Q. Was theirs all two year olds except as to—

85 Mr. Angevine: Objected to by the defendant as leading.

By the Court: Objection sustained.

Q. By Mr. Botsford: How about the other bunch of two hundred head or more, what were their ages. A. They ran from yearlings up to cows, I don't know how, different ages.

Q. Now what was done there on Wednesday, Mr. Frost, with reference to their feeding or watering those cattle? A. Wednesday we got there about ten o'clock in the morning.

Q. Where did you go to? A. Got to the stock yards there at the foot of 12th street viaduct.

Q. How did you get there? A. By boat.

Q. How far did you have to go by boat to get to the stock yards? A. I should think it was a mile perhaps in that neighborhood.

Q. What time did you get to the viaduct? A. It must have been about ten o'clock.

Q. Were those three bunches of cattle there yet? A. They were still on the viaducts.

Q. What was done there with those cattle in the way of feeding or watering them? A. There was a crew there—

Q. How many men? A. I should judge there was probably eight or ten.

Q. How many of this bunch of 3400 or 3500 head of cattle, or thereabouts, were fed on Wednesday? A. I don't think there was very many.

Q. Give the court and jury, about how many? A. They carried hay into the bunch and distributed here and there a little at a time. But what about, what portion of that three thousand head or over, were fed, it is a matter only of conjecture, I would not think there was over—

86 Mr. Angevine: The defendant objects to what he thinks he says this is simply a matter of conjecture.

By the Court: Objection sustained.

Q. How many cattle that was put in there was capable of feeding? A. On the viaducts?

Q. Yes? A. O, I suppose they occupied, a thousand head could possibly be fed or could change the place they occupied on the viaducts, those number of cattle.

Q. The feed which was put in there was capable of feeding how many head of cattle that was the question I asked you? A. I don't think it would have fed over three hundred head of cattle at the outside.

Q. Does that include all that was put in there that day? A. Yes sir.

Q. How many cattle were watered that day of this entire bunch? A. I should think seven or eight hundred head.

Q. How were they watered? A. They were run down the incline at the foot of the viaducts and watered as well as they could be from the overflow.

Q. Did anything happen to the cattle or any of them while being watered there. A. There was a few drowned.

Q. How did they drink that water? A. They did not drink it very well.

Q. Why?

Mr. Angevine: Objected to by the defendant, why they did not drink the water, it is a matter of mere conjecture.

By the Court: I think so.

Q. By Mr. Botsford: What was the condition of the water? A. Very bad.

Q. Was it the kind of water that cattle usually drink?
87 A. No sir.

Q. What made the water bad? A. I don't know, I am sure.

Q. Was it clear or muddy water? A. Very muddy and smelled bad.

Q. State how the stream ran whether it was slow running stream of water or whether it was standing water. A. At that particular place it seemed very sluggish.

Q. What was the condition of the stock yards at the point where that water was as to having manure in it and stuff usually found around stock yards. A. I could not say as to that, it was bad water.

Q. Do you know how that was before the water was there, whether it was in that condition the stock yards and pens are usually in.

Mr. Angevine: Objected to by the defendant as leading and suggestive.

By the Court: Objection sustained.

Q. Do you know whose cattle out of these three bunches were fed and watered that day, whether any of yours were fed and watered or whether it was the Minnesota and Dakota Cattle Company's fed and watered or whether it was the other bunch of two or three hundred? A. They were all mixed together; all of the cattle were in there at that time, that is of each brand, was watered and fed a little.

Q. What was done in the way of feeding and watering those cattle on Thursday? A. They went through the same process of feeding and watering that they did on Wednesday before.

Q. How much feed was put in there on Thursday, that is how many cattle were fed,—

Mr. Angevine: Objected to by the defendant as call-
88 ing for the conclusion of the witness, let the jury determine whether that is sufficient feed or not—it is immaterial.

By the Court: Objection sustained.

Q. Do you know how much feed was put in there. A. No sir I do not. I was there myself at the time.

Q. Can you give the court and jury any idea how much? A. I should think the amount of feed which was placed in the viaducts, if it had been properly distributed—

Mr. Angevine: Objected to by the defendant, it is the same matter was objected to awhile ago.

By the Court: Sustained.

Q. By Mr. Botsford: About how much hay would be needed to feed each one of those 32 or 3300 head of cattle?

Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial and calling for the opinion of the witness.

Objection overruled.

Q. Question read.

By the Court: That is at one feed.

A. Witness: About twenty pounds.

Q. Mr. Botsford: Twenty pounds to the steer? A. Yes sir to the animal.

Q. Mere matter of calculation, that would take twenty times thirty two hundred, would be 64000 pounds; now about how many pounds of hay was put in there on Thursday. A. I don't think there was over two thousand pounds of hay.

Q. How many of those cattle were watered on Thursday, Mr. Frost? A. I should think perhaps eight or ten hundred.

Q. How were they watered and what water was given them. A. Watered them the same as on the preceding day.

89 Q. Were there any of them drowned in driving them down to the viaduct the same as they did before. A. There was a few, they were [weal] and fell down and got into deep water.

Q. What was done in the way of feeding and watering there on Friday? A. On Friday, if my recollection serves me right, they were [then] most of them water on that day or given a chance to drink at least.

Q. Out of this same water?

By Mr. Angevine: Objected to by the defendant.

By the Court: Tell how they were watered.

A. Witness: They were watered by driving them down the different inclines leading from the viaducts into the overflow of water.

Q. You may state whether they drank that water any better Thursday or Friday or any different than they did on Wednesday?

Mr. Angevine: Objected to by the defendant as leading and [duggestive].

By the Court: Objection sustained.

Q. By Mr. Botsford: How did they drink the water there Thursday and Friday.

Mr. Angevine: Objected to by the defendant, the manner in which they drank it is immaterial.

By the Court: Objection overruled.

A. Some drank it not very well, others would not drink it at all.

Q. How many of those cattle were fed there on Friday.

Mr. Angevine: Objected to by the defendant, and the manner of the examination of this witness, the witness ought to be capable of stating what was done on Friday—it is leading and suggestive.

By the Court: It is hardly proper in this condition of the record, he may state what they were fed, if he knows, how much they were fed.

90 By Mr Botsford: How much feed was put down there on Friday, how many pounds or about how many pounds? A. I should think four or five thousand pounds distributed.

Q. How many pounds of feed was fed to the cattle on Saturday. A. Now I think I am right, the cattle I think were driven down into the pens on that day.

Q. Well how many pounds of feed were given them over in the viaducts or in the pens on Saturday? A. All of the cattle were fed on that day but what amount was fed I am unable to say. But the amount of feed which was put before the cattle seemed to be an abundance.

Q. That is on Saturday? A. Yes sir.

Q. Well, state whether or not they were watered on Saturday? A. Yes sir they were watered.

Q. All of them or only part of them? A. All of them.

Q. Where were they watered on Saturday? A. In the yards.

Q. Well in the yards, how, from what water? A. They were watered from the,—I don't know what water it was the water was turned in.

Q. From the hydrant? A. Yes sir.

Q. Did any of those shipments of cattle in question die on the way from Texas to Kansas City? A. No sir.

Q. State what the condition of the cattle was when they arrived in Kansas City? A. They were in good condition, all strong and on their feet.

Q. What did you [pau] per head for those cattle in Texas?

Mr. Angevine: Objected to by the defendant as immaterial and not the proper manner of proving the value of the cattle.

By the Court: Objection sustained.

91 By Mr Botsford: What was the cash value of the cattle in Texas?

Mr. Angevine: Objected to by the defendant as immaterial incompetent, irrelevant and the witness has not shown himself competent to testify.

By the Court: It appears the loss to the cattle and to the cattle occurred here at Kansas City, and if this witness is able to state, it would be better in my judgment to state the value of the cattle here at Kansas City where the loss occurred. The contract read here provides that the cash value at the place of shipment must be taken as the basis of the value. However having again examined the contract I will allow you to show the cash value at the place of shipment. I will allow this rule of damage on account of the language in the contract.

Mr. Botsford: Q. How long have you been in the cattle business? A. About thirteen years.

Q. Are you familiar with the values of cattle? A. Yes sir.

Q. Have you been engaged during that thirteen years in buying and selling cattle to some extent? A. Yes sir.

Q. You bought these particular cattle did you? A. Yes sir, I did.

Q. Was the price which you paid the reasonable market price and value of those cattle in Texas where you bought them?

Mr Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial, and the witness has not shown himself competent to testify on that point as to the market value in Texas.

By the Court: Objection sustained.

Mr Botsford: Does your honor hold that he cannot show what he paid for the cattle.

By the Court: I think it is better for this witness to qualify himself to prove what the market value of the cattle was in Texas; first qualify him to see if he knows.

92 By Mr Botsford: Did you know the market price of steers of this kind in Texas at the time you bought them? A. Yes sir.

Q. State what the cash market value of those steers was at the time you bought them at Hereford Texas. A. The steers of that age and class were worth in Hereford $21.

Q. Per head? A. Per head.

Q. I will ask you to state what was the price which you actually paid for those steers.

Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial.

By the Court: The witness has stated he knows the market value, and what it was, objection sustained.

Q. Mr. Botsford: Mr Frost, after those cattle were taken down into the pens here in Kansas City, how long did they remain there? A. I may have been off one day, I stated they were driven down on Friday.

Q. You stated on Saturday? A. On Saturday, I think I am mistaken one day, I think they were driven down on Friday.

Q. How long did they remain in the yards at that time. A. Until the following Monday.

Q. State what was done with them? A. They were loaded into the cars and taken out near Emporia, Kansas, for pasturage.

Q. Who loaded them up?

Mr Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial, and not tending to prove any issue in this case.

By the Court: Objection overruled.

Mr Angevine: There is an agreement covering that matter reduced to writing.

93 By the Court: I understand that, but still I think it may be shown for the purpose of showing, not the legal effect of this agreement between the parties, but it is to prove who did the work.

Mr Angevine: That is immaterial because that was provided for in the contract, who actually did the work I suppose is immaterial, and as to the manner, who should take them out there is provided for.

By the Court: I know it is.

Defendant then and there duly excepts.

Q. Mr Botsford: Read the question—question read. A. I understand that.

Mr. Angevine: I object to his understanding.

Objection sustained.

Q. Mr Botsford: Did you have any talk or conversation with Mr Coombs, the general live stock agent of the Santa Fe Railway company?

Mr Angevine: Objected to by the defendant as immaterial.

By the Court: He may state if he had any conversation with him; if he had any understanding I do not think would be proper.

A. Witness: Yes sir, I had some conversation with Mr Coombs.

Q. Where was that conversation? A. I think it was at one time at Judge Ball's office.

Q. Who was present at that time? A. I think Mr Millet was present.

Q. Who else? A. Mr Steube.

Q. Who else? A. Mr T.

Q. Was Mr Ball and myself there? A. Yes sir.

Q. Was Mr Coombs there? A. Yes sir.

Q. Was Mr Lathrop there? A. Yes sir.

Q. Mr Gardiner, attorney for the Santa Fe company? A. Yes sir.

94 Q. Now state as briefly as you can what conversation took place there between you, Mr. Coombs, and Mr. Lathrop on the one hand and either Mr. Ball and myself on the other hand with reference to these cattle, what should be done with them?

By Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial, and the testimony sought to be elicited is incompetent for the reason that the final result of their conversation was reduced to writing, and is the contract under which those cattle were handled from the stock yards at that time.

By the Court: Was there an agreement entered into in writing at that time that those cattle were to be returned to Lyon County, Kansas and there kept for a certain time.

Mr. Botsford: That was agreed on orally at that time.

Mr. Angevine: I am not certain as to their contract.

Mr. Ball: The writing covers the terms on which the Santa Fe pay these charges. The conditions of the contract does not specify the subsequent handling of the cattle.

Mr. Botsford: We expect to prove that these gentlemen Mr. Lathrop and Mr. Coombs desired us to take—and then Mr. Coombs announced that they would take the cattle up to their pastures in Lyons County, Kansas, that is the short of the matter, stated shortly, we expect to prove. Subsequently these bonds were given.

By the Court: The terms of this obligation are pretty full I think we better confine this to that.

By Mr. Botsford: I want to show what was done with those cattle.

Q. Following that meeting what was done with
95 those cattle? A. They were loaded out.
Q. Loaded out by whom?

Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial.

By the Court: Objection overruled; defendant then and there duly excepting.

A. Loaded out by the Santa Fe people.
Q. Where did they take the cattle?

Mr. Angevine: The defendant moves to strike out the statement of the witness as a conclusion and not a statement of any fact.

By the Court: Overruled; defendant then and there duly excepting.

Q. By Mr. Botsford: Where did they take the cattle. A. They took them out near Emporia.

Q. Did they take all of your cattle which remained? A. No sir, there was a few left in the yard, just alive, not taken.

Q. How many? A. Oh, in the neighborhood of twelve or thirteen head if I recollect right.

Q. What was the condition of that thirteen, twelve or thirteen head? A. They were down.

Q. How down—what was their condition Mr. Frost, describe it to the court and jury? A. The condition was such that [there] were tramped and ribs broken in and a great many of them blind, and some the eyes entirely run out of their head.

Q. State whether any of your cattle died there in the viaducts? or in the stock yards? A. Yes sir.

Q. Do you know whether any of the cattle of the Minnesota and Dakota Cattle company died there? A. Yes sir, they did.

96 Q. State whether the cattle of the Minnesota and Dakota Cattle company were also taken? A. Yes sir all taken at the same time.

Q. How many train loads? A. I think three train loads.

Q. How many cars in each train? A. I don't remember.

Q. Did you accompany the cattle from Kansas City? A. I went with the last train; I went out Monday.

Q. Did they all go together on one day or different days? A. They went on different days.

Q. Which day was it you say they went? A. Why I think two trains went out on Sunday and one train on Monday.

Q. Who went with the two trains which went on Sunday? A. Why the young man who was with me went with one.

Q. That is Mr. Newton? A. Yes sir.

Q. Who went with the other? A. The other was some man Mr. Steube had, Mr. Mullen.

Q. Mr. Stuebe is foreman? A. He is one of the members of the Minnesota and Dakota Cattle company.

Q. Had those cattle of the Minnesota and Dakota Cattle company and your cattle been separated up to this time? A. No sir.

Q. When and where were they separated? A. The remnant of the herd was separated at Evarts South Dakota.

Q. When? A. About the 13th or 14th of July.

Q. Where was those cattle taken to from Kansas City, the time you mention, Sunday and Monday? A. They were taken to Emporia, Kansas.

Q. How near? A. A station this side I think, I
97 don't know just how far it is, not very far this side of Emporia, that is two trains of them, and one train was unloaded right at Emporia.

Q. Which one of those trains was unloaded at Emporia? A. The train which I accompanied.

Q. Where were the other two train- unloaded? A. They were unloaded this side of Emporia, I think 12 or 13 miles something like that.

Q. Were those three train loads of cattle put in one pasture? A. One train load went to Emporia and put in another pasture.

Q. Who drove the cattle out to the pastures to the place where they were unloaded?

By Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial.

By the Court: I understand there is no claim for damage of what occurred down at Emporia.

By Mr. Botsford: This evidence bears on this point; they make the point that these cattle were put in the stock yards here to be delivered to another carrier; we want to show and have it brought out and distinctly appear by the evidence that, as we understand the fact to be, they continued to remain in the custody of the Santa Fe company; they took the cattle out of the stock yards and took them to their pastures in Lyons County, and without having sufficient time for the cattle, if I may use that word, resuscitate.

We want to show that fact, we think it is proper and material in view of the contention of Mr. Angevine, and which he makes when the Santa Fe company put them in the stock yards, they had nothing further to do with them; it shows the conduct of the defendant company.

98 Mr. Angevine: The written contract provides that the Santa Fe should take them out there and put them on pasture; not on their own pasture, they did not own any pasture, they took them out and put them on pasture and paid the pasture bill, and reshipped them; there is no contention about that—

Mr. Ball: I think so—this obligation shows exactly what was to be done with the cattle.

By the Court: Objection overruled.

Q. Mr. Botsford: Did you drive them out? A. No sir.

Q. Did you employ a man who drove them out?

Mr. Angevine: Objected to as leading.

A. No sir.

Q. How long did those cattle remain in the pastures out there give us some idea how long they remained in the pastures or about how long. A. As I stated before they were loaded out here the last train on Monday, I think was the 13th and shipped out to Emporia and from there reloaded.

Q. How long did they remain in the pasture—about how long. A. From June the 13th until July 10th.

Q. What was done with the cattle then? A. They were loaded and forwarded to their destination.

Q. By whom?

By Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial.

By the Court: Objection overruled; defendant then and there duly excepting.

By the Court: They were shipped over the Santa Fe road? A. Yes sir.

Q. By Mr. Botsford: Did you accompany the ship-
99 ment? A. I accompanied the last train.

Q. Over what road did they go in going from Emporia? A. They went over the Santa Fe to Atchison.

Q. And crossed the Kaw river where? A. At Topeka, I think.

Q. Topeka, Kansas? A. Yes sir.

Q. What time did those cattle, the two bunches reach Evarts, South Dakota? A. The 13th or 14th, I am not positive which.

Q. Which month? A. They all reached there the same day.

Q. Which month? A. July.

Q. Mr. Frost when those cattle were separated at Evarts how many of your bunch was left.

Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial.

By the Court: Objection sustained.

By Mr. Botsford: I want to show how many in that was shipped out; I want to show how many of the herd was left for the purpose of showing the number of deaths.

By the Court: You better show that at some other place—than at the point of destination as it is conceded they were shipped over the Burlington and Milwaukee roads after they left the hands of the Santa Fe road. The objection is sustained.

Q. Were you along with the cattle shipment from the pastures to Evarts? A. Yes sir.

Q. Did any of those cattle die on the way from Emporia to Evarts, South Dakota? A. Yes sir.

Q. How many? A. The train which I was with, is all, of course, that I know anything about, and out of that train I think there was about 13 head which died. 12 or 13 head between Emporia and Evarts.

Q. Do you know about how many of the 32 or 3300
100 head was on that train? A. No sir I do not.

Q. Can you give about the proportion of the entire number was on that train? A. Approximately one-third, I presume.

Q. Did any of those cattle die going over to Emporia? A. Yes sir.

Q. How many? A. 4 head in the train I was on.

Q. Did any of them die while in the pastures at Emporia. A. Yes sir some died.

Q. How many? A. I am unable to say at this time.

Q. Do you know about how many? A. No sir, I do not.

Q. How many of your bunch was left after deducting deaths at Evarts, South Dakota, when they arrived there?

By Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial and not the proper way of showing the loss against the defendant the Santa Fe railroad.

By Mr. Botsford: 798 head intact at the time they arrived here, some died in here and at Emporia and some out in Kansas.

By the Court: This witnes may show the number of cattle that died here as the result of this disaster at Kansas City, but of course, if there are any of these cattle lost by reason of the manner in which they were handled upon other lines of road after leaving the Santa Fe, cannot be shown.

Mr. Botsford: We expect to follow this up by showing the number of cattle which lived, and the damage suffered.

By the Court: The objection is sustained.

Q. By Mr. Botsford: State whether these deaths were the result of not feeding and watering the cattle there and in the stock yards?

By Mr. Angevine: Objected to by the defendant as
101 incompetent, irrelevant and immaterial and calling for the conclusion of the witness and as leading.

By the Court: The objection is sustained.

Q. By Mr. Botsford: How many of these cattle which died, died in consequence of not feeding and watering?

By Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial, and as leading and suggestive and assuming that some of them died from that cause.

By the Court: Objection sustained to this question.

Q. By the Court: You state certain number of these cattle died here and certain others died at Emporia? A. Yes sir.

Q. Do you know what occasioned the death of these cattle? A. Yes sir, I think I do.

By the Court: State.

Mr. Angevine: Objected to by the defendant as calling for the conclusion of the witness; objection overruled, defendant then and there duly excepting.

A. Witness: By reason of starvation and want of water and feed, held in the viaducts at Kansas City.

Q. What was the cause of the death of the cattle which died on the way between Emporia and Evarts, South Dakota?

By Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial.

By the Court: Qualify the witness first and see if he knows.

By Mr. Botsford: Do you know what caused the death of those cattle which died between Emporia and South Dakota, as well as those which died before? A. Yes sir.

Q. What was the cause of their death?

102 By Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial, and calling for the conclusion of the witness.

Objection overruled, defendant then and there duly excepting.

A. Starvation, weakness caused from starvation and want of water and feed.

Q. Was there any accident affecting these cattle in any way between Emporia, Kansas, and Evarts, South Dakota? A. No sir.

Q. Were the cattle fed along while they were on that route? Between Emporia and Evarts South Dakota, were they fed and watered? A. Yes sir.

Q. What was the condition of the pastures that the defendant had or procured in Lyons County, Kansas?

By Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial and does not tend to prove any issue in the case, and no complaint made.

By the Court: Objection sustained; plaintiffs then and there duly excepting.

Q. Now after making allowances for these deaths how many cattle were there left on their arrival at Evarts South Dakota?

By Mr. Angevine: Objected to as not the proper means of ascertaining the loss that occurred while the cattle were in the possession of the defendant.

By the Court: Objection overruled. Defendant duly excepted.

A. About 697 head.

Q. Do you include in that the cattle which were left in the stock yards? A. Yes sir.

Q. What was the total death loss Mr. Frost, at the time you got to Evarts, South Dakota? A. I think 99 head or about that.

103 Q. Are you able to state whether these cattle that were left, 690 odd head, were diminished in the market value, and if so, by reason of what cause and to what extent they were so diminished in their market value?

By Mr. Angevine: Objected to by defendant as incompetent, irrelevant and immaterial and not fixing the market value at any particular place and the witness has not shown himself qualified to testify.

By Mr. Botsford: I will put the question at Evarts, South Dakota.

By Mr. Angevine: Objected to as amended as incompetent, irrelevant and immaterial and not the proper measure of damages and not the proper place for estimating the damage—to the cattle in the possession of the defendant.

By the Court: It is true it would be a matter of common knowledge that a regular shipment made in the usual way for that length, would depreciate the cattle in value some what; of course, it is contended here that this was more than that and a greater depreciation in value by reason of the way the cattle were handled; of course, if this witness is qualified to state, I think the witness should be qualified—qualify this witness to state.

By Mr. Botsford: Are you familiar with the shipment of cattle from Texas to South Dakota. A. To a limited extent, yes sir.

Q. During how many years have you shipped cattle from Texas to South Dakota? A. I only shipped two years from that particular point.

Q. Were you familiar in July, 1903, with the values of cattle in South Dakota, in Evarts, and in that neighborhood? A. Yes sir.

Q. State to the court and jury Mr. Frost, whether
104 the value of that 690 head of cattle was diminished in any way in consequence of their not being fed and watered?

By Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial and not the proper way of proving the measure of damages, the witness has not shown himself qualified to testify.

By the Court: How many years do you say you shipped cattle from Texas, to South Dakota? A. Two years.

Q. Were the cattle of a similar character to this shipment of cattle? A. The same class.

Q. From your experience you know whether a shipment of cattle in the usual way from Texas to South Dakota, diminishes the value of the cattle? A. Yes sir.

Q. You say it does? A. Yes sir a little.

Q. Do you know to what extent cattle such as this shipment from places in Texas, to where these were shipped to South Dakota are damaged by reason of the shipment under ordinary circumstances? A. Your honor please, I misunderstood that first question—I had in mind that you had reference to these damaged cattle altogether.

Q. I am speaking generally with reference to the shipments of cattle? A. Will damage cattle?

Q. Are you, from your experience, are you able to state what cattle are depreciated by shipment in the ordinary way. A. Yes sir, I understand you now; yes sir, I think I am.

Q. Do you know to what extent these cattle were depreciated in value by reason of the shipment as made; I ask you

now whether you know or not, that is the ones which arrived at Evarts, South Dakota? A. Yes sir.

Q. Were these cattle in a worse condition and worse damage than if the shipment had gone through in the ordinary way? A. Very much worse, yes sir.

105 Q. Do you know what the value of these cattle would have been at Evarts, South Dakota, if they had been shipped through in the usual and ordinary way and time, had it not been for this delay at Kansas City? A. Yes sir.

Q. Do you know what the value of these cattle this 697 head which was shipped, this shipment was, at Evarts, South Dakota when it arrived there, per head? A. Yes sir.

By Mr. Botsford: Now proceed and give that market value or rate of this 697 head when it arrived?

By Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial and not tending to establish the proper measure of damages in this case, and not establishing the value at the proper place under the contract under which the cattle were shipped.

By the Court: I think the difference in value between the value of what these cattle would have been received at Evarts, South Dakota, for the purposes they were received, and what the value would have been if they had been shipped in the usual and ordinary way, is the difference in value under this contract—you may find out.

Defendant then and there duly excepting.

A. They were worth about, I would not want to pay over $12 or $14 for them.

Mr. Angevine: The defendant moves to strike out that statement of the witness.

By the Court: Sustained.

By Mr. Botsford: The question is, what was the market value, in your opinion of those cattle at Evarts, South Dakota, when they arrived there.

106 By Mr. Angevine: The same objection to that as before.

By the Court: You have stated you knew what the market value was? A. Yes sir.

Q. Do you? A. Yes sir.

Q. Now state what it was? A. Worth about $14.

Q. By Mr. Botsford: Per head? A. Yes sir.

Q. What would have been the market value of those 697 head of cattle if they had arrived there in the ordinary way shipped in the ordinary way?

By Mr. Angevine: Objected to by defendant as incompetent, irrelevant and immaterial and not the proper way of proving damages in this case.

By the Court: Objection overruled; defendant then and there duly excepting.

A. $24.

Q. Mr. Frost, state whether or not there is any [defference] in the market value in Dakota cattle two years old steers, such as these, where they arrive say on the first of June, at the beginning of the pasture season and where they arrive on the 14th of July?

By Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial and not tending to prove any issue in this case.

By the Court: Objection sustained—for the reason, that your answer to your former question included this shipment of cattle, the time they were shipped and the time they arrived; the witness says they were worth $14 per head; that if they had gone to Evarts in the ordinary time, arrived there, he says they would be worth $24.

Q. By Mr. Botsford: Did you include in your estimate the difference between $14 and $24 per head, the loss from delay as a matter of time separate and apart from the diminu-
107 tion in value consequent upon not feeding and watering, is that included or not in your estimate.

By Mr. Angevine: Objected to by defendant as incompetent, irrelevant and immaterial and not tending to prove any issue in the case.

By the Court: Overruled—defendant then and there duly excepting.

A. No sir.

Q. Now is there any difference in the value, the market value of cattle arriving there on the first of June, than arriving on the 14th or 15th of July.

Mr. Angevine: Objected to by the defendant as incompetent irrelevant and immaterial; and because the written contract providing for the return of these cattle, stipulates, it is agreed by both parties, it was agreed without prejudice to the parties, it was necessary to be done.

By the Court: You are asked to state whether you knew the market value of these cattle at Evarts, South Dakota, at the time that they arrived there, you stated you knew that market value? A. Yes sir.

Q. You knew the time at which they arrived there? A. Yes sir.

By the Court: And you stated the market value of these cattle at the time they arrived there? A. Yes sir.

By the Court: He states that he knew the market value of these cattle at the time they arrived at Evarts, South Dakota; he states what that market value was.

Mr. Botsford: He also states that he did not have in mind the difference in value consequent upon the matter of delay, separate and apart from the other.

By the Court: That may have been true, but it must of necessity include,—he has testified these cattle were worth $14 per head at the time they were received there, at Evarts, South Dakota,—I think that includes everything.

108 Q. By Mr. Botsford: Were you put to any extra expense by reason of the detention of these cattle at Kansas City, by reason of their being sent out to pasture? A. I was put to the extra expense of being detained at Kansas City on account of the hold-up.

Q. What as the amount of that extra expense?

By Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial; the witness has repeatedly testified he did nothing in regard to handling the cattle, feed and water or anything else and it certainly is not a proper item of expense charging us for staying here riding on a boat.

Mr. Botsford: I submit if he was detained here, in connection with these cattle in consequence of this matter, the detention of the cattle here was wrongful, it is the proper consequence and should be charged up .

By the Court: That would be owing to the reason of his staying here.

By Mr. Botsford: We submit that he had a right to remain here; does your honor say that Mr. Frost should go away when these cattle were in this condition, and not stay here, and that be a necessary and proper expense, of staying here.

By the Court: Unless he was here for some purpose in connection with the cattle.

By Mr. Botsford: We propose to prove that he was.

Q. By Mr. Botsford: Did you remain here with the cattle after they got into trouble?

Mr. Angevine: Objected to by defendant as incompetent, irrelevant and immaterial, and leading.

By the Court: Objection overruled; defendant then and there duly excepting.

109 A. Yes sir.

Q. Did you remain with the cattle until they were put into the pastures?

By Mr. Angevine: Objected to by defendant as leading; the witness ought to be required to state, and not have the question put in a leading form.

Objection overruled, defendant duly excepting.

A. Yes sir.

Q. What was the delay and expense to which you were subjected for that in remaining with the cattle?

By Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial and not a proper item of expense.

By the Court: Sustained unless he shows he had some duty to perform or did some duty in regard to the cattle.

Q. By Mr. Botsford: Did you have any other business while you remained here except to look after these cattle? A. No sir, I did not.

Q. During the whole time you were here up to the Emporia trip? A. No sir no other business.

Q. Did Mr. Newton remain with you? A. Yes sir he did.

By the Court: For what purpose did you remain? A. I supposed it was my duty to remain.

Q. For what purpose? A. To superintend the reshipment of the cattle if it came to that pass and anything left to ship.

Q. And look after your interest in the cattle? A. Yes sir.

Q. And care of the cattle? A. Yes sir.

Q. Did you retain Mr. Newton also for that purpose? A. Yes sir.

Q. And you did do that yourself and Mr. Newton assisted you? A. Yes sir.

110 By the Court: Very well.

Q. By Mr. Botsford: Now what was the total amount of the cost and outlay which you expended in connection with the detention of Mr. Newton here and yourself during that time?

By Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial and not a proper measure of damages against this defendant.

By the Court: Overruled, defendant then and there duly excepting.

A. I furnished an itemized statement of my expense bill during that time.

Q. Is this the itemized statement; I call your attention now to the statement served on the defendant?—showing witness paper. A. Yes sir.

Q. Is that correct? A. Yes sir correct items. I did not notice there is no footing there.

Mr. Botsford: Now I offer at this time this notice containing that statement with the stipulation that they may be read in evidence—I will read the stipulation—Exhibit A.

Mr. Angevine: That has nothing to do with the question to the witness that exhibit a.

Mr. Botsford: That is true I thought I read these papers.

Mr. Angevine: We object to exhibit a as incompetent irrelevant and immaterial and not the proper manner it, with the special reservation in the stipulation to do that. He has testified fully upon the matter.

By the Court: I think the witness may refresh his recollection and memory on that, he can state the amount.

111 Q. By Mr. Botsford: After looking at this paper about what was the amount.

By Mr. Angevine: Objected to by defendant as incompetent irrelevant and immaterial and not a proper memorandum of refreshing his recollection, and it is not shown that it is such a memorandum as is permitted for that purpose, and the question asked—

By the Court: Let him state the amount and purpose for which he expended it.

Q. Mr. Botsford: State the amount? A. I can't state just exactly the amount, but from my recollection it is in the neighborhood of $150.

Q. Did you make any memorandum at the time of the matter? A. Yes sir.

Q. Is this the memorandum? A. Yes sir.

By the Court: Refreshing your memory from this memorandum state the amount you expended for the purpose?

By Mr. Angevine: The defendant objects to this testimony as incompetent irrelevant and immaterial.

Objection overruled, defendant then and there duly excepting.

A. I would say in this connection there is an item here of $100, that was on account of our outfit going to Evarts, South Dakota to get these cattle and they were not there.

By Mr. Angevine: The defendant objects to that item and moves to strike out the testimony of the witness concerning that for the reason that it is incompetent, irrelevant and not one of the expenses that the defendant could reasonably foresee would have occurred by reason of the failure to get the cattle there at any certain time, and the contract itself provides, they do not contract to get the cattle at their destination at any particular time.

112 By the Court: Sustained; I thought this was an item he expended here.

Q. Mr. Botsford: That item was not incurred, so that disposes of that—The next item is made here—Evarts, July, 7, 8, 9 and 10 looking after cattle; was that item of expense occurred and paid by you?

By Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial.

Objection overruled, defendant duly excepting.

A. Yes sir.

Q. The following item, W. H. Frost, 16 days at Kansas City, Missouri $5 per day, total $80, was that the reasonable value of your time.

By Mr. Angevine: Objected to by defendant as incompetent irrelevant and immaterial.

Objection overruled; defendant duly excepting.

A. Yes sir.

Q. Then here is board paid for Newton, while we set cattle in pasture, while at Emporia, Kansas, $21.05, did you pay that out? A. Yes sir.

Q. The next item wages paid said Newton while looking after said cattle while in said pasture at Emporia, Kansas, $30 was that paid? A. Yes sir.

Q. For that purpose? A. Yes sir.

Q. The next item, cash paid for feed for horses used while cattle were in pasture $11.10.

By Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial and not shown to be a necessary expense.

By the Court: Find out what these horses were used for.

A. They were used in looking after the cattle while in the pasture.

113 Q. Was it a necessary expenditure? A. Yes sir so represented to me.

Q. Did you pay the amount $11.10? A. Yes sir.

Q. The next item cost of telegrams sent while detained at Kansas City $8 what were those telegrams sent for? A. Telegraphing to the members of our company as to the conditions in Kansas during the flood.

Mr. Angevine: Objected to by the defendant as incompetent irrelevant and immaterial, and move to strike it out from the jury, because the witness was here personally present.

By the Court: I think so. Sustained.

Mr. Angevine: Now we also move to strike out the item of board $21 for Newton at Emporia for the reason that it is not shown that he had anything to do with the care or custody of the cattle there.

By the Court: He had a right to be there if he had some duty to perform in connection with the cattle.

By the Court: Did you remain down there at Emporia during the time these cattle remained there Mr. Frost? A. No sir.

Q. You left Mr. Newton there? A. I left Mr. Newton there.

Q. What were his duties in reference to the cattle while they were there? A. To look after them and see that they got water and he and others to lift up the weaker ones, for the purpose of lifting up and taking care of the weaker cattle, more particularly.

Q. Did the defendant in this case have any men there in charge of the cattle while they were in the pasture at Emporia? A. I don't know.

Q. Did you have any arrangement with the defendant as to taking care of the cattle while [there] were there in the pasture or left to Mr. Newton there. A. The matter
114 was talked over informally and we agreed to leave three men with these cattle, that was the understanding.

By Mr. Botsford:

Q. You mean for the two companies? A. Yes sir.

Q. You left Mr. Newton there for your company? A. Yes sir.

Q. Who did the Minnesota and Dakota Cattle Company leave there? A. I can't recall their names, they were strangers to me.

By the Court: The motion will be overruled. Defendant duly excepted.

By Mr. Angevine: I also move to strike out the items of $30 for wages paid to Newton and $11.10 horse hire at Emporia for the same reason, that it is incompetent, irrelevant and immaterial and not a proper charge against the defendant.

By the Court: It is overruled; of course, you can't try a law suit all at once; I apprehend that Newton is here and will be used as to what he did.

Mr. Angevine: His deposition is here.

By the Court: Does it show what he did there.

By Mr. Botsford: I don't think in his deposition he was asked in regard to the use of those horses.

By Mr. Angevine: My recollection is Mr. Newton was very positive he never did anything towards these cattle at any time or place caring for them.

By the Court: I will not pass upon this motion in that respect at the present time, but will when his deposition is read.

By Mr. Angevine: What was the ruling of the court in regard to the telegrams.

By the Court: They were stricken out.

By Mr. Botsford: What was the size of those pastures there Mr. Frost.

By Mr. Angevine: Objected to by defendant as in-
115 competent, irrelevant and immaterial.

By the Court: objection overruled. Defendant duly excepted.

A. I don't know.

Q. Didn't you see the pastures? A. No sir, I did not.

Q. State whether the use of the horses there by the men looking after that number of cattle, those three men, was reasonably necessary?

By Mr. Angevine: It does not seem to me that the witness can testify as to that, if he never saw the pastures.

By the Court: Objection sustained; somebody ought to know something about it.

Cross-Examination.

Q. By Mr. Angevine: Where do you live? A. Ft. Pierre, Stanley County, South Dakota.

Q. What is your business? A. I am in the hardware and implement business. Also interested in stock.

Q. How long have you been engaged in the hardware and implement business? A. About two years.

Q. How long did you say you had been in the hardware business? A. About two years.

Q. What business were you engaged in before? A. In the stock business.

Q. Where were you engaged in the stock business. A. In Stanley county, South Dakota.

Q. What was the character of the stock business in
116 Stanley county, South Dakota. A. I don't know as I just understand your question.

Q. What were you doing feeding cattle or ranch cattle. A. Ranching cattle.

Q. How long had you been engaged in that business? A. About 13 years.

Q. Had you ever shipped cattle from Texas or New Mexico to your ranch in Dakota at any time prior to 1903? A. Yes sir.

Q. When did you first commence shipping cattle from Texas to your ranch in Dakota? A. The spring of 1902 was the first shipment I made.

Q. How many shipments of cattle did you make during the year 1902? A. Just that one.

Q. How many car loads of cattle did you ship. A. I forget how many car loads, 1000 head.

Q. Did you personally superintend that shipment? A. I did.

Q. You bought the cattle? A. Yes sir bought the cattle.

Q. And shipped them just one shipment? A. Yes sir just one shipment.

Q. When did you next ship cattle from Texas; was it the shipment in question here? A. Yes sir.

Q. Was that the shipment in question the last shipment which you ever made from Texas to Dakota? A. That was the second season, yes sir.

Q. It was the second shipment, was it not? A. Yes sir, practically the second shipment.

Q. I believe you stated the shipment in question was the second shipment? A. Yes sir.

Q. Now it is true is it not, that cattle shipped from Texas to or other warm countries to Dakota do not winter very well the first winter, and there is atways a certain per
117 cent of loss of them is there not. A. It depends on the ages of the cattle.

Q. There is a certain per cent of loss in any event is there not of cattle shipped from Texas to Dakota? A. On steers they figure on a very light per cent the first year.

Q. The loss on southern cattle shipped to Dakota is much greater than cattle shipped from any northern state into Dakota? A. I don't think so.

Q. You do not think so? A. No sir.

Q. You think the Texas cattle stand the Dakota winters as well as northern cattle? A. Yes sir they do.

Q. Your testimony is that Texas cattle shipped to Dakota stand the Dakota winter as well as the Dakota native cattle do they? A. No sir, I did not make that statement.

Q. Do they stand the winter as well as cattle shipped there from northern countries to Dakota? A. That is our experience, yes sir.

Q. That is your experience—the country where you ranch your cattle in Dakota is a prairie country is it not. A. Prairie and broken country.

Q. Broken country is it? A. Yes sir.

Q. No timber? A. Some timber.

Q. What is the character of the grass there? A. What they call alkali and buffalo grass.

Q. They are both short grasses are they not? A. The buffalo grass is a short grass, the alkali is not so short.

Q. It grows thin upon the ground? A. Some places it grows very thick.

Q. The grass is different from the grass grown in
118 Texas, is it not? A. They have the buffalo grass in Texas, I notice about the same grass we have up there.

Q. Still the principal range in Texas is different grass from your buffalo grass? A. They have different grass there from what we have.

Q. Now don't you know as a fact that cattle shipped from Texas to Dakota do not winter well the first winter there as a rule? A. Two year old steers winter very well with very little loss.

Q. You shipped one train load of cattle from Texas at the time you have spoken of which you came with did you? A. Yes sir.

Q. Was there another train load of cattle from the same place or was that some other company's cattle. Were your cattle all in one train. A. The cattle I was with?

Q. The cattle which you shipped individually? A. They were in two trains.

Q. But you accompanied one train and somebody else another train? A. Yes sir.

Q. Your train was the train the witness spoke of yesterday? A. Yes sir.

Q. At what time did you arrive at Strong City, with your train of your cattle. A. We arrived at Strong City, the evening of the 26th about 11:30.

Q. To be exact about it was it not twelve o'clock and one minute midnight? A. No.

Q. Was it not after midnight when you arrived there? A. My recollection is about half past eleven.

Q. Did you look at your watch? A. No sir, I don't remember.

Q. You would not say it was not after midnight? A.
119 No sir, I would not but I don't think it was midnight quite.

Q. What did you do on arrival at Strong City? A. Stood on the platform and superintended the unloading of the cattle.

Q. You superintended the unloading of your cattle into the yards? A. Yes sir watched the unloading and counted them in the cars.

Q. At Strong City? A. Yes sir.

Q. And then you went to the hotel and went to bed? A. Yes sir.

Q. And what time did you get to bed? A. Got to bed about two o'clock.

Q. It took until about that time to unload the cattle? A. Yes sir.

Q. The time it usually takes to unload a train load of cattle of that kind? A. No sir the facilities there was not the best.

Q. The fact is there was another train load of cattle in the yards ahead of you? A. Yes sir.

Q. And the yards were somewhat crowded and the facilities not good for unloading a second train load. A. There was no cattle in there was unloading at that time.

Q. There was no cattle? A. No sir.

Q. What was the reason the facilities were not good, in an ordinary way weren't they good? A. In the first place they did not seem to have a crew that understood their business very well.

Q. You say you went to bed about two o'clock; what time did you get up the next morning? A. About six o'clock.

Q. When did you first go to the stock yards after
120 first getting up? A. I don't remember I think about seven.

Q. After you ate breakfast? A. Yes sir.

Q. Was the other train load of cattle in the yards at the time you went there in the morning? A. Yes sir.

Q. The train load you brought in was there also? A. Yes sir.

Mr Botsford: Your train load do you mean? A. The second train load.

Q. Mr. Angevine: You came in there with the second train? A. Yes sir.

Q. Was there any other cattle in the yards there at the time except your two train loads? A. No sir, I don't think so.

Q. Did you superintend the feeding of those cattle at Strong City that morning? A. I told the yard master what I wanted fed.

Q. What you wanted fed? A. Yes sir.

Q. What time was it when you gave that order? A. I gave that order before I left the cars the night before.

Q. Did you superintend the feeding of the cattle on that morning, the morning of the 27th, was it? A. The morning of the 27th, yes, I did.

Q. Superintend the watering of the cattle? A. Yes sir.

Q. And directed how much they should be fed, did you? A. Yes sir, I did.

Q. And they were fed according to your directions? A. Yes sir.

Q. And watered according to your directions? A. Yes sir.

Q. Were they? A. Yes sir.

121 Q. And what time did they commence loading loading those cattle? A They commenced loading them in the evening some time.

Q. That same day? A. Yes sir.

Q. What time was it when you fed them on that morning? A. Why it was eight or nine o'clock somewhere along there.

Q. They fed them when you told them what to feed them and directed the matter? A. Yes sir I was there and told them to get their feed.

Q. It takes cattle about five hours to feed and water, does it not? A. Why they usually take that time to rest and feed and water.

Q. Now did you have any talk with the agent at Strong City, during that day as to washouts on the Burlington road? A. I had some talk with the agent, yes sir.

Q. And he told you that the Burlington road had reported that its track was washed out and could not forward the cattle, did he? A. Yes sir.

Q. And it was by reason of that delay that the cattle were held there awaiting advices from the Burlington road as to when they could receive them? A. I don't know.

Q. That is what the agent told you? was it? A. Yes sir, that is what the agent told me.

Q. He told you that the Burlington road had notified them that they could not receive the cattle until their track was

repaired, did they not? A. All he said to me was wash-outs.

Q. Was-outs on the Burlington road did he? A. At one time he said on the Burlington road, but at another time between St. Joe and Council Bluffs.

Q. That was on the Burlington was it not; did he name the place where the washout was? A. No sir.

Q. Did he say it was at or near Hamburg Iowa? A. No sir.

122 Q. At one time he told you there was a washout on the Burlington road, and at another time he told you there was a washout between St. Joe and Council Bluffs? A. Yes sir.

Q. You know of your own knowledge that the road running from St. Joe to Council Bluffs is the Burlington? A. Yes sir.

Q. You know that is the road which is spoken of here in this case as the Council [Bluss], St. Joe and Council Bluffs road? A. I don't know that either.

Q. You know there is only one road running through St. Joe to Council Bluffs, direct, on that side of the river? A. That is all I know about.

Q. That is called the Burlington road? A. Yes sir.

Q. You know that is the Council Bluffs road, do you not? A. I know it runs into Council Bluffs.

Q. You know it is what is called The Kansas City, St. Joe and Council Bluffs road? A. I know it only as the Chicago, Burlington & Quincy.

Q. You know it is the same road, the same as spoken of as the Council Bluffs road? A. No sir, I have not that knowledge.

Q. Haven't you that knowledge now from your own information? A. From hearsay.

Q. That is the only information which you have, it is the Burlington road, just hearsay? A. I bought a ticket over the road.

Q. Your ticket, when you bought a ticket over that branch of the road, read Kansas City St. Joe and Council Bluffs road? A. I don't think so.

Q. You got your information as to both facts in the same way? A. That is by hearsay, that is that it was the

123 Burlington road.

Q. And the Council Bluffs road? A. Yes sir.

Q. So that the road is the same road, when you speak of washout on the Burlington you mean the road your cattle was going over? A. Yes sir.

Q. So when you were detained at Strong City, you were advised by reason of the washout on that road, were you not? A. Yes sir.

Q. They commenced loading up in the evening didn't they? A. Yes sir.

Q. Had they finished loading them at that time? A. I think so, I think the train was loaded at that time.

Q. Did it move away from the station or did it stand there? A. It moved from the yards down on the side track.

Q. Which way from the station? A. My recollection is, it is west.

Q. And the train after being loaded that time was moved down to the east end of the yards? Was it not? A. Yes sir.

Q. Ready to go out? A. Yes sir.

Q. And it stood there and did not go out? A. Yes sir.

Q. And the agent told you that they had again received word from the Burlington that their road was again washed out? A. I asked the agent what the trouble was and he told me it is washouts.

Q. He told you that they had been notified again by the Burlington that their track was again washed out? A. He did not say notify, he says there are washouts ahead.

Q. Then what was done with the cattle. A. Backed up and unloaded again.

124 Q. Did you object to their being unloaded again? A. I had nothing to say in the matter.

Q. You did not say anything one way or the other? A. No sir.

Q. The agent told you that they could not forward the cattle at that time by reason of the washouts and that they must be unloaded again, you say, did he? A. Yes sir.

Q. And you said nothing one way or the other? A. No sir.

Q. How long did they remain in the yards at that time when they were unloaded? A. They were loaded again the next [—], loaded again if I recollect right, I think I am right next following morning.

Q. That would be the morning of the 28th? A. That would be the morning of the 28th.

Q. And about what time in the morning did they commence loading then? A. About eight o'clock.

Q. What did they do towards loading then? A. Loaded about eight cars and then unloaded again.

Q. Did the agent tell you again what they were unloaded for? A. I asked him what the trouble was and he said washouts.

Q. And he told you then that there was not only washouts on the Burlington but a washout on their lines between Topeka and Atchison, didn't he? A. I don't recollect whether he did state at that time where the washouts were or not.

Q. You did understand from the agent before you left Strong City that the Santa Fe line between Atchison and Topeka was washed out didn't you? A. No sir I did not not at that time.

Q. You had been told that by the agent hadn't you?
125 A. No sir I had not not at that time. No sir, he did not tell me just where the washouts were on what road.

Q. Didn't he tell you before you left Strong City that the Santa Fe line between Topeka and Atchison was out of business on account of washouts? A. I don't think so, if he did I have no recollection of it.

Q. But he did tell you that he was again notified that there was washouts and the cattle could not go forward as they had intended? A. Yes sir.

Q. And they then unloaded them? A. Yes sir.

Q. Did you say anything in regard to unloading them, whether he should or should not unload them? A. I told the agent, I had a talk with the agent on the proposition and told him I was getting pretty tired of that kind of business.

Q. Getting pretty tired of holding the cattle there? A. Yes sir.

Q. Did you tell him you wanted them sent on whether they ran into washouts or not? A. No sir.

Q. You did not say you wanted him to forward them on their way, whether the forwarding road would receive them or not? A. No sir I asked him if they could not be run around the flooded district.

Q. You asked him if they could not run them around the flooded district? A. Yes sir.

Q. Didn't he tell you then they were trying to arrange or would try to arrange to run them around the flooded district? A. No sir I do not have any recollection of anything of that kind.

Q. You asked him to run them around the flooded district? A. Yes sir.

126 Q. When was that you asked him that? A. I I think that was the 28th the last time we unloaded.

Q. About what time in the day? A. I do not remember the day I think after we got the cattle back in the yard.

Q. Give the jury your best recollection as to the time it was? A. I think it was perhaps about 11, or ten or 11 o'clock in the forenoon.

Q. And during all of this time the defendant had kept its train crew and engine there ready to take out the cattle when they could be moved, hadn't they? A. I don't know just about that I could not say.

Q. You know it was there from time to time you saw it, the train and crew from time to time as they were loading and unloading? A. Yes sir.

Q. And you did not suppose they were unloading the cattle and reloading them for fun? A. No sir I did not see any fun for me anyway.

Q. No fun or profit for any one was it, and then is when you asked them to see if they could not run around the flooded district? A. Yes sir.

Q. Did you suggest any route for them to take to go around the flooded district? A. Yes sir.

Q. You did? A. Yes sir.

Q. And asked them to see if they could not get the Missouri Pacific Railway Company to take them at Atchison or Kansas City, didn't you? A. No sir, I did not.

Q. You simply wanted them to make arrangements to run around the flooded district? A. Yes sir.

Q. And that is all you said about it? A. I suggested or asked them if they could not be run by Superior over
127 the Elkhorn.

Q. You knew ten miles west of Strong City the road you came over was out of business, didn't you? A. No sir.

Q. You knew on the 28th of May that the [the] station of Neva, five or six miles or ten miles west of Strong City where the Superior branch you have spoken of, leaves off that the track was flooded for miles, didn't you? A. No, sir, I did not.

Q. Didn't you know the Superior branch at that time was out of business? A. No sir I had no knowledge of it.

Q. Will you say the trains were running from Strong City to Superior at that time? A. I don't know a thing about it.

Q. Strong City was the eastern or southern terminus of the Superior branch was it not? A. I don't know anything about that.

Q. The trains going to Superior Nebraska, met the main line at a little station five or six miles west of Strong City didn't they? A. I don't know.

Q. Which is a Junction point? A. I don't know.

Q. Have you ever been over the Superior branch? A. Over there once the year before at night, I don't recollect the station at all?

Q. You did not know where it was? A. No sir.

Q. You would not want your cattle sent that way, if the track was flooded, would you? A. No sir.

Q. Don't you know as a matter of fact the track from Strong City west to Florence has a double track? A. That I am not positive of.

Q. You saw the tracks there didn't you? A. I
128 saw the tracks at Strong City.

Q. You saw the tracks from there both east and west didn't you? A. Yes sir.

Q. The track is straight and level and you can see it a long distance from the station? A. Yes sir.

Q. And double track? A. Yes sir.

Q. Every train that went from Strong City west, or came to Strong City from the east came or went on the north track during that time, didn't they? A. I could not say as to that.

Q. Did you see a train on the south track during that time? A. I don't know the north track from the south track.

Q. Don't you know as a matter of fact that the water ran over the road from near Strong City clear to the Junction point Neva, we have spoken of, to such an extent that the east bound track was entirely unfit for use on the 28th of May? A. I don't know anything about the station you speak of at all.

Q. Didn't the agent tell you there was high water on the Superior branch and that that could not be used for shipments safely, shipments of cattle? A. I have no recollection of him telling me.

Q. You would not say he did not tell you? A. No sir.

Q. You do not know of any train leaving Strong City for Superior during the 28th, do you? A. I am not acquainted with the country very well, I would not know whether a train came from Superior or where.

Q. While your cattle were detained at Strong City they were loaded and started to leave the station and then returned didn't they? A. That was on the 28th, yes sir.

Q. Is that the only time they started and then returned? A. That was the second time, the first time they were loaded and unloaded and this time they were, I don't know one time they were partially loaded and then unload-
129 ed and the next time they were fully loaded and unloaded again.

Q. Were they at any time while you were there loaded and taken out of the pens and then returned? A. No sir.

Q. Was there another train of cattle had been loaded at Strong City while you were there and started on its journey

and then returned to Strong City by reason of the floods? A. That I could not say.

Q. Don't you know while you were waiting there at Strong City with your cattle a train load of cattle was reloaded at Strong City and started towards its destination east and got as far as Staffordsville and was then returned to Strong City and unloaded by reason of the flood. A. I don't think there was.

Q. When were your cattle next reloaded? A. They were reloaded again the morning of the 29th, Friday morning.

Q. They were reloaded Friday morning the 29th? A. Yes sir.

Q. About what time in the day? A. I think they were loaded at about ten o'clock or half past.

Q. Did you ask the agent whether they had arranged to run them around the flooded district? A. I did not ask him any questions at all.

Q. Did he tell you anything about it? A. No sir.

Q. Just took it for granted they had accepted your advice and had made arrangements to run them around the flooded district, did you? A. I did not presume anything, I did not know; I did not ask any questions.

Q. You did not ask any questions and did not care where they went so they got out of there? A. I did not know.

130 Q. There had been a large amount of stock fed there for that time had there not? A. I don't know anything about that.

Q. It is a small station? A. Yes sir it is a small station.

Q. Very small town? A. Yes sir.

Q. And the principal business there is as a junction point for the Superior line and stock yards of the company is it not? A. I don't know anything about that, the truth of it.

Q. You know they are pretty extensive stock yards for a small station like that? A. It is a good station I thought quite a little town.

Q. Very small town there is there? A. Quite a town.

Q. What time did your train leave the station at Strong City on the 29th? A. About 11:30—1:30 in the afternoon.

Q. Didn't it leave Emporia at 1:30? A. No I am sure that I looked at my watch at that time.

Q. What time did you arrive at Emporia. A. I think about half past two I should think, three or somewhere along there.

Q. It is only a short distance from Strong City to Emporia? A. I don't know just the distance, it did not seem very far.

7

7

Q. Half an hour's run or such a matter? A. I think so.

Q. How long did you stay at Emporia? A. Staid there two or three hours.

Q. Did the conductor or any agent come and talk with you while you were there or did you ask any questions? A. I tried to find out what we were laying there for. I did not get any reply.

Q. Of whom did you inquire? A. The train men.

131 Q. Brakemen? A. Yes sir.

Q. He said he did not know, did he? A. He said he did not know.

Q. Very probably would not know; now when you started out of Emporia you came on towards Kansas City then did you? A. I did not know which way we were going.

Q. Had you ever been over that line? A. I had been over that line once or twice.

Q. You knew you did not go by way of Topeka didn't you when you left Emporia? A. I did not know, no sir.

Q. What was the next station you remember, after you left Emporia? A. The next station I remember was Olathe, Kas.

Q. What time did you get there? A. About daylight in the morning.

Q. You knew Olathe was not on the Topeka-Atchison line, didn't you? A. No sir. I did not know anything about it I never looked at it.

Q. Where did you got from Olathe? A. Went to Kansas City.

Q. What is the first town you reached after leaving Olathe, do you remember? A. The first I have recollection of was at Argentine.

Q. Do you remember of passing through Holliday? A. No sir I do not remember.

Q. From which direction did you come into Argentine? A. In the directions there I am lost.

Q. Did you go into Argentine from one direction and go out of it going to Kansas City in the other direction? A. I don't know I could not say.

Q. How long did you stop at Argentine, if you stopped there at all? A. We did not stop there very long.

Q. The train just passed on through did it? A. It slowed up there I think.

132 Q. It made no stop of any consequence there? A. I don't think so.

Q. Your recollection is that they passed right through Argentine on the way to Kansas City, is it? A. Yes sir.

Q. And arrived at Kansas City a few minutes afterward? A. Some little time, they ran very slow through there.

Q. Argentine is only two or three miles from the stock yards at Kansas City? A. I don't know the distance, I don't think it was very far.

Q. You can see from one station to the other can't you? A. I don't know that; I don't know whether you can or not.

Q. Don't you know from the bluffs of Kansas City, Missouri, you can see all over Argentine, from the bluff in Kansas City, Mo. A. Yes sir, my recollection of it now, I think you can.

Q. What time did you arrive at the stock yards in Kansas City? A. Somewhere around seven o'clock, it may have been a little earlier and it may have been within a few minutes later.

Q. Where was your train placed upon arrival at Kansas City? A. Placed in the stock yards.

Q. Shoved right in at once? A. Yes sir.

Q. Did you say anything to any of the people in charge of that train about unloading or not unloading at the stock yards? A. No sir, never said a word.

Q. When they shoved them into the stock yards you were on the train? A. Yes sir.

Q. When they commenced unloading, what did you do. A. I stood one side and let them unload.

Q. Did you count the cattle as they unloaded? A. No sir, not this time, there was not so much opportunity to count them there was so many unloaded at a time.

Q. They placed the train along up about the chutes
133 so that one chute came opposite the door of each car?
A. Yes sir.

Q. And unloaded all out of the cars at the same time. A. Yes sir.

Q. And only took a few minutes to unload the train? A. Yes sir.

Q. Do you remember where with reference to the live stock exchange they unloaded? A. No sir I could not tell you.

Q. Do you know now from your acquaintance with the live stock exchange that that was north or south of the building? A. I should think it was north, that is my recollection.

Q. Did they not shove the train right in from the south side and leave it stand at the south side of the building? A. No sir I don't think so.

Q. You spoke of suggesting the propriety of sending the cattle from Strong City by way of Superior, you knew that the Superior branch of the Santa Fe road did not connect with the Kansas City St. Joe and Council Bluffs road, didn't you? A. I did not know anything about it.

Q. The Kansas City St. Joe and Council Bluffs road runs from Kansas City to Council Bluffs and no where else, does it not? A. I don't know that either.

Q. The train load of stock which you took by way of Superior branch the night before went from Superior, Nebraska, over the Northwestern road, did it not? A. Yes sir, the Elkhorn and Missouri Valley.

Q. And it makes an entirely and different route all the way through does it not to send them that way? A. It would from Strong City.

Q. And that would have to be arranged for before the stock could be forwarded from Strong City? A. I guess, I don't know, I presume that would be the case.

134 Q. As a shipper you know that would be the case, prudence would not suggest that the Santa Fe take the stock without knowing whether some carrier would forward it, would they. A. I should presume that would be the case.

Q. You would not want them to do that without having arrangements made at Superior for forwarding the cattle would you? A. That is why I suggested, I asked the agent if such change would not be made.

Q. And such a change would have to be made by the general officers of the Santa Fe road at Topeka with the general officers of the [Nrothwestern] road, would it not. A. I am not familiar with that.

Q. Well you knew that the local agent of the company at Strong City would not have any authority to make any such arrangement didn't you? A. I presume that he could negotiate about the consumation of such arrangement.

Q. Did you suppose he had any authority to change the running of trains in any respect? A. No sir, I had no such idea.

Q. The general officers of the railroad company are required to do that and then the train master is required to make provision from station to station for the running of that train? A. As I said before I am not familiar with the workings of a railroad.

Q. You know enough about railroad business to know that a station agent could not tell the conductor of that train, to take this train of cattle by the Superior branch? A. That would be my idea of it.

Q. You would not want to be on a train if he did that, would you? A. I would want to know it was all right.

Q. You would want to know no other train was in
135 the way? and that some general officer of the company had arranged for the running of that train? A. Yes sir.

Q. You would not want your stock to start on that kind of a trip until the routing was arranged for them clear through, would you? A. I should think not.

Q. When you arrived at Kansas City on that morning where did you first go? A. Went right to the Santa Fe offices at the stock yards exchange.

Q. You went to the Santa Fe offices in the Live Stock Exchange? A. Yes sir.

Q. To the offices of the Santa Fe stock agent? A. Yes sir.

Q. Did you see the stock agent there? A. I saw Mr. Brown.

Q. In the stock agent's office? A. Yes sir.

Q. Did you have any conversation with him about forwarding the cattle? A. Yes sir.

Q. And he told you that arrangements had been made for the Missouri Pacific to take the stock, did he? A. I thing Mr. Steube accompanied me at the time; I know we went in together and the first thing I wanted to know what time we could get out of there, with this stock, and he told us that some time in the afternoon.

Q. He told you that arrangements had been made for the Missouri Pacific to take the stock out, didn't he? A. At that time I don't think there was anything said about any other roads, I just spoke to him about getting out of there as soon as possible.

Q. He did say one train load of stock had already been delivered to the Missouri Pacific, didn't he? A. No
136 sir not to my knowledge, I have no knowledge of anything of that kind at all.

Q. While you were in the office, did not the Missouri Pacific agent, stock agent come into the office and say to Mr. Brown, the stock was in the yard and they were getting ready to take it out? A. Not to my knowledge, no sir.

Q. Did you see the Missouri Pacific agent in their office during the time you were there? A. If he was there I did not know it.

Q. Did you have any conversation with the Missouri Pacific stock agent in that office. A. Had not with any one other than Mr. Brown at that time.

Q. How long did you stay at the Santa Fe stock office? A. We were not there very long, but a few minutes, I think we went there the second time.

Q. When was it you went there the second time? A. I think after we had our breakfast.

Q. About what time did you have your breakfast? A. I think about nine o'clock.

Q. Where did you go for breakfast? A. I think we ate at the Transit House.

Q. Right out in front of the stock exchange? A. Yes sir.

Q. You are familiar with the location of the stock yards and surroundings are you? A. Pretty well, yes sir.

Q. And the live stock exchange building is situated near the center of the stock yards, is it not? A. Yes sir I think so.

Q. And an open street or passage way from the front of the live stock exchange leads out east past the Transit House? A. Yes sir.

137 Q. And it is about two blocks is it not from the front of the Live stock exchange down that street to the Transit House, one or two blocks? A. Block and a half or two blocks.

Q. Something like that? A. Yes sir.

Q. And those stock yards extend over the Kansas river here and across the state line into Missouri, do they not. A. Well I was so informed.

Q. That is your understanding of it? A. Yes sir.

Q. And the live stock exchange building stands on the state line and the state line passes through it? A. Yes sir.

Q. And the Transit House is over east in Missouri? A. Yes sir.

Q. Now those stock yards extend north from the live stock exchange building fully half a mile do they not? A. I should think so.

Q. And extend south and north some distance do they not? A. I think so.

Q. And a long train of cattle coming in from the south onto and on the track where they unload cattle would be wholly within the stock yards, would it not, a long train of twenty or thirty cars? A. I should think so, I think they cut them in two there in order to handle them.

Q. Do you know where the Missouri Pacific road unloads stock at the stock yards? A. No sir I do not.

Q. The different railroads in there, in the stock yards there, unload the stock where their line extends into the stock yards, do they not, that is your information? A. I should presume so.

Q. That stock yards is a public stock yard is it not, where cattle are received for sale and shipment and reshipment and so forth? A. Yes sir.

138 Q. And the stock yards company feeds and cares for the stock while they are in there, do they not? A. Yes sir.

Q. You could not go and feed the cattle there could you, that is without the permission of the stock yards company? A. I should think not.

Q. You could not take the cattle out of there without their permission could you? A. No sir.

Q. And no railroad company could feed or water cattle while in [their] without their permission,—of the stock yards company, could they? A. Oh, I don't know about that, I suppose they could.

Q. And they could not take the cattle out without the permission of the stock yards company could they? A. I never experienced any difficulty in that particular I am sure.

Q. You know as a business man that a clearance slip is to be issued by the stock yards company before any cattle can be taken out of the stock yards company? A. It is reasonable to presume that would be the case.

Q. You know that is a fact in that and other stock yards; that is the practice? A. Yes sir.

Q. At all public stock yards which you have had any knowledge of, is it? A. Yes sir.

Q. And the stock yards company did feed and water the cattle when they were fed and watered while in there did they, that is your cattle? A. They were fed by my orders.

Q. They were fed by your orders? A. Yes sir.

Q. But the Santa Fe Railway company did not feed them while they were in there did they, it was the stock yards company did what feeding was done there? A. I
139 gave my orders to the yard master.

Q. Of the stock yards company? A. Whether he belonged to the stock yards or the railroad company, I don't know of curse.

Q. You know as a matter of fact that the stock yards do not belong to any railroad company? A. I presume that is the case.

Q. That the stock yards company is organized for the purpose of receiving and handling cattle? A. Yes sir.

Q. All cattle that come there? A. Yes sir.

Q. You know Kansas City is a general stock market? A. Yes sir.

Q. And packing center? A. Yes sir.

Q. And one of the largest stock markets in the United States, don't you? A. Yes sir.

Q. Second only to Chicago is it not? A. That is right.

Q. That the stock yards facilities there are better than the stock yards facilities of any other state in the United State except Chicago yards? A. They are better than any I have visited outside of Chicago.

Q. And so far as you know or have heard they are the best in the United States except Chicago yards? A. That is right, I think.

Q. And it is the largest stock market except Chicago is it not? A. I think so.

Q. And the facilities for handling and reshipping better there than any other state in the United States except Chicago, are they not? A. I think so.

Q. Those stock yards as far as you have been ad-
140 vised have been in existence a great many years, have they not? A. Yes sir.

Q. And you have never heard of any injury by water to the stock in those yards before May and June, 1903, did you? A. No sir.

Q. There was no water in the yards when your cattle were unloaded there was there? A. No sir.

Q. No water in the yards at any time during that day was there? A. Saturday, no sir.

Q. And there was no water in the yards until some time toward noon on Saturday, was there? A. I think there was water in there about nine o'clock.

Q. Sunday morning the first water came into the yards; you know there is a large bank with large capital doing business in the live stock exchange, do you not? A. Yes sir.

Q. And you have been in that bank, haven't you? A. Yes sir.

Q. And that is located on the first floor is it not? A. Yes sir.

Q. And below that in the basement is the defendant's live stock office, is it not? A. Yes sir.

Q. That is the place where you went to see the defendant's live stock agents, wasn't it? A. Yes sir.

Q. In the basement? A. Yes sir.

Q. And there was no water in the basement at any time on Saturday, was there? A. No sir.

Q. That basement is below the surface of the ground is it not? A. Yes sir.

Q. How late on Saturday were you in the basement of that building? A. I think the last time about two or half past in the afternoon.

141 Q. There was no water there or in the yards at any place at any time during that day as far as you know? A. No sir.

Q. And the first water in the yards was on Saturday about nine o'clock was it, or Sunday about nine o'clock? A. That is the first water I noticed where I was at the time at the Transit House.

Q. What time did you leave the Transit House that day, or did you leave the Transit House on Sunday? A. Yes sir.

Q. Did you go down to the stock yards or up town? A. I was to the stock yards in the morning.

Q. What time in the morning? A. About eight o'clock.

Q. Did you see your cattle? A. Yes sir.

Q. In what part of the yards were they at that time? A. Most of them right in the east side of the stock exchange.

Q. Were they south or north of the street leading to the exchange building? A. It strikes me they were south.

Q. At that time there was a few hogs in the stock yards was there not? A. I could not say as to that.

Q. Didn't you see any hogs there? A. I was interested in the cattle then.

Q. Did you see any hogs? A. I did not notice.

Q. Was there any shipped in the yards? A. I did not notice.

Q. Saturday was a holiday, May 30th? A. Yes sir.

Q. And as a rule cattle men do not ship their catttle to market for sale to arrive there on a holiday, do they? A. No.

Q. And your experience as a stock man is the latter part of the week is a poor market for stock at the stock yards anyway is it not? A. Yes sir.

Q. Cattle men as a rule do not ship their stock aiming to have them come on the yards the latter part of the week do they? A. No sir.

142 Q. So that in ordinary cases the run of cattle at the stock yards would be lighter the latter part of the week than the fore part of the week, would they not? A. Yes sir.

Q. And being a holiday on Saturday would make the run still lighter would it not? A. Naturally, yes sir.

Q. So that the run of cattle in the stock yards at that time was [liter] than it ordinarily would be during the fore part or the middle of the week? A. Yes sir.

Q. And still lighter on account of Satrday being a holiday, was it not? A. I could not say as to that, but naturally Saturday would be an off-day any way, holiday or not.

Q. Now you staid at the Transit house until Sunday, did you leave the Transit house on Sunday? A. I did.

Q. Go up to the city? A. Yes sir.

Q. What time Sunday did you leave the Transit house? A. It strikes me it was about noon or thereabouts.

Q. Was there any water in the street in front of the Transit house at that time? A. Yes sir.

Q. How much? A. About knee deep at that time.

Q. How did you go from there up town by the street cars? A. No sir.

Q. How did you go? A. I said the water was about knee deep, that was on the sidewalk, and off of the sidewalk it was a little deeper than that.

Q. The street cars had stopped running hadn't they? A. Yes sir.

Q. The people in the office buildings there had fled before that hadn't they, that is at the live stock exchange? A. Why I think in the lower part of the building.

Q. You know Mr. Titus the live stock agent? A. Yes sir.

Q. He is a cripple? A. Yes sir.

143 Q. You saw him carried out from the stock yards there that forenoon, didn't you and put on the street car there in front of the Transit House? A. No sir.

Q. You knew he was so removed, didn't you? A. I saw him carried out of the Transit House.

Q. It was from the Transit House and not from the building he was carried out? A. I saw him carried out of the Transit House I was there at the time.

Q. What time was that? A. I think it was about ten or eleven along there some time.

Q. And put on the street car? A. I don't know they carried him away from there.

Q. You know they did not get out of that flood on that street car don't you? A. I know they carried him out, that is all I know.

Q. Up to that time nobody had removed anything from the live stock exchange building had they? A. Not to my knowledge.

Q. The bank was still there with doors closed and nobody removing anything, was there. A. I was not in the exchange building Sunday morning at all.

Q. The Transit house faces the entrance to the building? A. Yes sir.

Q. Sitting in the office of the Transit house you look right down the street in front of the building? A. Yes sir.

Q. There could not be much property removed from the live stock exchange without it being seen from the office of the Transit house could it? A. I should think not.

Q. There was no way of removing things except to go out of that street? A. I don't know of any other street.

Q. No other street or path way of any kind leading

144 from the live stock exchange building to any other street.

A. I never went around the stock exchange building.

Q. You know the stock yards company, buildings on all three sides? A. Yes I saw that from this side.

Q. So there is no way of getting out, and you know everything in the bank was caught right in the flood? A. From my present knowledge I could not say.

Q. You know in all probability it was not removed, it was there the last you knew of it?

Objected to by the plaintiff. Objection sustained.

Q. You saw nothing removed from any of the offices there? A. No sir.

Q. You saw nothing removed from any of the business houses in the vicinity of the Transit house did you? A. No sir.

Q. The water came up so rapidly it would have been impossible to move things, did it not after it started to come up over the street? A. It came up pretty rapidly.

Q. You never saw water in a large river rise so rapidly as that rose, did you? A. I think not.

Q. And it continued to rise at about the same rate until the water was from ten to twelve feet deep in the streets in the vicinity of the Transit house was it not? A. Yes I think so.

Q. All over the west bottoms of Kansas City, Missouri and also Kansas City, Kansas? A. Yes sir.

Q. And it ranged in depth from ten feet to twenty feet according to the elevation of the land, did it not? A. I presume that would be the case.

[W.] Were you here during the entire flood? A. Yes sir.

Q. You know all of the packing houses of Kansas
145 City are located in the river bottoms in that section of the country, do you not? A. Yes sir.

Q. And you know nothing was removed from any of those packing houses, do you not? A. It is purely a presumption on my part, that part of it.

Q. You stood on the bluff hour after hour watching it? A. Yes sir.

Q. You know that nothing was taken away so far as you could see was there? A. Yes I did.

Q. So far as you were able to see there was no way of removing property out of that flood, was there after the water commenced coming up at the rate you have spoken of? A. I think not.

Q. You were there over the ground after the flood subsided, were you not? A. Yes sir.

Q. And you saw in the Santa Fe company's yards, a hole dug in the middle of the yards in which this building could be buried, did you not, in the Santa Fe company's railroad yards? A. I saw such an opening as you [descrive] there, but I did not know whose yards.

Q. It was in the railroad yards was it? A. I don't know.

Q. There were several locomotives and several pullman cars in the bottom of that hole when the water subsided, was there not? A. I don't know.

Q. You saw them there? A. I saw the opening there.

Q. Did you see the opening before the water was pumped out or receded? A. Yes sir.

Q. You saw the end of one of the pullman cars sticking out of the top of that water, didn't you? A. I saw some cars, and an engine or two if I recollect right.

Q. That hole was 20 or 30 feet deep was it not. A. I don't know about the depth of it I could not say.

146 Q. It would cover a quarter of an acre at least would it not. A. I do not think it was that large.

Q. The current during the rise of that river was very rapid was it not? A. Quite rapid in places.

Q. In the street in front of the Transit house after the water got up two or three feet deep it was so swift a man could hardly wade in it, was it not in the street running north and south? A. It was quite swift.

Q. In the streets running east and west it was not quite so swift? A. I don't remember about that.

Q. The current was from the south to the north was it not? A. On the directions here I do not know which is hardly north and south.

Q. Large buildings commenced floating down stream before you commenced to leave the Transit house? A. No sir.

Q. After you got on the bluff did you watch the flood during Sunday and Monday? A. Yes sir.

Q. And by Sunday, in the middle of the afternoon of Sunday, by noon, Sunday, freight cars, houses and other light articles were floating down the streets in the vicinity of the Transit House, were they not? A. I could not see from where I was.

Q. Where were you on the bluff? A. On the hill 12th street viaduct.

Q. From that hill could you not see houses floating down the streets? A. I don't remember of seeing any houses floating down the street.

Q. Could you not see freight cars floating down the stream? A. I don't remember of seeing anything of the kind.

Q. Did you see that at any time during the flood? A. No I think not.

147 Q. Was there not hundreds of freight cars and through those yards in the vicinity of where that hole was washed away and went down stream? A. I don't know.

Q. Did you see any of them going down? A. No sir.

Q. What time Sunday were you on the bluff at 12th street viaduct? A. It was quite late when I got back I did not get out there early, I came out I was pretty wet, and I was looking for dry clothes.

Q. What time was it when you got back on Sunday? A. Along towards evening about five o'clock I should think.

Q. The Standard Oil Company had a large plant, storage plant just across the river, the Kaw river from the stock yards in which they had numerous steel tanks, 30 to 35 feet in diameter and 30 or 40 fet high, did you see any of those tanks floating down the stream that Sunday evening? A. No sir.

Q. Did you see any of them float down the stream at all? A. No sir.

Q. You know they did float down the stream? A. I don't know anything about it.

Q. You knew so from the reports in the paper and heard it? A. I might have read it at the time but have no recollection of it now.

Q. Did you on Sunday or Monday see numerous large railroad cars tank cars made of steel floating down that stream? A. No sir.

Q. You know it to be a fact that dozens of them floated away don't you? A. No sir not of my own knowledge I do not.

Q. You know that hundreds of houses in that flooded district floated away during that flood? A. No sir, I do not.

Q. Did you see any houses floating away during that
148 time? A. I never saw any houses floating no sir I saw several of them there washed away. Tipped over, and washed away.

Q. Did you go over the flooded district after the water had subsided? A. Only in and around the stock yards is all.

Q. Were you at the north side of the stock yards? A. Yes sir, I think so.

Q. There is a large wagon viaduct extends from the Missouri Pacific and Union Pacific tracks at the north end of the stock yards, is there not? A. I do not have any recollection on that.

Q. If you were at the north end of the stock yards at that time, you saw that that viaduct was knocked down at one end didn't you? A. I noticed a viaduct one of them knocked down.

Q. That viaduct was 20 to 25 feet above the level of the ground was it not before it was knocked down. A. It might have been in that neighborhood.

Q. The railroad yards pass under it don't they. A. I could not say.

Q. You saw railroad yards under there? A. I did not notice any railroad tracks.

Q. Were you in the yards in the vicinity where that big hole was which we have spoken of, after the waters subsided.

A. No I don't think I was, I had no business there at that particular time.

Q. Were you on the 12th street [viaduvt] after the waters subsided? A. Yes sir.

Q. While you were on the 12th street viaduct on Sunday evening did you see any passenger trains standing at the union depot station just to your right? A. I could not say, my recollection of it is there was trains—cars there.

Q. You could just see the tops of those cars out of the water.

149 By Mr. Botsford: Let him finish his answer.

Q. By Mr. Angevine: Have you anything further to say. A. I said I noticed cars there, I don't know whether freight cars or not.

Q. You could just see the tops of the cars out of the water, couldn't you? A. I noticed them sticking up aways out of the water.

Q. After the water subsided you were there on the 12th street viaduct? A. Yes sir.

Q. You saw the best train on the Santa Fe road, passenger train, standing there almost covered with mud which had been completely submerged, didn't you? A. I don't know whether it was the best train or not.

Q. You saw a passenger train there at the station where it had been made up to go out and caught in the flood didn't you? A. I could not answer that, I am not sure.

Q. You did see several passenger trains standing there? A. I saw cars standing there.

Q. Didn't you see—was there anything further you wished to say? A. Nothing.

Q. You did see several passenger trains standing there that were covered with mud that had been submerged during the flood, didn't you? A. I saw several cars standing there; whether they were passenger trains or freight cars I am unable to say at this time.

Q. Are you acquainted with Mr. Hurley, the general superintendent of the Santa Fe road? A. No sir, I am not.

Q. Ever meet him? A. I don't know that I ever have.

Q. Did you see him there at that time? A. I don't know.

Q. Did you see a special car of the Santa Fe road there near the union station which was run up on a little

150 trestle by itself to keep it out of the flood? A. No sir.

Q. You know after the water commenced rising over the street at Kansas City in the vicinity of the Transit house that it was but a very short time until it was so high it would have been impossible to [moved] property of any kind, don't you? A. Yes sir, that is right.

Q. You know that every bridge across the Kaw river from the mouth of the river up to Argentine or beyond was washed away in that flood except one, don't you? A. I know it only by newspaper report.

Q. You could see from the bluff they were down? A. As far as I could see there was but just one bridge standing.

Q. That had 17 locomotives on it to hold it down? A. Yes sir.

Q. During that flood you could just see the tops of the smoke stacks of those locomotives couldn't you; you could not see anything else could you. A. My recollection is those locomotives were not under water.

Q. They were all under water except the extreme top? A. I don't think so.

Q. When did you see them? A. I think it may have been, I think that is right too, after the water began to subside.

Q. If you saw them at any time on Sunday afternoon or Monday, they were completely submerged except the smoke stacks. A. I did not see them on that day.

Q. It was afterward you saw that? A. Yes sir.

Q. You know that electric lighting in the bottoms was entirely destroyed by that flood, don't you? A. Yes sir.

Q. You know that the telephone service was completely destroyed by that flood? A. Yes sir. [A.] Why no
151 I don't know as to that.

Q. You know there was no way of crossing from Kansas City, Kansas to Kansas City, Missouri, for a week or more except by boat, don't you? A. Yes sir.

Q. That is true? A. Yes sir.

Q. The water supply of Kansas City, Missouri, was cut off by that break through the main pipe by that flood, was it not? A. I know it was cut off.

Q. You know the gas supply of Kansas City, Kansas, was cut off about two o'clock Sunday by that flood, don't you? A. I remember of it being cut off, I don't know just what time.

Q. You know also that it would have been impossible for any person to very well feed and water that stock during the fore part of that week, don't you? A. Yes sir.

Q. So far as you know the stock yards company used their utmost endeavors to protect and feed and water that stock, did they not? A. I am not sure about that.

Q. You know that on Sunday and Monday nearly every boat that could be found was pressed into service by the authorities of Kansas City, Kansas and Kansas City, Missouri, in saving the inhabitants of the bottoms who were caught in their dwellings, do you not? A. Yes I think that was the case.

Q. And that they confiscated every boat they could get hold of for that purpose in saving the lives of the inhabitants; you know that there was thousands of people caught in their homes in the bottoms, who had to be rescued by boats, don't you? A. Yes sir.

Q. And you know it was a very dangerous operation in rowing boats through the mass of driftwood then floating down the stream do you not? A. I don't know anything about that part of it.

152 Q. Now it was very dangerous to do so? A. They had some difficulty in getting to some places.

Q. You know that dozens of men were caught in the various packing houses and had to be rescued by boat, do you not? A. I understood there was some caught, I don't know how many.

Q. You know that the large warehouses of Kansas City, Missouri, are located in the bottoms in the vicinity of the stock yards, do you not? A. Yes sir.

Q. The property in the lower stories of all of those warehouses was destroyed by that flood, wasn't it? A. I don't know.

Q. You know they were flooded? A. Yes sir.

Q. You know nothing was removed, don't you, and nothing of any consequence? A. As far as knowing I would not be positive on that proposition.

Q. So far as you know, nothing was removed? A. Yes sir.

Q. You were there the same as anybody else in town and had an opportunity to see? A. Yes sir.

Q. You know there is a bank at the corner of Union avenue and Mulberry street, do you not? A. No sir, I do not.

Q. A branch of the bank of commerce? A. No, sir, I do not.

Q. You don't know as to that? A. No sir.

Q. You know there are numerous surrounding small shops in the vicinity of the stock yards and the flooded district, do you not? A. Yes sir.

Q. And that they were all caught and the property destroyed, were they not? A. I presume.

Q. You know that to be a fact don't you? A. No sir, I don't know it to be a fact.

153 Q. After the water subsided, you were down in the bottoms and [and] saw dozens of these stores with goods on the shelves utterly destroyed, didn't you? A. The fact of it is I was not paying much attention, "I had troubles of my own."

Q. But you saw those things? A. I saw in some places.

Q. Every store or shop you saw in the bottoms after the water subsided was in that condition? A. Yes sir, every one that I noticed.

Q. And the bottoms from bluff to bluff there was built up with residences, warehouses, freight houses and other structures, are they not? A. Yes sir.

Q. And that the entire district was submerged for the depth from 10 to 20 feet? A. Yes sir, I think so.

Q. The stock yards company drove the cattle from the viaducts down to the pens as soon as the pens were fit for them to be driven into, didn't they? A. Yes sir.

Q. And when they were driven down there they walked into mud a foot deep, didn't they? A. In some places, yes sir.

Q. The sediment from the flood, wasn't it? A. Yes sir.

Q. And that extended over nearly the entire stock yards, didn't it? A. Yes sir.

Q. The flood waters were very black and muddy, weren't they? A. Yes sir.

Q. Over the flooded district? A. Yes sir.

Q. And the sediment settled over the streets, and many of the streets were six and eight inches deep, were thy not? A. Yes sir.

Q. And you saw in many places where for blocks
154 the mud had to be shoveled off of the car tracks before the cars could be run? A. Yes sir.

Q. On Monday you did not get within a mile or more of the stock yards did you? A. No sir.

Q. Did you get closer than 12th street that day? A. No sir.

Q. That would be about a mile away? A. I think so, may be less.

Q. The territory between 12th street viaduct and the stock yards is built up with large implement houses, is it not? A. Yes sir.

Q. So that you could not see the stock yards from 12th street viaduct, could you? A. Why, I think you can see the yards, you could see the viaducts very fairly.

Q. From the 12th street viaduct? A. Yes sir.

Q. Don't those tall eight and ten story warehouses interfere with the view? A. There is one place where we could see quite plainly, I don't know just where it was somewhere along the bluff there.

Q. There is a row of houses along the east side of the stock yards on the east side of the street the full length of the stock yards, is it not built up with residences and other property? A. Yes sir.

Q. And business houses? A. Yes sir.

Q. And is built up solid except the land occupied by the streets and railroad tracks from the stock yards clear to 12th street viaduct, is it not? A. I think so, that is my recollection.

Q. In going from the stock yards up to the 12th street viaduct by the street cars you pass the Rock Island freight house, do you not? A. Yes sir.

Q. When you went down after the flood subsided, you saw that that freight house, had been submerged and the contents ruined, didn't you? A. I saw it had been submerged, I don't know about the contents.

155

Q. Whatever was perishable in that warehouse had been destroyed? A. I should think so.

Q. And the same with every other building in the flooded district was it not true? A. Yes sir I should think so.

Redirect Examination.

Q. By Mr. Botsford: I have here a railroad map of the Santa Fe System for 1904, I will be obliged if you will please point out on it this Superior road which you and that agent at Strong City, talked about, is that the line running up here? A. Yes sir.

Q. Superior is on the line between Nebraska and Kansas is it? A. It is in Nebraska.

Q. Where does that run down to as relates to Strong City? A. Right down here (pointing on the map.)

By Mr. Botsford: I will offer this [may] in evidence.

Mr. Angevine: Objected to by the defendant; there never was any contract to carry them by the way of Superior. The [may] is not identified as a [may] of this railroad company, and there is not any agreement of any kind to transport the cattle by the way of Superior; the evidence shows it would take them on to another line other than the one which they had contracted to.

Mr. Botsford: You still make the objection.

Mr. Angevine. Yes sir.

Mr. Botsford: We will prove it by some other witness.

Q. Have you given on cross-examination all that was said there at that time between you and the agent? A. I don't think so.

156

Q. If there was anything said by the agent to you in connection with your suggestion about the Superior route, please state it to the court and the jury.

Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial; the written contract under

which they were shipped expressly provides that no agent except general agents have authority to make those contract or to change their routing, so we object to that.

By the Court: That is true, but you called for that part of the conversation with the agent in regard to the change of this route; I think he may give it: Objection overruled, defendant then and there duly excepting.

Q. By Mr. Botsford: What did the agent say. A. I asked him if he could not send us by the way of Superior and then over the Elkhorn Missouri Valley or Northwestern to Council Bluffs.

Q. What did he say? A. He says we can't do it because you are routed by Atchison.

Q. While these cattle were being transported, did you have any conversation, or correspondence in any way with Mr. J. E. Hurley, the general superintendent of the Atchison Topeka and Santa Fe Railway company? A. No sir.

Q. Or with E. A. Austin? (train-master) A. No sir.

Q. Or with H. W. Sharp, the superintendent of the Atchison Topeka & Santa Fe Railway Company, at Kansas City? A. No sir.

Q. With E. T. McLellan superintendent of the Santa Fe road at Topeka? A. No sir.

Q. Or with W. K. Ekert chief clerk in the office of the general superintendent, Mr. Hurley? A. No sir.

Q. Or with F. C. Fox, superintendent of the Atchi-
157 son, Topeka & Santa Fe Railway Company at Newton, Kansas? A. No sir.

Q. Or with C. W. Cook, assistant freight agent of the Atchison Topeka & Santa Fe Railway Company at Topeka? A. No sir.

Q. Or with W. J. Healey, freight auditor of the Santa Fe road at Topeka? A. No sir.

Q. Or with J. H. Garside, agent of the Atchison Topeka & Santa Fe road at Atchison? A. No sir.

Q. Or with H. B. Morse, yard master, of the Santa Fe road at Emporia? A. No correspondence.

Q. Correspondence or conversation? A. I had no correspondence with him that I know of.

Q. Did you have any conversation with any of them? A. I don't know the name, I had, I was directed to the, I don't know what his position was, I have forgotten; train dispatcher I think.

Q. Where? A. At Emporia.

Q. Did you have any with the yard master? A. I don't remember whether the yard master.

Q. Did you have any correspondence or conversation with L. E. McClure, train master of the Atchison Topeka and Santa Fe at Newton? A. No sir, I think not.

Recross-Examination.

Q. By Mr. Angevine: The agent at Strong City told you that he had no authority to send you by the way of Superior or any other way except the way the cattle were billed, didn't he? A. He said I can't do it, you are billed by way of Atchison, those are about the words that he used.

Q. You knew without his telling you he had no
158 authority to send you any where? A. I knew that but I presume that he was in position.

Q. You knew that he was a mere local agent for the purpose of receiving and forwarding freight for the company? A. Yes sir.

Q. And that he had no authority whatever to change any routing of any train? A. Yes sir.

John T. Shy sworn testified on behalf of the plaintiffs as follows on

Direct Examination.

Q. By Mr. Botsford: What is your name? A. John T. Shy.

Q. Where do you reside? A. Kansas City, Mo.

Q. How long have you lived in Kansas City, Mo. A. About 11 years.

Q. What is your business? A. I am not in any business particularly now, trading in cattle.

Q. Are you in that business now? A. No sir, I am not particularly in any business at present.

Q. What was your last business? A. Buying and trading in cattle.

Q. Up to what time did you carry on that business. A. [Uo] until the present time as far as that is concerned.

Q. How extensively during the time you say you have been in the cattle business have you engaged in buying and selling? A. I bought a good many cattle in the last 15 years.

Q. Where? A. In Texas, Arizona and New Mexico.

Q. Any other states and territories? A. Yes sir.

Q. Name them [plese]? A. Some in the Indian
159 Territory, some in Kansas and some in Colorado.

Q. Any other states? A. No sir. I don't think I have.

Q. Have you ever transacted any live stock business in either of the Dakotas? A. Yes sir.

Q. During what year? A. I bought a great many cattle in Colorado and South Dakota and Montana and the northwestern country.

Q. During what years—during what years did you buy cattle in the Dakotas and Montana? A. I did not buy any in Dakota and Montana, I bought them in Texas and shipped them there.

Q. During what years did you buy cattle in Texas and ship them to the Dakotas. A. For the last 12 or 15 years.

Q. How extensively? A. Well a good many cattle.

Q. When you say a good many, about how many of them have you bought in Texas and shipped to the Dakotas. A. Well I could not tell you exactly, a good many of them as high as twenty to thirty thousand some years.

Q. During what periods of the year are cattle usually bought in Texas and shipped to the Dakotas? A. Commence buying along about the first of January and contract for them to be delivered along in May, principally in May and June.

Q. I will ask you if you know whether there is any difference between the value of Texas cattle shipped to South Dakota on the first of June and arriving in South Dakota on the first of June and cattle shipped out previous, and arriving there on the 14th and 15th of July of the same year? A. Yes sir, we consider cattle delivered up there that early say commence shipping about the 5th of May, and generally aim to get there just as soon as we can by the middle of
160 June if we can, and we consider cattle that is got there early on the grass, the earlier they can, probably 75 to one hundred pounds in six weeks, and considering that they hold that flesh until after they go to market, they make that much out of any cattle.

Q. What is the condition and what was the condition in the year 1903, and other years between a steer shipped out from the Panhandle of Texas, and arriving in South Dakota the first of June, a steer arriving there on the 14th or 15th of July? A. I think that would make some difference in the condition of the cattle, at the time they were shipped.

Q. Assuming that they are ordinary two year old cattle in good flesh, found in Texas, on different ranches in New Mexico and Texas in the spring? A. As far [aw] I have noticed it cattle that come there early we consider about $2 a head difference in getting there late in July, they have to get kind of acclimated and get settled down on the range,

located, we call it before they do any good much and in the summer the flies get bad and the cattle do not get located so well as they do early in the spring.

Q. These cattle in controversy bought in the Panhandle of Texas, $21 per head, about the 20th of May 1903, they were two year old steers, what would be your judgment as to the difference in value of those cattle between their arrival on the first of June, and the 14th of July, in South Dakota? A. I would consider them $2 per head difference. I would like to explain that a little, these are cattle which are taken up there in that country, you know they turn them loose on the range, they have to make their own living, and cattle which get in good flesh, and ordinarily they stand the winter, and there is a good deal less danger in the death loss
161 among them in the winter.

Q. There is less danger where they arrive on the first of June and get there on the 14th of July? A. Yes sir it makes a good deal of difference, besides the difference in the weight of the cattle.

Q. Any thing else you wish to add? A. No sir.

Cross Examination.

By Mr Angevine:

[—] You say also that it makes a difference in regard to the condition of the cattle in their start from Texas? A. Yes sir.

Q. Cattle do not stand the journey so well as cattle in better flesh? A. If they are too thin.

Q. They do not gain as well after they get up there do they. A. I do not know as that makes much difference in gaining, if they get there early they gain about as well, but the point is that the cattle are very thin it takes them much longer to get in flesh for the winter, that is the point.

Q. Two year old steers bought in Texas for $21 per head, were pretty highly paid for in the spring of 1903, pretty high price for them? A. No sir, some of them are bought higher than that rate and some lower.

Q. They do average considerably lower than that? A. No sir, I think that was about the average.

Q. There is always a considerable percent loss on Texas cattle shipped to the Dakotas any way is there not, during the first winter. A. That is owing a good deal to the winter, there is some loss I think, some of course, not so much as others.

Q. And when the winter is open so the grass is not covered with snow, there is not so much loss as when it is covered with snow? A. No sir.

Q. If there is several inches of snow on the ground
162 during the winter it makes it pretty hard, for the cattle to get through does it not? A. If there is too much snow, they need some snow for the cattle to do well, if they get away from the water, if there is not too much snow, they do better than if there is not any, if there is too much they can't get the feed.

Q. If there is six inches of snow that is too deep for them? A. Yes sir and covers up the ground, if it don't blow off it gets a crust on it.

Q. The best for the cattle is when the snow has blown off the ranges, but still in the ravines where they can get it to lick? A. Yes sir.

Q. It don't improve their feeding any to have six inches or more to cover the ground all over. A. No sir.

Q. They do not run around in the snow and feed so well as if it is not covered with snow, do they? A. No sir.

Q. And if the ground is more generally covered with snow to the depth of several inches the death loss would be greater than if it was not? A. Yes sir.

Q. And in a case of that kind the death loss of ten or even twenty-five per cent would not be considered an excessive loss. A. That is a pretty big loss.

Q. Frequently happens there is a death loss of twenty-five to fifty per cent on Texas cattle shipped up there during the first winter? A. No sir. I don't think that heavy a loss; there has been such a thing, of course, a good many years ago.

Q. It frequently happens that the entire amount is lost does it not? A. Yes sir, pretty close to it, has been once or twice in my recollection.

Q. You know as a matter of fact, from your own
163 experience that cattle up there during the winter of 1903, and 1904, suffered severely don't you? A. There was a few localities that did suffer right smart, a few localities, some few places they wintered nicely and other places there was quite a loss.

Q. Cattle within your knowledge up in that country during that winter some of them suffered a loss of thirty or forty per cent did they not? A. That I could not say as to that, I believe I know one or two places of a loss of twenty-five or thirty per cent in a small area of country.

Redirect Examination.

By Mr. Botsford:

[—] Do you know where the pastures of the Empire State Cattle Company and the Minnesota and Dakota Cattle Com-

pany are located? A. I have never been over right on the ground, I have been all around them, but never been right on their ground.

Q. Do you know anything about the loss of cattle there last winter, the winter of 1903 and 1904? A. The loss there was not so very heavy, it was rather light, I don't know exactly the loss.

Q. You spoke of the loss through that territory? A. Yes sir I mean above there up beyond there a couple of hundred miles the loss was pretty heavy. I do not say any large loss.

Q. Do you know anything of the loss sustained by these parties on their pastures up there, with respect to these bunches of cattle in controversy here? A. No sir, I don't really know what loss they had.

Q. What was the per centage of loss last winter, that is to say the winter of 1903 and 1904 in the territory which you described up there where the cattle went up there say
164 the first of June and were in say a normal condition of cattle shipped out of the Panhandle of Texas two years of age. A. Well I will just have to give you an idea about that.

Q. About what was the per centage of loss among such cattle two year old steers. A. I think some men interested here up there, of good range cattle in that country, could give you more and a better idea about that, of course, I have watched the business pretty close, because there is where I have done my trading and making my money and I have watched that very close all the time, I think through this section of the country in there, because I have two customers right in the same section of the country, the very best information I could get, there was not more than five per cent loss I would not think in there.

Q. Is that above or below the average loss among cattle of that kind? A. I think that is about my idea is of course, it is only one man's idea, but my idea I think all lost about that much.

Q. That was an average loss? A. Yes sir.

Q. That per centage? A. I think that taking that country through it will average that one with another.

Recross Examination

By Mr. Angevine:

[—] You say you have some customers in that vicinity? A. Yes sir some I trade with.

Q. Who are your customers there? A. I have traded a good deal with a man by name of Phillips, and sold a good many cattle through there.

Q. Any customer at Evarts or near there. A. He don't live near Evarts he lives at Pierre, I have traded a good deal with this man Phulips and he has traded a good deal
165 with the neighbors around and I shipped cattle there and distributed them different places.

Q. That is in the vicinity of Pierre? A. Yes sir and out in the section of the country where these people are.

Q. These people are west of the Missouri river? A. Yes sir.

Q. Pierre on the Missouri river? A. Yes sir.

Q. And these people west, how far west? A. I think they are about a hundred miles; I guess.

Q. The percentage of loss is greater out there than in the vicinity of the Missouri river is it not east of there. A. Some sense it is different.

Q. Are you acquainted with the L Tomb Cattle company? A. Yes sir.

Q. They do business at Evarts do they not and handle cattle there? A. Yes they have a good many.

Q. They handled cattle there during the summer of 1903, didn't they? A. Yes they handled cattle every year, different points up there.

Q. Where were their cattle shipped from Texas? A. Yes sir different places.

Q. They had over a hundred head of cattle die in sight of the station of Evarts in that section, in sight of Evarts? A. I don't know.

Q. You know they had a big loss don't you. A. No sir, I don't know positively about that, I can't just recall that certain transaction, they might have had it, I don't know, Mr. Tomb is here.

Q. You understood they had a big loss [sont] you? A. No sir, it has been so long I might have heard of it, I don't know it.

Q. You could not say whether that is so or not? A. No sir.

166 Q. Were you there during the summer of 1903 at Evarts? A. No sir.

Q. Did you ship any cattle to that station during that summer. A. At Evarts, I don't believe I did, I am not sure that I did I am not positive.

W. H. Frost called for further

Cross-Examination.

By Mr. Angevine:

[—] Are you acquainted with the Tomb Cattle Company? A. Why somewhat yes sir.

Q. You know that they shipped some cattle from Texas to Evarts during the summer of 1903, do you not.

Objected to by the plaintiffs as incompetent, irrelevant and immaterial and not proper cross-examination.

Objection sustained, defendant then and there duly excepting.

Q. I will ask you one question so as to put it in the record; Mr. Frost you know that the L Tomb Cattle company shipped cattle from Texas to Evarts, Dakota, during the summer of 1903, do you not.

Objected to by the plaintiffs as incompetent, irrelevant and immaterial and is not within the issues in the case. Objection sustained, on the ground it is not proper cross examination; defendant then and there duly excepting.

167 Thomas B. Tomb, sworn, testified on behalf of the plaintiffs as follows on Direct Examination.

Q. By Mr. Ball: What is your name? A. Thomas B. Tomb.

Q. Where do you reside? A. 617 east 9th street.

Q. What city? A. Kansas City, Mo.

Q. How long have you lived in Kansas City, Mo. A. Ever since 1884.

Q. What is your business? A. Cattle.

Q. How long have you been engaged in the cattle business? A. Since 1880.

Q. Where have you been engaged in that business? A. In Western Nebraska and in southern Dakota.

Q. What kind of cattle business? A. In the range business.

Q. What is your firm or company? A. L. Tomb Company.

Q. Where are the pastures? A. South Dakota on the Standing Rock.

Q. What kind of cattle do you pasture there? A. Texas cattle.

Q. How long have you been running that. A. We have been in that country, not all just on the Standing Rock, we have been in there since 1883.

Q. Where is your railroad station, for your consignments going to pasture. A. At Evarts.

Q. South Dakota? A. Yes sir.

Q. Do you know Mr. Frost? A. Well yes, I know him now.

Q. Do you know Mr. Mullen, president, of the Minnesota and Dakota Cattle company? A. Yes sir.

Q. What is the best time for the shipment of cattle from the Panhandle of Texas to those ranges? A. We try
168 to get our cattle up there by the 20th of May, from that to the first of June.

Q. Is there any difference between the value of the same animals that land on those ranges by the first of June from what the value of the same cattle would be if landed there the 14th or 15th of July? A. Yes sir.

Q. Do you know about what the difference in their value would be in that case?

By Mr. Angevine: Objected to by the defendant.

By the Court: He has not asked you what it was, he asked you if you know.

Q. Mr. Ball: Whether you know about what it would be?

Mr. Angevine: Objected to by the defendant.

By the Court: Do you know? A. I think I do—I think I know.

Q. By Mr. Ball: Now what is that difference of cattle two year old steers up in the Panhandle, bought in the Panhandle and shipped up there in say 1903, what would have been the difference in their value if they landed on the 14th of July at Evarts instead of on the first of June?

By Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial, and not within the issues in the case.

By the Court: Objection overruled—defendant then and there duly excepting.

A. Well I would consider from two to three dollars.

Q. Per head? A. Yes sir.

Q. Were you in Kansas City during the great flood of 1903? A. Yes sir I was in here just on Tuesday.

Q. Tuesday following the climax of the flood on Sunday? A. Yes sir.

Q. Did you see the cattle of the Minnesota cattle
169 company at the stock yards? A. I did after they came off the viaduct.

Q. Who was with you when you saw them? A. I think Mr. Allen was with me if I ain't mistaken.

Q. L. A. Allen? A. Yes sir.

Q. What was the condition of the cattle? A. Bad condition.

Q. Do you know how many? A. I could not tell you, I did not count them, a good many.

Q. What was the character of those cattle; what kind of cattle were they? A. They were a good class of cattle.

Q. Do you know what they were worth in the condition you saw them?

By Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial and not the proper measure of damage.

By the Court: Objection sustained.

Q. Do you know what those cattle as you saw them would have been worth at Evart, South Dakota, the market value of them there.

By Mr. Angevine: Objected to by defendant as not the proper measure of damage.

By the Court: Objection sustained.

Q. Do you know what the market value of that kind of cattle was in South Dakota about the first of June, 1903? A. You mean at Evarts?

Q. Yes sir, at Evarts? A. They would have been worth $25.

Mr. Angevine: Defendant moves to strike out the answer as not responsive to the question, and as incompetent, irrelevant and immaterial.

By the Court: Motion sustained.

[—] Answer that yes or no, whether you know what
170 the value market value, of that kind of cattle at Evarts, would have been the first of June, what would they have been worth at Evarts, if you know if yes yes or no, then I will ask you what it was? A. Yes sir, I do.

Q. What is it?

By Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial and does not tend to prove the proper measure of damages in this case.

By the Court: This question is what would have been the value of such cattle, as you say to have been down here, belonging to these plaintiffs, in the event they had been shipped from Texas to Evarts, South Dakota, in the usual way of shipping such cattle and reached there June 1st.

A. Well, they would have been worth $25, I saw of these cattle before they were shipped.

Q. You saw them when they were taken out of the viaduct? A. Yes sir.

Q. About what time following Tuesday? A. I can't just say when that was.

Q. Was it during that week? A. That is just as soon as they were able to go down, I suppose.

Q. What would those cattle, in their then condition, have been worth at Evarts, on the 1st of June?

By Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial and not the proper measure of damages.

By the Court: Objection sustained.

Mr. Ball: That was about the first of June.

By the Court: These cattle were at Emporia after that.

By Mr. Ball: The measure as we all understand it, it seems to me that the value, the condition of the cattle at that time might have some bearing on ascertaining, at the time,
171 to fix the measure of damages.

By the Court: I think the cattle as shipped to Evarts at the time they were shipped; you get into this case all of these different matters, unless you confine it down—these cattle were not at Evarts at this time.

The question is what they were worth when they arrived there, and if they had arrived there in due season; the objection is sustained.

By Mr. Botsford: I can't see, the market value in Dakota immediately following the injury,—what they would have been worth at that time.

By the Court: That is because your cattle were not there.

Mr. Botsford: Suppose they had been there.

By the Court: We can't suppose.

Mr. Botsford: Our contention is that they were not there without our consent—that they should have been there—I understand the rule laid down by the supreme court, in the case I called your Honor's attention to this morning and in that case the injury was inflicted in Ohio.

By the Court: You had a contract to deliver, the contract of shipment by which they were to be shipped and arrive in South Dakota about the first of June; you have been allowed to prove what these cattle in question would have been worth if they had been shipped through in the ordinary way and arrived about that time; you also contend that these cattle were damaged by delay occasioned here at Kansas City by loss of food, starvation of the cattle and being held here until along in July.

Mr. Botsford: We claim addition item of damage, the delay, irrespective of the injury to the cattle here at Kansas City, that that is an additional and separate item and
172 would exist in case, if the cattle had not been otherwise injured.

By the Court: Now to get at the whole and complete measure of damages, as you contend for it, you have to locate some time and place of these particular cattle. If the cattle were worth less has to be proved here, received in the middle of July than received the first of June, these cattle were worth less, if those cattle were injured by reason of the way they were fed and cared for during the high water; the question is how much these cattle would have been worth had they gone through in the regular way and received there in the manner in which they reached there.

These cattle on account of the way they were shipped, were worth less for feeding, on account of being later in the season, and being posied by the water and so forth; on account of all of these things, the question is what they were worth at that time.

Mr. Botsford: We have a right of action as soon as they were taken down for that negligence; of course, the action was not brought until afterwards, though the damage accrued, they were lumped in one suit.

By the Court: The question is, what was the damage in one bunch.

By Mr. Botsford: Do you say we have no right to prove both sources of damage, either in the bunch or separately?

By the Court: I do hold the question as to what these cattle were worth here, considerable length of time before they reached South Dakota, no evidence of the value of these cattle at the time they reached the point of destination.

By Mr. Ball: Mr. Tomb, did you examine these cattle with any particularity? A. I just looked at them.

173 Q. Would you be able to state, how much in your judgment the cattle were depreciated in value by the experience which they went through here in the stock yards.

By Mr. Angevine: Objected to by the defendant, on the ground that the witness has not shown that he saw them after they went to Emporia or Evarts and knows nothing about their condition, it is a mere conclusion.

By the Court: Objection sustained; plaintiffs then and there duly excepting.

By Mr. Ball: If these cattle were being taken, or were taken to the pasture about the 9th or 10th of June, and kept there until about the tenth of July, at Emporia, and then forwarded to Evarts, South Dakota, and arriving there, about the 14th of July, what in your judgment would they be worth after being landed at Evarts?

By Mr. Angevine: Objected to by defendant because the witness has not shown that he has any knowledge of their condition when they arrived at Evarts, South Dakota.

By the Court: Find out whether he knows or not from his experience.

By Mr. Ball: From your experience in handling this class of cattle and from your observation of these cattle and their condition after coming off of the viaduct, do you know whether, after they were subsequently pastured in the way I have stated and forwarded to Evarts, and arriving there the 14th of July, do you know what would be their value, the market value at Evarts on the 14th of July?

By the Court: Answer yes or no.

Q. I could not tell that unless I would see the cattle.

Q. Unless you had seen them on the 14th of July after they had been through the pasture? A. Yes sir.

Q. In your experience what effect would a month's
174 pasturing of cattle have, after you saw them, would it have on them, could you form a judgment as to what they would be worth after being transported and pastured for a month?

By the Court: Answer that question yes or no.

A. State that question (question read) I don't believe I could.

(Ten minutes recess.)

Mr. Ball: I do not know whether I excepted to the rulings of the court on those questions, I would like to have the record show now that we except.

Cross-Examination.

By Mr. Angevine: How long have you been engaged in the live stock business at Kansas City stock yards? A. I have never been in the yards, I am a ranchman.

Q. You never had business at the yards? A. No sir I only raise cattle and sell them.

Q. Your home is in Kansas City, Missouri? A. Yes sir.

Q. And how long have you lived in Kansas City, Missouri? A. Ever since 1884.

Q. Did you ship cattle to the vicinity of Evarts, South Dakota, during the year, 1903? A. Yes sir.

Q. Are you connected with the L Tomb cattle company? A. Yes sir.

Q. What relation do you sustain to that company? A. I am the president.

Q. And the company takes its name from you, or your name? A. Yes sir—Lake-Tomb Cattle Company.

Q. Mr. Lake and Mr. Tomb furnish the name? A. Yes sir.

Q. And you shipped cattle there did you? A. Yes sir.

Q. To Evarts? A. Yes sir.

175 Q. How many cattle did you ship to Evarts, during the spring of 1903? A. About ten thousand.

Q. Now it is a fact, is it not, that cattle shipped from Texas, to that northern country, are subject to a loss under the most favorable conditions? A. Yes sir some times.

Q. And more than shipping cattle from one locality in the same, to another locality, in the same latitude, cattle sent north are liable,— A. It is owing to whether you strike a blizzard or not, there is no trouble if you do not strike a blizzard.

Q. But southern cattle do not stand the winters there, the first winter as well as northern cattle, do they? A. No sir not so well.

Q. You have had a considerable per centage of loss on your own cattle shipped to that station, have you not? A. You mean since I have been on the ranch.

Q. Yes, 1902 and 1903, say? A. We have had, yes sir, we always have a loss.

Q. During 1903, you lost a good many cattle; that is the immediate vicinity of that station, I presume, after unloading, didn't you? A. No sir.

Q. Did you in 1902? A. No sir.

Q. You have lost? A. I will tell you how you got that wrong impression on that, we sent out a man with some cattle, and they were inexperienced men, not competent men, and they lost the cattle after they got out about forty miles and then we got them again, when we rounded-up, that is where you got that impression.

Q. You have lost a good many cattle up there by death have you not? A. You mean there since, yes sir.

176 Q. And some during the summer soon after they were unloaded haven't you? A. Yes sir a few; you are bound to lose a few.

Q. And you commence shipping yours early in May, do you. A. Yes sir, as early as we can.

Q. And you aim to get them to Dakota as soon as the grass starts up there? A. We want to get them there a little before.

Q. Before the grass starts? A. Yes sir.

Q. What time does the grass start in Dakota. A. Along about the first of June.

Q. And you like to have them on the range before that? A. Yes sir, you can drive cattle out on the old grass.

Q. Better than on the new grass? A. They do very well, but it is a good deal better to have them there when the new grass comes in if you can.

Q. They drive better do they before the new grass starts? A. Yes sir, they always drive better before they get full of grass.

Q. And about June and July the grass is fresh so they do not drive so well? A. Yes sir, they drive well, but you have to take a little more time.

Q. And you have to handle them with greater care? A. You handle them slower. You take an animal and it is liable to scour if you do not handle them correctly.

Q. You say you did not see the stock yards until the flood was subsided. A. I say I think it was on Tuesday the first time I saw the flood, I was out of the city.

Q. And at that time of the year, the flood was unprecedented in the history of Kansas City, so far as you know. A. It was bad.

177 Redirect Examination.

Q. By Mr. Ball: Did you see these cattle of the Minnesota and Dakota Cattle company, and of Mr. Frost's company in Texas? A. Yes sir.

Q. Before they were sent up there? A. Yes sir.

Q. Do you know about what per cent of that kind of cattle, went through in the ordinary way in time, were lost, during the winter of 1903 and 1904 on those ranges there, the same kind as these?

By Mr. Angevine: Objected to by defendant as incompetent, irrelevant and immaterial.

By the Court: Ob-ection sustained, plaintiffs then and there duly excepting.

By Mr. Ball: On the ground of its not being re-examination.

By the Court: I do not see how this can be material to this inquiry.

Mr. Ball: Our contention will be that a very great loss occurred on the range of these particular cattle in the winter of 1903 and 1904.

By the Court: On account of the time received there and their condition.

Mr. Ball: And the condition in which they were in, if they went there, being in better condition, and which we claim they were, there would have been some loss; what I

want to get at and show, in order to arrive at as nearly as possible the amount of the loss; the matters of which we complain was, what would be the percentage of loss on that kind of cattle.

By the Court: You have shown by this witness if these cattle had been started through they would have been
178 worth two or three dollars more than at the time they were received.

By Mr. Ball: The point I want to get at is, this death loss was in the following winter.

By the Court: Worth two or three dollars a head more because the death loss would be more, because they would not be in such good condition.

Mr. Ball: That was by reason of the delay, and the debilitated condition in which they were; we expect to show that something like 25 to thirty per cent of these cattle reached there—

By the Court: I think you better show as you started out by this man, there were many men saw these cattle received there; and the question is what these cattle were worth at the time received there, if they had gone straight through, and that comprehends all of these minor matters, you cannot [divided] up the damages and prove it in that kind of shape.

But the question then might be searched out in cross-examination getting at the foundation of the witness' judgment upon these propositions; but it must be true as stated that the difference in the value of these cattle at the time received and in the condition they were when received and what they would have been if gone straight through, there must be a difference in the value of these cattle by reason of this occurrence.

You have most likely entered into a supplemental agreement which changes the face of your first agreement; with your knowledge and consent these cattle were shipped down and held down at Lyons county, in order that they might be cared for; you could have commenced your action right after these cattle came out of the flood.

179 Then it would have been what the cattle were worth here if they had come here in proper shape and been properly handled.

I am not going to allow this testimony.

Plaintiffs then and there duly excepting.

Mr. Botsford: We offer to read in evidence stipulation in regard to these demands and notices, the same ones you examined this morning, Mr. Angevine. And I want to read the

accompanying exhibits, being marked plaintiffs' exhibit number one.

Mr. Angevine: We make the same objection to it, if you are going to offer them.

Mr. Botsford: I offer all three of them; all three of the exhibits.

Mr. Angevine: Defendant objects to the offer of exhibit A for the reason that it is incompetent, irrelevant and immaterial.

It seems that they should not all be offered together [becamse] the same objection might not be applicable; we object to exhibit B as incompetent, irrelevant and immaterial, and does not tend to prove any issue in the case, and the same as to exhibit C.

By the Court: What is the purpose of this offer to prove your claim made under the contract.

By Mr. Botsford: Yes sir.

By the Court: The objection will be overruled; defendant then and there duly excepting.

Mr. Angevine: We now ask the court to instruct the jury that the evidence will only be introduced and only be considered for the purpose of showing the service of notice and not to be considered as any evidence therein recited.

180 By the Court: I understand the sole purpose for which these are offered is to prove the claim in writing, and they are received only for that purpose, the jury will only consider it for that purpose.

Mr. Botsford reads such exhibits as follows towit:

To the Atchison, Topeka & Santa Fe Railway Company:

You are hereby notified that I, W. H. Frost of Fort Pierre, South Dakota, the shipper named in three certain contracts for the shipment of twenty-one (21) cars of cattle consisting of 798 head, and shipped in cars numbered as follows:

	No. of car	Initial	
	405	S W S	
	3080	S W S	
	5 - 4	H X	(correct number cannot be
	4666	H X	deciphered)
	5361	R	
(A)	5070	R	
	5272	R	
	4321	S W. S	
	53908	H T	
	53882	A T	
	4148	R	
	148	S W. S	
	4404	H T	
	53439	A T	
	53804	A T	
	53927	A T	
	5043	R	
	53236	A T	
	52041	A T	
	4661	H X	
	1844	S W. S	

From Hereford, Texas, to Evarts, South Dakota, made at Hereford, Texas, on May 25th, 1903, between the Pecos & Northern Texas Railway Company and its connecting carriers, severally, of the first part, and W. H. Frost, as shipper, of the second part, will and do now claim damages, as agent for the owners of said cattle for injuries to said cattle caused by negligence on the part of your company, its officers, servants, agents and employes in the handling and shipping of said cattle, which damages have accrued and will hereafter accrue by reason of such negligence on your part.

Dated June 8th, 1903.

W. H. FROST.

181

Kansas City, Missouri,
June 10th, 1903.

It having been proposed by the Atchison, Topeka & Santa Fe Railway Company, to take the cattle belonging to the shipment made by me from Hereford, Texas, destined for Evarts, South Dakota, out of the Kansas City, stock yards, to some neighboring pasture, I hereby give my consent that said railway company may, temporarily before continuing the shipment of said cattle to the said destination put them upon pasture at the instance, risk and expense of said railway company, it being understood that in giving this consent all rights

are reserved by me the same as they existed before this consent was given, and that no right under the contracts of shipment, and no right to damages either to said cattle or for delays in their shipment, is waived.

(signed) W. H. FROST.

(B)

Delivered the original of above to W. A. Coombs, asst. Gen. Live Stock Agent of A. T. & S. F. R. W. at office of the company at 905 Main St. this June 10, 1903.

J. B. B.

Kansas City, Missouri, July 25th, 1903.

To the Atchison, Topeka & Santa Fe Railway Company:

Please take notice, That with respect to the shipment of 797 head of cattle from Hereford, Texas, to Evarts, South Dakota, which shipment was made on May 25th, 1903, and received by your company, which cattle were afterwards unloaded by your company on May 30th, 1903, at the Kansas City Stock Yards, and the remnant of which cattle were afterwards pastured in your pastures at Emporia Kansas, we make the following claim for damages:

182	Of the 797 head, 99 head died each being of the value of $25.....	$2475.00
	There were 8 head of said 797 head crippled so as to render them totally valueless, worth $25.00 per head	200.00
	Of said 797 head of cattle so shipped from Hereford, Texas, there remained 690 head, but said 690 head were so damaged by reason of the failure of your company to properly care for the same and [the] feed and water the same, and by reason of the negligence of your company in the shipment of said cattle between Strong City, Kansas, and Evarts, S. D. so that there has been a diminution in the value of said 690 head in the sum of $10.00 per head so that we have lost on said 690 head the sum of	$6900.00
	We have also paid out and expended for time and labor and other expenses in looking after said cattle by reason of your detention of said cattle and your negligence in carrying the same in the following sums:	
	Special trip after cattle from ranch at Evarts, S. D. eighty miles travel.....	100.00
	Board of W. H. Frost, July, 7, 8, 9, 10 while looking after cattle for four days at $2.00 per day.....	8.00

Value of time W. H. Frost 16 days at Kansas City, Mo. at $5.00 per day	80.00
Value of time W. H. Frost, July 7, 8, 9, 10, $5.00 per day	20.00
Board paid for Mr. Newton while with said cattle in pasture while at Emporia, Kansas	21.05
Wages paid said Newton while looking after said cattle while in said pasture at Emporia, Kansas	30.00
Cash paid for feed for horses used while cattle were in pasture	11.10
Cost of telegrams sent while detained at Kansas City.	8.00
Excessive charge for freight paid for the whole of said 797 head of cattle, all of which were not delivered	.....

The above and foregoing are the items of damages that have occurred to the present date. There are other items of damages that may occur hereafter as the result of your negligence, and in the shipment of said cattle not possible not to be stated, but which we reserve the right to claim in any law suit brought therefor.

(C) Respectfully submitted
EMPIRE STATE CATTLE CO.
W. H. Frost.
By Botsford, Deatherage & Young,
Attorneys.

To the Agent of the Chicago, Milwaukee & St. Paul Railway Company, at Evarts, South Dakota:

Please take notice, that we have served the Atchison, Topeka & Santa Fe Railway Company, at Kansas City, Missouri, with a notice and claim for damages of which the above is a true copy. Respectfully submitted,
EMPIRE STATE CATTLE CO.
W. H. Frost,
By Botsford, Deatherage & Young,
Attorneys.

183 In the United States Circuit Court for the District of Kansas. First Division

Empire State Cattle Company, et al Plaintiff,
vs.
Atchison, Topeka & Santa Fe Railway Company, Defendant.

Stipulation.

It is agreed by and between the above parties that on June 9th, 1903, plaintiff's attorneys, Botsford, Deatherage & Young, delivered to W. A. Coombs, Asst. Gen. Live Stock

Agt. of defendant, in Kansas City, Missouri, a notice of which the paper hereto appended and marked exhibit A is a copy, signed by W. H. Frost and dated June 8th, 1903.

That on June 10th, 1903, said plaintiff's attorneys delivered to said Coombs another notice signed by W. H. Frost and dated June 10th, 1903, Kansas City, Missouri, of which the paper hereto appended and marked exhibit B is a copy.

That on July 25th, 1903, said attorneys delivered to said Coombs another notice of which the paper hereto appended marked exhibit C is a copy all of said deliveries at Kansas City, Mo.

It is further agreed that said exhibits A, B, and C together with this stipulation may be read at the trial of said cause so far as the same is pertinent and material without further proof of the service of said notices on said defendant.

BOTSFORD DETHERAGE & YOUNG,
Attorneys for Plaintiff.

A. A. HURD,
Attorney for defendant.

June 13, 1904.

Mr Botsford: We now offer in evidence notice to the defendant company and Mr Hurd, accepting service on the 28th of December last, to produce at the trial, these bonds which were given in the month of July by plaintiffs in these two cases.

Mr Angevine: Objected to by the defendant as the
184 same prove no issue in the case.

Mr Botsford: I simply call for the paper described in that notice. I want to put the notice in the record.

Mr Angevine: I do not think I can comply with the request, as to one of those instruments; I think I have one of those bonds, I have not been able to find but one of them, I think I have the Empire Cattle Company bond.

Which said notice as so offered in evidence is as follows towit:

In the Circuit Court of the United States for the District of Kansas—First Division.

Empire State Cattle Company, Plaintiff
vs.
Atchison Topeka & Santa Fe Railway Company, Defendant.

Minnesota & Dakota Cattle Company, Plaintiff,
vs.
Atchison Topeka & Santa Fe Railway Company, Defendant.

To A. A. Hurd, Attorney for said defendant:

You are hereby notified to produce at the trial of the above entitled causes the bonds given by said plaintiffs in or about the month of July, 1903, to your company to secure the payment to your company of certain charges paid to the Kansas City Stock Yards Company and certain pasturage charges, in the event that the court should decide the same in your favor.

You are also notified to produce at said trial the waybills and all other records of your company made by your company at the time of the shipment during the last week of May, 1903, of the cattle in controversy in the above cases, and particularly those records of your company showing how the said shipments of cattle were routed over your railway.

BOTSFORD DEATHERAGE & YOUNG,
Attys. for Empire State Cattle Co.
R E BALL,
Atty. for Minn & Dakota Cattle Co.

Received copy of the above notice this 28 day of December, 1904.

A. A. HURD,
Atty. for A. T. & S. F. Ry. Co.

185 J. D. Carr, sworn, testified on behalf of plaintiffs as follows on

Direct Examination.

By Mr Botsford:

Q. What is your name? A. Jeff D. Carr.

Q. Where do you live? A. Ft Pierre, South Dakota.

Q. How long have you lived in South Dakota? A. 22 years, with the exception of two years during that time.

Q. Are you one of the plaintiffs in this action? A. Yes sir.

Q. Interested as part owner of these cattle? A. Yes sir.

Q. What business have you been following for the last five years and ten years A. Stock business.

Q. In what way? A. Handling stock on the range in South Dakota there.

Q. Now just state to the court and jury how many years you have followed that business? A. I could not say exactly, about eight to nine years I think since I first went into the business.

Q. Have you bought and sold cattle during that period? A. To some extent.

Q. Does your experience as a cattle man in South Dakota, enable you to state the market value of Texas cattle brought into the Dakotas in say 1902 and 1903, and 1904? [Q.] Yes sir.

Q. Do you know these cattle in controversy in this case? A. I do yes sir.

Q. When did you first see them? A. 14th of July 1903.

Q. Where? A. At Evarts, South Dakota.

Q. Do you mean 1903 or 1893? A. 1903.

Q. Where did you say you saw them? A. At Evarts, S. D.

186 Q. What was being done with these cattle when you saw them? A. There were branding these Minnesota—

Q. Your cattle? A. What I was going to say, they were separating the cattle and branding those other cattle.

Q. Separating which cattle? A. The Minnesota and Dakota Cattle company and the Empire State cattle.

Q. How many cattle did you plaintiffs in this action have, if you counted them?

By Mr Angevine: Objected to by defendant as incompetent irrelevant and immaterial; objection overruled, defendant then and there duly excepting.

A. 697 head.

Q. What was done with those cattle after they were separated and branded? A. I took them to the pasture.

Q. You may state whether or not you saw the first train load of these cattle? A. I did.

Q. Where did you first see them? A. I first saw them in Sioux City, I met them in Sioux City.

Q. When, what day? A. I think it was the 30th day of May, I am not positive, as to that, I would say last Sunday in May.

Q. Did you accompany the shipment from Sioux City? A. Yes sir.

Q. To Evarts? A. Yes sir.

Q. What day did they arrive in Evarts? A. On Monday.

Q. What day of June? A. First day of June.

Q. 1903? A. 1903.

Q. How many cattle was there in that first shipment? A. 763 head.

Q. What difference was there between the two train loads of cattle as to ages, if any? A. No difference.

187 Q. I will ask you if you can state, if you know the market value at Evarts, South Dakota of that first train load of cattle, say on the 1st day of June, 1903, when they arrived there?

By Mr. Angevine: Objected to by defendant as incompetent, irrelevant and immaterial, and not being the cattle in question.

By Mr. Botsford: We submit that these two bunches having been bought as the same time, that they are the same character of cattle; we have the right to interrogate this witness as to the difference in value between that first train load which arrived there on the first of June, and the value of the cattle in the other train load which arrived there on the 14th of July.

Objection overruled.

A. I do.

Q. Now what was the market value of that first train load of cattle on that day?

By Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial.

Objection overruled; defendant then and there duly excepting.

A. I should say twenty-five dollars.

Q. Do you know the market value of the 690 odd head of cattle on the train load in controversy at Evarts, South Dakota, on July 14th, 1903, on which day it arrived there? A. I think I do.

Q. What was that market value?

By Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial and not the proper measure of damages in this case.

Objection overruled; defendant then and there duly excepting.

188 A. I should say from fourteen to fifteen dollars per head.

Q. What was the nature of last winter in South Dakota, there has been some question about it here, do you know? A. Yes sir, I do.

Q. What sort of a winter was it? A. It was an ordinary winter.

Q. How was it as to snows and as to the depth of the snows.

By Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial.

Objection sustained.

Mr. Botsford: We now offer in evidence the way bills which have been produced under the notice, put in evidence here, showing the routing of these cattle.

By Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial and not tending to prove any issues in this case, it is a way bill, simply a memorandum made by the shipping agent for the direction of their agents and not a part of the contract under the authority I called the courts attention to yesterday.

By the Court: This routing extended through Atchison.

By Mr. Botsford: Yes sir.

Mr. Angevine: The courts hold for instance in a case of a blank endorsement, the law implies the contract the same as if written and parol testimony is not admissible to vary the terms of the contract so implied.

By the Court: I don't think you need argue it; I don't see it cuts any figure in the case; allow it all to go in.

Defendant duly excepted.

Mr. Angevine: Do you care to put them all in?

Mr. Botsford: Yes, those you have produced I think we had. We better, without reading them all.

189 Mr. Angevine: I don't think there is any use of encumbering the record with all of them, they are all substantially alike, put in one and have the record show the others are similar.

I will ask that they read the part that they desire to introduce in evidence, that is go in over our objection to that this bill may be returned as part of our files, and of course go in under our objection, I would like to have the bills returned to the railroad company's files.

Mr. Botsford: Can we take them to night, and see if there is any difference here.

Mr. Angevine: Yes.

By the Court: You can look over them to night; I should think where it is done over objection you might agree what this routing was by the initial company. Let it go over until the morning.

Adjourned to January 18th 10 o'clock a. m.

January 18th, 10 o'clock a. m., resumed.

Mr. Botsford: The last thing done at the adjournment was to offer one of these way bills and I have had the stenographer put their endorsement on the way bill; they are all the same; I have selected another one and I will ask the stenographer to erase from the one I offered, and put the same marks on this one. (which is marked plaintiffs' exhibit No. 3)

Mr. Angevine: I will renew the objection; the defendant objects to the introduction of the way bill in evidence for the reason that the same is incompetent irrelevant and immaterial and is not a part of the contract of shipment, but is simply a memoranda for the guidance of the employees of the defendant, and indicating the carries handling the cars in question.

By the Court: It will be received and admitted for
190 the purpose of showing the routing over which the cattle were, by the initial carrier routed.

The defendant then and there duly excepting.

Now it is agreed I understand, Brother Angevine, that all of the other way bills of the shipment of the plaintiffs in the Empire Cattle case, were the same and taken the same, for the purpose of this case, as this one, this one may stand in lieu of all of them.

Mr. Angevine: Except the number of the way bill and number car and number of cattle in that car; I think that is the only manner they might vary. Also excepting the number of the contract under which the way bill is issued.

Mr. Botsford: With that exception, it is agreed that the others are the same and this may be taken as the same in order to save putting them all in evidence.

Mr. Angevine: That is subject to objections and exceptions as to relevancy and competency.

Mr. Botsford: Certainly.

And which said way bills as so offered and read in evidence are in words and figures, following to wit:

[191]

CARD WAY-BILLS MUST BE ATTACHED (NOT PASTED) TO REGULAR WAY-BILL BEFORE MAILING TO AUDIT OFFICE.

Leave this Space Blank for Binding.

From THE Herford, Tex. To PECOS &

ROUTE.

VIA JUNCTION	VIA JUNCTION
AMARILLO STATE LINE	HUTCHISON
WITH	WITH
S. K. T. A. T. & S. F. R.	K. C. S. J. C. R.

Way Bill Settled in Interline Account July, 1903.

WEIGH THIS CAR AT

STOP THIS CAR AT LANG

* When a through rate is used and the shipment is to be re-w

CONSIGNOR. Connecting Line Reference, Original Car and Way-bill Number and Point of Shipment.	MAR Consignee and
W. H. ERO... Reloaded July 10, Lang, Kans.	EMPIRE STA
	CONTRA

Valuation, $22.00 per head, as per contract. Lo

(Form 1846 Regular. Old 55.)

ORTHERN TEXAS RAILWAY COMPANY.

Evarts, S. D. **Date** May 25th, 190 3

WAY-BILL { SERIES M. / No. 37

	VIA JUNCTION
	CO. BLUFFS.
	WITH
RY.	C. M. S. P. RY.

MARKED CAPACITY OF CAR Lbs.

FOR Feed.

Gross, Tare, and Net Weight of Carload Freight to be entered in this space, where the Car is weighed.

Strong City, Kans.
Unloaded 5 A
Reloaded 1:52 P.
Way-Bill 12
Feed Charges 4500

CAR INT'L H. F CAR No. 4666
Transferred into

INT'L 4 C. No. 1194 at

INT'L No. at

-billed en route, the subdivisions must be shown in the rate column in road order, noting opposite each proportion the initial of the road to which it accrues.

S, stination.	No. of Head.	Description of Stock.	WEIGHT.	Rate and Authority.*	FREIGHT.	ADVANCES.	PREPAID.
C. C.	38	Cattle.	22 000		100 00		
		O. K. Brn W. J. H. M.	4 8-57			7/1 1/03.	
30		(FILE) (77257)					

AGENT AT DESTINATION MUST ENTER BELOW DATE REPORTED.

7/14

O. K. E. L. M. 7/16/03

d at 8:30 P. M. Length of car, 36 feet inches.

OWNER'S RISK OF EXPENSE OR DELAY BY REASON OF QUARANTINE REGULATIONS.

192 Mr. Botsford: Mr. Frost I want to ask you a question again or two.

W. H. Frost called, testified on behalf of plaintiff as follows, on

Direct Examination

Q. Do you know the name of the station in Lyon County, Kansas, called Emporia, where your cattle were reloaded? A. Yes sir.

Q. What was the name of it? A. Lang.

Q. State where they were carried to by defendant company from Lang? A. Carried to Atchison.

Q. By way of what point? A. By way of Topeka.

Q. Now from Atchison, what company took the cattle from Atchison, what company took the cattle? A. The Burlington.

Q. When you say the Burlington you mean the K. C., St. Joe & Council Bluffs, do you not? A. I understand they are one and the same.

Q. How far did the Burlington as you call it take the cattle? A. Council Bluffs, Iowa.

Q. What company took the cattle from that point? A. Milwaukee, Chicago & St. Paul.

Q. To what point did the Chicago, Milwaukee & St. Paul take the cattle? A. Council Bluffs to Evarts, S. D.

Mr. Ball: We now offer the way bill of May 26th, 1903.

Mr. Angevine: Defendants objects to the introduction of the way bill in evidence for the reason that the same is incompetent, irrelevant and immaterial, and no part of the contract under which the cattle were shipped, but it is a mere memorandum directing the officers of the defendant road as to the manner of handling the cattle.

By the Court: The objection will be overruled and the offer will be received, not for the purpose of showing the way bill will be received, not for the purpose of showing it

193 is a part of the contract between the parties, but the original routing of the cattle from the initial point to the point of destination and for the purpose of showing that the cattle were routed in this way, it will be received.

The defendant excepts to the ruling of the Court.

And which said way bill as so offered and read in evidence is in words and figures following, to-wit:

[194]

CARD WAY-BILLS MUST BE ATTACHED (NOT PASTED) TO REGULAR WAY-BILL BEFORE MAILING TO AUDIT OFFICE.

Leave this Space Blank for Binding.

PECOS &

From Bovina, Tex. To

ROUTE.	VIA JUNCTION	VIA JUNCTIO
	AMARILLO	ATCHISON, KS
	WITH	WITH
	SANTA FE RY.	K. C. S. J. & C. B.

WEIGH THIS AT CAR

STOP THIS CAR AT

* When a through rate is used and the shipment is to be re-w

Way Bill Settled in Aug. 1903. Interline Account.

EMPORIA

CONSIGNOR. Connecting Line Reference, Original Car and Way-bill Number and Point of Shipment.	MA Consignee and
Minn. and Dak.	Minnesota & D
Cattle Co.	

Valuation, $22.00 per head, as per contract.

EMPORIA.
(Form 1846 Regular. Old 55.)

& NORTHERN TEXAS RAILWAY COMPANY.

Evarts, S. D. **Date** May 26th, 190 3

WAY-BILL { SERIES M. / No. 191

ON	VIA JUNCTION
S.	CO. BLUFFS.
	WITH
RY.	C. M. & ST. P. RY.

MO. P.
MARKED CAPACITY OF CAR Lbs.

FOR Feed.

Gross, Tare, and Net Weight of Carload Freight to be entered in this space, where the Car is weighed.

Paid Mo. River Rate

CAR INT'L P. V. CAR No. 5005
Transferred into

INT'L A. T. No. 53465 at

INT'L No. at

-way-billed en route, the subdivisions must be shown in the rate column in road order, noting opposite each proportion the initial of the road to which it accrues.

ARKS, d Destination.	No. of Head.	Description of Stock.	WEIGHT.	Rate and Authority.*	FREIGHT.	ADVANCES.	PREPAID.	AGENT AT DESTINATION MUST ENTER BELOW DATE REPORTED.
Dakota Cattle Co.			22 000		7590 10 000		F 966 2031 01	
	39	Steers					B	5/28
		S. L. & C.		34-1/2	Verton W.	B.9-5/28 Att	ached 881 00	
		More or less.						

Reloaded 5:30 A. M. 5/29 Aug. 6/03

Loaded at 10:30 **P. M.** **Length of car,** 36 **feet** **inches.**

OWNER'S RISK OF EXPENSE OR DELAY BY REASON OF QUARANTINE REGULATIONS.

195 Mr. Ball: All of those way bills issued at the original point of shipment, were the same in each respect as this way bill, with the exception that some of them were from Kenna, New Mexico, and others like these from Bovina, Texas, with the exception of the number of cars, and the number of steers in each car; in the aggregate these way bills cover the entire shipment of the Minnesota & Dakota Cattle Company in this train mentioned in the petition from Bovina and Kenna.

Mr. Angevine: But it is not admitted that the number of cattle covered by the way-bills is the same as the number claimed in the petition.

Mr. Ball: I understand that; but all of the way bills in this shipment refer to contracts of shipment which were in substance the same.

Mr. Angevine: The contracts were the same in substance.

By the Court: Were they numbered the same?

Mr. Angevine: No sir.

By the Court: You better have your stipulation in.

Mr. Ball: But in the aggregate they refer to all of the contracts of shipment which were made.

Mr. Angevine: Copies of all of the contracts I think are attached to the answers.

Mr. Botsford: I now offer in evidence bond given by the Empire State Cattle Company.

By Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial and does not tend to prove any issues in the case.

By the Court: Is it not admitted by the pleadings in the case?

Mr. Botsford: Not in our case.

By the Court: You are making this offer then in
196 case number 8155 alone?

Mr. Botsford: Yes sir.

Mr. Angevine: I do not understand there is any issue in the case, upon which they can be competent.

By the Court: Objection overruled—defendant then and there duly excepting.

And which said bond as so offered and read in evidence, is in words and figures following to-wit:

Mr. Botsford: Reads

Know All Men By These Presents: That we, the Empire State Cattle Company, a corporation organized under the laws of the State of South Dakota, and W. H. Frost, M. Mullen, T. B. Tomb and Charles Steube, are held and firmly

bound to the Atchison, Topeka & Santa Fe Railway Company, in the penal sum of Five Thousand Dollars, for the payment of which well and truly to be made, we bind ourselves, our successors, heirs, executors, administrators jointly, severally and firmly by these presents:

Witness our hands and seals this 9th day of July, 1903.

The condition of this obligation is such that the Empire State Cattle Company did in the month of May, 1903, ship twenty-one (21) carloads of cattle from Hereford, Texas, consigned to Evarts, South Dakota, said shipment to be transported over the line of the Atchison, Topeka & Santa Fe Railway Company, or its connections as shown by said contracts to Atchison, Kansas, and thence forwarded to Evarts, South Dakota, the point of destination; and

Whereas, said cattle were taken to Kansas City Stock Yards Company and held there until the floods subsided and then put on pasture and are now about to be shipped through to said point of destination at Evarts, South Dakota; and

Whereas, said the Atchison, Topeka & Santa Fe Railway Company propose to forward said cattle consigned to Evarts, South Dakota, in accordance with said stock contracts, and

197 Whereas, bills and charges for yardage, feed and pasturage for a large amount are claimed by said railway company or by the Kansas City Stock Yards Company against said owners of said cattle which bills are denied by the above bounden cattle company, and payment whereof refused, and

Whereas, the Atchison Topeka & Santa Fe Railway Company, are about to forward the remainder of the cattle so shipped without requiring the payment of such bills and charges for feed, yardage and pasturage upon the giving of a bond conditioned for the payment of said charges, if it shall be ultimately determined that whatever liability therefor, or that a lien exist therefor, and

Whereas, the above bounden has agreed to pay the freight on said shipments promptly at destination:

Now Therefore, if the above bounden the Empire State Cattle Company and W. H. Frost, M. Mullen, T. B. Tomb and Charles Stuebe or any of them shall well and truly pay all proper expense of feed and pasture bills which shall be ultimately charged up against the owners of said cattle or be a lien therefor, or whether in favor of the railway company or

in favor of any one to whose rights the railway company has succeeded, then this obligation shall be void, otherwise it shall be and remain in full force and effect, if the said charge for feed and pasture are held to be proper charges against the cattle, then the proportion to be charged against the cattle mentioned herein may be determined on prorata basis. It is expressly understood, however, that neither the said Empire State Cattle Company, or the said the Atchison Topeka & Santa Fe Railway Company, by the giving and taking of this bond waive any of their respective rights under the contract of shipment of said cattle and all of such rights on the part of the above parties shall be and remain as they may have been finally determined and agreed upon or finally adjudged by the courts.

198 (signed) Empire State Cattle Company by W. H. Frost, president, with the seal of the Empire State Cattle Company, as follows: Empire State Cattle Company, a corporation, (seal) Signed by W. H. Frost, individually, M. Mullen, Thos. B. Tomb, Charles Stuebe.

Mr. Angevine: The defendant moves to strike out this testimony so offered, for it appears from the reading of it, it does not tend to prove any issues in this case.

By the Court: Objection and motion overruled, defendant then and there duly excepting.

By the Court: In the other case I understand the contract is admitted by the pleadings.

By Mr. Ball: It is admitted by the defendant pleading a correct copy of that in the answer.

Mr. Angevine: It is admitted by the pleadings of both parties, for the reason it is not denied under oath.

By the Court: Being admitted the contract there is the best evidence.

By Mr. Botsford: Now we offer in evidence this stipulation; we agree that all depositions in this case may be considered as in evidence in both cases.

Mr. Angevine: That is, competent evidence only goes to the court in case there is any question about it.

By the Court: I suppose the stipulation is filed in the case.

By Mr. Botsford: No sir, not filed.

Mr. Angevine: I suggest they should all be filed; I have not had access to the stipulation; I would like to have the parties file all their stipulations and leave them in the files in the case where I can have access to all of them.

By the Court: That should be done; they should all be filed in the case.

And which is in words and figures following to-wit:

199 In the Circuit Court of the United States for the District of Kansas, First Division.

The Minnesota & Dakota Cattle Company, Plaintiff,
vs.
The Atchison, Topeka and Santa Fe Railway Company, Defendant.

The Empire State Cattle Company et al., Plaintiff,
vs.
The Atchison, Topeka and Santa Fe Railway Company, Defendant.

Stipulation.

It is hereby stipulated and agreed in the above entitled cases that all depositions taken heretofore or hereafter by either party in either of said cases, upon notice, may be read in either or both of said cases, so far as the same may be material and pertinent to the issues therein joined, without regard to which case said deposition may be taken in, and without regard to the residence of the witness or witnesses whose depositions may be taken, provided, such witness is not personally present at the trial of the case in which his deposition may be read.

Dated this 27th day of May, 1904.

R. E. BALL,
Attorney for the Minnesota & Dakota Cattle Company, Plaintiff.
BOTSFORD, DEATHERAGE & YOUNG,
Attorneys for the Empire State Cattle Company et al., Plaintiffs.
A. A. HURD and TON H. REYNOLDS,
Attorney- for the Atchison Topeka and Santa Fe Railway Company, Defendant.

And thereupon the plaintiffs offered and read in evidence the deposition of Albert Newton, which as so read is in words and figures following, to-wit:

200 Direct Examination

By Judge J. S. Botsford:

Q. What is your full name? A. Albert Newton.

Q. What is your age and residence? A. Twenty-five; Colorado.

Q. How long have you lived in the state of Colorado? A. About nine months.

Q. What is your business? A. Working on a ranch.

Q. In connection with cattle? A. Yes sir.

Q. How long have you been engaged in working in connection with cattle? A. About ten years.

Q. Did you ever live in South Dakota? A. I lived there about eight months.

Q. Where were you living in the months of May and June, 1903? A. I was in Kansas.

Q. You know Mr. W. H. Frost, one of the plaintiffs? A. When, in May?

Q. May and June, 1903, yes, that is what I asked you? A. I was in Texas.

Q. Where were you living at that time, where was your home? A. My home was in Texas.

Q. You know one Mr. W. H. Frost, one of the plaintiffs? A. Yes sir.

Q. Are you acquainted with him? A. Yes sir.

Q. How long have you known him? A. Known him about two years.

Q. State whether or not you accompanied Mr. Frost anywhere in the latter part of May, 1903, and if so, where? A. I accompanied him from Hereford, Texas, to South Dakota with a train of cattle.

Q. How many cars were in the train, if you remember, or about how many? A. Well, I don't know; 21, I believe.

Q. Where were the cattle put on the cars? A. Hereford, Texas.

201 Q. And you remember the day of the month in May, 1903, when that occurred? A. It was the 25th.

Q. When did they leave Hereford, Texas? A. They left about nine o'clock in the evening.

Q. You remember the day of the week that that occurred on? A. Either Monday or Tuesday, Monday.

Q. Well, you may state whether on that trip you passed through the state of Kansas and, if so, what points in the State of Kansas? A. I passed through Leavenworth.

Q. How is that? A. Or not Leavensworth—it was over the Santa Fe.

Q. You passed over the Santa Fe in the state of Kansas? A. Passed over the Santa Fe.

Q. Do you remember whether while passing over the Santa Fe in the State of Kansas the cattle were unloaded to be fed and watered and rested anywhere? A. They were unloaded at Strong City.

Q. Now what day was that that you reached Strong City where they were unloaded to be fed and watered? A. The twenty-sixth.

Q. What time on the twenty-sixth? A. About eleven o'clock in the evening they arrived there.

Q. When were they unloaded? A. They were unloaded by about one o'clock in the morning.

Q. Morning of the twenty-seventh? A. Twenty-seventh.

Q. Well, when had the cattle been fed and watered and rested, ready to resume their journey, if you know? A. By about one o'clock the next day, on the twenty-seventh.

Q. On the twenty-seventh in the day time, you mean, do you? A. Yes sir.

Q. Well, state what was done then with the cattle? A. Well, one train of them was—

202 Q. Go on, what was done with one train of them? A. One train was partly loaded that morning, early that morning.

Q. Yes. Was this train that you were on the only train that Mr. Frost had of cattle there? A. No; he had two trains.

Q. Two trains; was the other train before yours or after yours? A. Before.

Q. How many cars, or about how many cars, were in the first train? A. Twenty cars, I believe.

Q. And they had cattle the same as yours? A. Yes sir.

Q. Do you remember who attended Mr. Frost? A. Mr. Cloyd.

Q. You remember anyone else? A. Mr. Keiser.

Q. Those two gentlemen represented Mr. Frost in respect of the other train? A. Mr. Cloyd represented them.

Q. And who was in your train besides Mr. Frost and you tending to the cattle, or going along with them I mean? A. Wasn't anyone.

Q. Was it on the 27th that the first train load was loaded, ready— A. (Interrupting) Commenced loading about eight o'clock in the morning.

Q. When were they finished loading up? A. Didn't load the rest; partly loaded and got a telegram to unload.

Q. You got a telegram to what effect? What information came to you gentlemen as to why they were to be unloaded? A. On account of high water.

Q. Where? A. Where?

Q. Where was the information that you got that the high water was? A. Well, I don't know.

Q. That is all that you heard, was it? A. Just on account of high water.

203 Q. How much of the first load had been loaded when they got that information and when they commenced to unload again? A. About half of the train.

Q. Well, state what afterwards was done with the cattle on that first train load? A. They were fed and loaded out that afternoon, that evening.

Q. Were these cattle that were in the first train loaded in the same yards as the cattle of the second train? A. Yes sir.

Q. Mixed together in the pens or kept separate? A. Kept separate.

Q. And what time on the afternoon of the 27th was the first train load loaded and taken out? A. They were loaded about five o'clock.

Q. On the evening of the twenty-seventh? A. Twenty-seventh.

Q. What time did that train load leave? A. Left about half past seven or eight; eight, I guess.

Q. Of the evening of the 27th? A. Yes sir.

Q. Now this loading and unloading and reloading, who did that? A. The stock yards company and the railroad company.

Q. The railroad company. These stock yards were the stock yards of the railroad company, weren't they? A. Yes, sir.

Q. And who did you say loaded and unloaded and reloaded the cattle? A. The railroad company.

Q. The railroad company and their employees? A. Yes sir.

Mr. Angevine: The defendant objects to that question as leading; and the defendant objects to the answer, as being the conclusion of the witness and not a statement of facts.

By the Court: The objection overruled; defendant then and there duly excepting.

Q. Did Mr. Cloyd, the other man that was with him in connection with these cattle, have anything to do with loading and unloading and reloading these cattle?

204 The defendant objects to the last question as leading.

By the Court: The objection overruled; defendant then and there duly excepting.

A. No sir.

Q. Well, where did the first train load go what direction were they going when you last saw them? A. They were going towards Emporia.

Q. On what railroad? A. On the Santa Fe.

Q. You saw no more of that first train after that? A. No sir; that is the last I saw of them.

Q. Did Mr. Cloyd and the other gentleman you have named continue with this train as they left Strong City? A. Yes sir.

Q. Now state whether any time on that day, the 27th of May, the second train load which you and Mr. Frost were accompanying, was located in whole or in part? A. We loaded the 28th, morning of the 28th.

Q. Well state whether any portion of them was loaded on the 27th? A. Twenty-seventh, no.

Q. On Wednesday, the afternoon or night, of the 27th? A. No sir.

Q. When were the cattle of the second train loaded, or any portion of them first reloaded? A. The twenty-eighth.

Q. What time of the 28th? A. Commenced about nine o'clock.

Q. Well, what was done with them then, were they all reloaded or only a portion of them or how? A. They were all reloaded.

Q. What was done with them then? A. That was the 29th.

Q. Now, you are speaking now of the morning of the 28th? A. Morning of the 28th?

Q. Yes sir. A. Well, they were loaded and unloaded.

Q. How long were they in the cars before they were unloaded? A. They wasn't in there very long.

205 Q. Well, give us some idea, Mr. Newton. A. Two or three hours.

Q. Well, who reloaded them there in the cars? A. The railroad company.

Mr. Angevine: I move to strike out that answer, as not responsive to the question and as a conclusion of the witness, and not a statement of fact as to who loaded and unloaded them.

By the Court: The objection overruled; defendant then and there duly excepting.

Q. Did you and Mr. Frost have any connection with the business of reloading them? A. No sir.

Q. Did the railroad officials or employees there consult you and Mr. Frost, or either of you, so far as you know about— A. (Interrupting) Not so far as I know.

Q. (Continuing) About the manner of loading them or unloading them? A. No sir.

Q. Now, what was done with the cattle in the second train load after they were unloaded and taken out of the cars at that time? A. They were fed again.

Q. Where? A. Where?

Q. While in the pens or out of the pens? A. In the pens.

Q. Well, how long did they remain in the pens there feeding? A. They remained there until the 29th, morning of the 29th.

Q. How many times were the cattle in that second train loaded, reloaded and unloaded? A. Only once.

Q. Only the once. Were they reloaded any time after the time you have mentioned on the 28th? A. No sir; after—you mean loaded and reloaded and unloaded?

Q. Yes sir? A. No sir; not after the 28th.

206 Q. Well, were they loaded and unloaded more than once on the 28th? A. Just the one time.

Q. Just the one time. Well, where did the cattle remain during the balance of the night and the morning of the 28th? A. In the stock yards.

Q. Where are those stock yards as relates to the tracks? A. Strong City.

Q. Well, are they near the tracks or far away from the tracks, or how? A. Right at the tracks.

Q. State how the cattle there were taken out of the cars into those pens? A. By the railroad company.

Q. Well, I know, but what is the connection between the pens and the cars? A. Why, shutes.

Q. Well, but what is the distance between the doors of the cars into which these cattle are loaded and the pens? A. Ten feet about.

Q. And connected how with the pens? A. Connected by shutes.

Q. Well now, when was it that the cattle were reloaded on the 29th? A. They were reloaded about, commenced about eight o'clock.

Q. You mean in the morning? A. In the morning of the 29th.

Q. Were they all reloaded at that time? A. Yes sir.

Q. What was done with the cattle then? A. They were run out on the track there until about half past one.

Q. Half past one on the 29th? A. On the 29th.

Q. How far did you go on the track? A. Just ran up to the depot.

Q. Depot in Strong City? A. In Strong City.

Q. How long did they remain there at the depot from the time they wede loaded, how many hours? A. They remained there about two hours and a half.

Q. Well now, when they were being held there at
207 that time did you hear any statement from any railroad official or employee? A. Well, I heard some one say it was on account of high water.

Mr. Angevine: I move to strike out the last answers, for the reason that it is hearsay evidence.

By the Court: Sustained; plaintiffs then and there duly excepting.

Q. Who did you hear make that statement?

Objected to by defendant; objection sustained.

A. I heard Mr. Frost and—

Q. Well, who else? A. Some of the railroad—

Q. Without saying what Mr. Frost stated did you hear any of the employees or anybody else connected with the railroad company say anything about that? A. I heard the agent.

Q. What agent? A. Agent at Strong City.

Q. Well, agent of whom? A. Depot.

Q. Station agent you mean, railroad station agent? A. Yes sir.

Q. You heard him say that, did you? A. Yes sir.

Q. Well, state whether any other cars were attached to this train load of cattle that you and Mr. Frost were with about that time? A. Yes sir, there was another train load attached to it.

Q. How many cars? A. I think there were 20 or 23, I am not sure.

Q. That is, in addition to the cars that you had? A. Yes sir.

Q. Whose cattle were these other twenty-three car loads? A. Minnesota & Dakota.

Q. Then what was done with the train after that, when those cars were attached? A. When they were attached?

Q. Yes? A. Well, they were—they stood there on the track, as I said.

Q. Until what time? A. Till one-thirty.

208 Q. What was done with the train then? A. Well, they started out.

Q. Well, where did they go to? A. They came to Kansas City.

Q. What time did you reach Emporia? A. Reached Emporia about two o'clock, little after.

Q. In the afternoon of the 29th? A. Twenty-ninth.

Q. What time did you reach Kansas City? A. We reached Kansas City about six-thirty the morning of the 30th.

Q. State whether the railroad officials, or their employees or agents or servants, consulted you in any way or asked directions of you, or asked directions or consulted with Mr. Frost as to where these cattle should go at any time? A. They did not.

Q. When did you first find out you were coming to Kansas City? A. I didn't know anything about it until I got here.

Q. And when did you say it was you got to Kansas City? A. About six-thirty the morning of the 30th.

Q. Well, what was done with the cattle then? A. They were unloaded.

Q. Unloaded where? A. In the stock yards.

Q. What time? A. They were unloaded by about ten o'clock.

Q. Did they remain in the cars from six-thirty to ten? A. No; they commenced to unload about, commenced to unload about nine o'clock.

Q. Nine o'clock, and finished unloading by ten? A. They were unloaded by ten.

Q. Into the stock yards? A. Yes sir.

Q. Was all of this second train of Mr. Frost's unloaded in the stock yards? A. Yes sir.

Q. And all the other ones too? A. All the other ones.

209 Q. Mr. Newton, what was the condition of these cattle when they were loaded at Strong City? A. They were in good condition.

Q. What was the age of those cattle? A. Two year old steers.

Q. Steers. All steers were they? A. Yes sir.

Q. What was the condition of the cattle in this additional bunch of twenty-three cars of the Minnesota & Dakota Cattle company when they were loaded at Strong City? A. They were in good condition.

Q. What was their ages? A. Two years.

Q. What were they, steers or heifers? A. Two year old steers.

Q. You say they were in good condition also? A. Yes sir.

Q. Well, were they in good condition when they were unloaded here at Kansas City? A. Yes sir.

Q. How long did you remain, you and Mr. Frost remain, here in Kansas City after May the thirtieth? A. We remained here until, I remained here until the fourteenth.

Q. Well, was Mr. Frost here all that time? A. Yes sir, Mr. Frost was here.

Q. State whether those cattle were fed and watered after they were put in the stock yards? A. They were fed the thirtieth.

Q. Thirtieth of May? A. Yes sir.

Q. Both bunches? A. Yes sir.

Q. State what became of these two bunches of cattle when they were put in the stock yards? A. Well, on the 31st they were put up on the viaducts.

Q. On the viaducts in the stock yards? A. Yes sir.

Q. That is May 31st, 1903? A. Yes sir.

210 Q. [Whay] were they put there, Mr. Newton? A. On account of high water.

Q. On account of the flood? A. Yes sir.

Q. Were these two bunches of cattle kept separated when they were put up on the viaducts? A. They were altogether on the viaduct.

Q. What time on May 31st were they put there on the viaducts? A. They were got up there by one o'clock.

Q. That was Sunday, wasn't it? A. Sunday morning, Sunday afternoon.

Q. After they were put up in the viaducts were they fed and watered? A. No sir; they were—part of them were fed Tuesday.

Q. Were they fed and watered Sunday morning? A. No sir.

Q. The same Sunday morning before they were put up in the viaducts? A. Well, I don't know whether they were or not.

Q. You don't know? A. No sir.

Q. You don't know when they were last fed in the stock yards there? A. I know they were fed—the last I know they were fed was the 30th.

Q. That is, Saturday night? A. Saturday.

Q. What time was the last feed given them that you know anything about? A. About three o'clock.

Q. You don't know whether they were fed at all or not Sunday morning? A. No, I don't.

Q. Well now, when do you know after Sunday was the first time that any of those cattle of either bunch was fed and watered? A. Well, there were a few of those fed Tuesday.

Q. What time Tuesday? A. About twelve o'clock they fed some of them.

Q. Well, you say a few of them, how many? A. Well, about 200.

Q. Now, how many cattle were there altogether in the two pens after they were mingled? [Q.] Well, I don't

211 know just how many the Minnesota & Dakota Cattle Company had.

Q. Well, do you know how many Mr. Frost had? A. Yes sir.

Q. How many? A. He had 790 head.

Q. You know that was the count of the cattle when they were shipped from Kansas? A. Yes sir.

Q. And none died on the way, did they? A. No sir.

Q. Well, do you [knwo] how many there were in the first bunch of the Minnesota & Dakota Cattle Company? A. No sir.

Q. And out of the bunches mingled together you say 200 were fed on Tuesday, that would have been the 2nd of June? A. Yes sir.

Q. That is correct. And that is the first time they were fed after they were put up in the viaducts, was it? A. First time.

Q. Was there any more than these 200 out of these bunches fed on Tuesday? A. No sir.

Q. What did you feed those 200 with and how was it that you could [ojly] feed 200 and no more? A. They fed them with hay. Reason they didn't have help enough to feed them all.

Q. How was the feed that was taken to them taken to them there? A. Taken by boat.

Q. Taken by boat? A. Yes sir.

Q. How [deed] was the water, so far as you know, in and about the stock yards under and around those viaducts? A. I should judge about 12 feet.

Q. The water at that time extended from bluff to bluff here in the West Bottoms of Kansas City, didn't it?

212 A. Yes sir.

Q. All the way from eight to fifteen and twenty feet? A. Yes sir.

Q. Somewhere along there? A. Yes sir.

Q. Well, were any of those cattle watered on Tuesday? A. No sir; there wasn't any of them watered.

Q. Were any of them fed Wednesday? A. Yes sir, part of them were fed Wednesday.

Q. How many? A. I should judge about a third of them.

Q. A third of the two bunches? A. Yes sir.

Q. Of all the cattle in the two bunches? A. Of all the cattle. There were more than two bunches up there. Mr. Stube had two trains himself.

Q. These two bunches of cattle in your train then were mixed still with other cattle than the Minnesota & Dakota Cattle, is that correct? A. Yes sir.

Q. And all four trains were mingled together, were they? A. Yes sir.

Q. Making together in all how many cattle, or about how many cattle? A. About three thousand.

Q. That is, you had about eight hundred and the Minnesoto & Dakota Cattle Company had about twelve hundred? (Corrected by Reporter; Twenty-two hundred) A. Yes sir.

Q. Now when you spoke of the two hundred that were fed on Tuesday did you mean two hundred of the three thousand? A. Yes sir.

Q. Do you know how many of the cattle of Mr. Frost and how many of the cattle of the Minnesota & Dakota Cattle Company were fed? A. No sir.

Q. Either on Tuesday or Wednesday? A. No sir, I don't know how many.

213 Q. Do you know whether any of Mr. Frost's cattle got fed either of those days? A. Well, there were a few of them I know.

Q. You only know that so many of the entire bunch were fed on each occasion? A. Yes sir.

Q. Or about so many? A. Yes sir.

Q. How many times were those that were fed on Wednesday fed that day? A. One time.

Q. Just the one time. What time on Wednesday? A. Well, they commenced about eight o'clock Wednesday morning.

Q. How did they get the feed to them that day? A. By boat.

Q. By boat the same as on Tuesday? A. Same as Tuesday.

Q. And the water was still about the same as it was the day before, was it? A. Yes sir, just about the same.

Q. Were any of those cattle watered on Wednesday? A. There was a few of them driven down to the water.

Q. Well, what do you mean when you say driven down to the water, how? A. To the end of the viaduct.

Q. These viaducts were about how far from the surface of the water? A. About how far was the water from the viaduct?

Q. No; was the viaduct above the water? A. Where the cattle were?

Q. No; where the cattle were before they went down? A. I don't understand your question.

Q. Well, how far above the surface of the water were the viaducts where the cattle stood and walked about? A. Oh well, they were about ten feet.

Q. Now, how did they get down from that ten feet so as to drink the water? A. Over at the end of the viaduct where it goes down.

214 Q. That is there is an incline there, is there? A. Incline, yes sir.

Q. And some of the cattle were driven down from the viaducts? A. Down the incline.

Q. To the water in the flood, is that it? A. Yes sir.

Q. To drink? A. Yes sir. And some of them were lost while they were trying to water them.

Q. Lost how? A. By getting into the flood.

Q. Got into the water? A. Getting into the water and mud.

Q. Well, how many were watered, how many of the three thousand were watered on Wednesday in that way? A. Well, there were about seven or eight hundred watered that day.

Q. And was that all? A. Yes sir.

Q. Who did that? A. The stock yards company.

Q. Do you know how many of the cattle died that day in the way you described? A. No sir, I do not.

Q. How did these men that got to the cattle there in the viaducts, either on Tuesday or Wednesday, get out there? A. Well, on Wednesday some of them came over on a cable, wire cable, on Tuesday and Wednesday they came over on a boat.

Q. Both days was that the only way that anybody could get to the cattle by boat? A. By boat.

Q. Now how were the cattle—what was done with them on Thursday? A. On Thursday they were, Thursday they were part of them driven down into the town, into the yards again on Thursday.

Q. Thursday, how many? A. Seems to me they were all driven down; I don't remember whether they were all driven down or not.

Q. On Thursday? A. On Thursday—what day? Let me see—

215 Q. Now, were those cattle that were first driven down into the yards, did they remain there, or were they driven back? A. No sir, driven back.

Q. Why? A. On account of the mud and water in the yards.

Q. Well, what would have been the effect of the cattle remaining in the mud and water in the bottom of the yards?

Mr. Angevine: I object to that question, as calling for the conclusion of the witness; the witness hasn't shown himself competent to give an opinion on that subject.

By the Court: I cannot see that it is material; objection sustained.

Q. State the condition fully of the yards at that time and why they were driven back? A. Well, they were so muddy that the cattle couldn't stay in them.

Q. Well, were all of the cattle that were driven down in the yards on that day driven back? A. Yes sir.

Q. What was done with the cattle that day with respect to feeding or watering them? A. Well, they were fed.

Q. How many of them? A. They were all fed at.

Q. What do you mean by "fed at"? A. Have hay; some hay put through all the viaducts.

Q. Well, was there sufficient hay for all of them? A. No, there wasn't.

Q. Well, how was there—how much more should they have had? A. Well, they didn't get more than half enough.

Q. Well, what was done with reference to watering the cattle that day? A. Well, they were taken the same as before, driven down, down the incline.

Q. How many of the whole bunch of three thousand were watered on that day? That is, on Thursday? A.
216 They were all driven down to the water.

Q. Did they drink? A. No sir, they didn't drink.

Q. Well, why? A. Because they wouldn't drink the water.

Q. Well, what was the condition of the water at that time? A. Well, it was so muddy and had such a scent that they wouldn't drink.

Q. Such a scent? A. Filthy.

Q. Water you mean, filthy odor? A. Yes sir.

Q. You say the cattle wouldn't drink? A. No, they wouldn't drink.

Q. Well, what was done with the cattle on Friday? A. On Friday they were put down into the yards again.

Q. All of them? A. Yes sir.

Q. Well, did they remain there? A. Yes sir.

Q. Were they fed and watered that day? A. Yes sir, they were fed.

Q. What was done with them with respect to watering? A. Well, they were watered; some of them were watered in the troughs.

Q. From where was the water obtained? A. From the water.

Q. From the flood waters? A. I don't know; suppose from the waterworks.

Q. You don't know where they got the water? What was the condition of the cattle when they came down from the viaducts? A. Well, they were in very bad condition.

Q. Well, in what respect was their condition bad? A. Well, they were weak and had been starved and quite a number of them had died.

Q. How many of them died? A. Well, I don't know.

Q. Well, do you know about how many of the three thousand died before they came down from the viaducts? A. Well, something near five hundred head.

Q. Do you know how many of those five hundred head belonged to Mr. Frost's cattle, or the Empire State Cattle
217 Company's and the other parties in that case and how many belonged to the Minnesota & Dakota Cattle Company? A. Up till that time?

Q. Yes? A. That had died?

Q. Yes? A. Well now, I don't know just how many had died.

Q. Well, were these cattle afterwards separated? A. Not here.

Q. Well, I mean further on? A. They were separated in Everett, South Dakota.

Q. Well, do you know how many cattle there were of Mr. Frost's bunch after that separation was made? A. About ninety-nine head—now, how many were lost?

Q. Yes? A. Ninety-nine head.

Q. Ninety-nine head. That is, he had the 797 head which you had started less ninety-nine head, is that what you mean to say? A. Yes sir.

Q. Was you there when the Minnesota & Dakota Cattle company got their cattle there? A. Yes sir.

Q. How many less did they have? A. They had something near four hundred.

Q. Something near four hundred head less? A. Less.

Q. Now, how long have you been in the cattle business and been familiar with cattle, Mr. Newton? A. About ten years.

Q. What do you say was the cause of the death of those ninety-nine head of cattle of Mr. Frost's bunch?

Defendant objects to the last question, for the reason that the witness has not shown himself competent to testify on that point and the testimony is incompetent, irrelevant and immaterial.

By the Court: Objection overruled, defendant then and there duly excepting.

218 Q. Go ahead and answer the question, what was the cause of the death of those ninety-nine cattle? A. Caused by not being fed or watered.

Q. Where? A. At Kansas City.

Q. In the viaducts of the stock yards? A. In the viaducts of the stock yards.

Q. What do you say was the cause of the death of the four hundred head of the Minnesota & Dakota Cattle Company?

Defendant objects to the last question, for the same reasons as last given above.

By the Court: Objection overruled; defendant then and there duly excepting.

A. The same.

Q. The same cause? A. Same cause.

Q. How long after the cattle were put down in the stock yards at that time did you remain in Kansas City? A. How long after?

Q. Yes? A. Well, I remained here until the 13th.

Q. Thirteenth of June? A. Of June, 13th or 14th.

Q. You remained here then about a week after the cattle were put down in the stock yards? A. Yes sir.

Q. Were the cattle still here at the time you left? A. No sir. I went out with the cattle.

Q. From where? A. From the stock yards.

Q. To where? A. To Emporia.

Q. The railroad company took the cattle out to Emporia? A. Out to Emporia, yes.

Q. What did they do with them at Emporia? A. Took them to a pasture.

Q. Out near Emporia? A. Three or four miles.

Q. The remainder of these three or four hundred head? A. Yes sir.

219 Q. They were still together, weren't separated until they got into Dakota? A. Weren't separated until they got to Everett.

Q. Now, how long did you continue to remain with them after they were taken out of the yards and taken to Emporia? A. About three weeks.

Q. You were with them all the time? A. All the time.

Q. What was done with the cattle then? A. They were loaded and shipped to Everett, South Dakota.

Q. And what time did you leave—did you go along with the cattle to South Dakota from Emporia? A. Went along.

Q. What road did they leave Emporia on? A. Left on the Santa Fe.

Q. And where were the cattle taken to from Emporia by the Santa Fe? A. They were taken to Atchison.

Q. Atchison, Kansas? A. Yes sir.

Q. Across by way of Topeka? A. I suppose so I don't know.

Q. Do you know whether you came back here to Kansas City or whether you went on? A. We didn't come to Kansas City.

Q. Went on from Emporia to Atchison direct, did they? A. Yes sir.

Q. Now, how many train loads contained the remainder of those three thousand cattle? A. How many train loads?

Q. Yes, as you started from Emporia? A. Three.

Q. Well, what was done with those cattle when you reached Atchison? You know what company took them there, what railroad company? A. Suppose it was the Burlington.

Q. Where did you go to from Atchison? A. From Atchison we went to a—to, I forget—Council Bluffs?

Judge Botsford: Don't ask him any questions; just give your own.

The Witness: We went to—well, I don't remember where to feed.

Q. Well, did you go on to Everett, South Dakota?
220 A. We went on to Everett.

Q. Now how long, Mr. Newton, were these three train loads of cattle going from Emporia to Atchison, how many hours, or about how many hours, if you know? A. Well, about forty-eight hours, I suppose.

Q. Between Emporia and Atchison? How long were these trains going from Emporia to Atchison, Kansas, after you started? A. Well, I don't remember just how long.

Q. Do you remember what time you left Emporia, what time of day it was? A. We left there in the morning about eight o'clock.

Q. What time did you reach Atchison? A. What time did we reach Atchison?

Q. Yes? A. That I don't remember.

Q. Remember whether it was the same day or not? A. It was the same day, yes.

Q. You reached Atchison the same day that you left Emporia, is that correct? A. Yes sir.

Q. How long was it before you got to Everett, South Dakota, after leaving Emporia? A. I don't remember.

Q. What time in the month did you get to Everett? A. I got there the fourteenth.

Q. Of what? A. Of July.

Q. And what day was it you left Emporia? A. Left Emporia?

Q. Yes? A. Left there the tenth.

Q. Tenth of July? A. Ninth or tenth.

Cross Examination.

By Mr. Angevine:

Q. What do you say your name is? A. Albert Newton.

Q. How old are you? A. Twenty-five.

Q. Where do you live? A. Colorado.

221 Q. What part of Colorado? A. Western part.

Q. What part? A. Mount Rose.

Q. Mount Rose? What is your business? A. Working on a ranch.

Q. What kind of a ranch? A. Stock ranch.

Q. In Mount Rose? A. No sir; it is in the country.

Q. How far from Mount Rose? A. Eight miles.

Q. What do you do on the ranch? A. Feed cattle.

Q. How many cattle have you charge of there? A. About 200 head.

Q. Who else is with you there at that place? A. I am working for L. E. Ross.

Q. You are working for him; working by the month are you? A. Yes sir.

Q. Anybody else working for him? A. No sir.

Q. How long have you been working for him? A. Been working for him about eight or nine months.

Q. Were you ever in the cattle business on your own account? A. No sir.

Q. Never owned any cattle? A. No sir, I never owned any.

Q. How long have you been a resident of Mount Rose, Colorado? A. Of Mount Rose?

Q. Yes, or that vicinity? A. About eight or nine months.

Q. Where did you live prior to that time? A. I lived in South Dakota.

Q. Where? A. West of Everett about seventy-five miles.

Q. How long did you live there? A. Lived there about nine months.

Q. What were you doing there? A. Working on a ranch.

Q. For whom? A. For the Minnesota & Dakota Cattle Company.

Q. When did you commence working for the Minnesota & Dakota Cattle Company? A. Fifteenth day of July.

Q. Of what year? A. 1903.

Q. That was the first you had ever worked for them, was it? A. Yes sir.

222 Q. Where did you commence work for them? A. Everett, South Dakota.

Q. [Has] you ever been at Everett, South Dakota, before that time? A. No sir.

Q. How did you come to be there at that time? A. Why, I went there with the cattle.

Q. With what cattle? A. The Umpire cattle.
Q. What cattle? A. Umpire.
Q. Empire cattle? A. Umpire.

Judge Botsford: He means Empire.
Mr. Angevine: Well, let the witness state.

Q. How long had you been working for the Empire Cattle Company, or the Umpire, whichever it is? A. Well, when I commenced working for them I was just going through with them.

Q. Just going through. Where had you been working prior to going through with those cattle? A. Texas.

Q. Where? A. Hereford, Texas.

Q. What were you doing there? A. Working on a ranch.

Q. For whom? A. For W. E. Hicks.

Q. W. E. Hicks near Hereford, Texas? A. About three miles east of Hereford.

Q. How long had you been working for Mr. Hicks? A. About four years.

Q. What were you doing? A. Working with cattle.

Q. Herding cattle? A. No; I wasn't herding cattle all the time.

Q. What were you doing the balance of the time? A. Part of the time working on the farm and part of the time I was riding a fence.

Q. Were any of these cattle bought from Mr. Hicks? A. No sir.

223 Q. How did you come to go from there with the cattle? A. How did I come to?

Q. Yes? A. Well, I just wanted to get up in that country and I—

Q. You were just going along with the cattle for the ride, were you? A. No; I was working with the cattle for transportation.

Q. Oh yes; you wasn't really employed then by them? A. Not at that time.

Q. Never had been at that time? A. No sir.

Q. You were helping with the cattle for your transportation through? A. Yes sir.

Q. You didn't own any cattle at the time? A. No sir.

Q. I believe you said you never had owned any? A. Said I never had been in the cattle business.

Q. You said you never had owned any cattle, didn't you? A. Yes sir.

Q. Well, that is true, is it? A. That is true.

Q. Where did you live prior to going to Hereford, Texas? A. I lived at Henrietta, Texas.

Q. How long did you live there? A. I lived there about ten years.

Q. Where did you live prior to that time? A. I lived in Grap Vine, Texas.

Q. How long did you live there? A. How long? I don't know just how long.

Q. About how long did you live there? A. I lived there about, about twelve to thirteen years.

Q. Where did you live prior to that time? A. Why, I was raised there.

Q. Oh yes. You had nothing to do with the Minnesota & Dakota Cattle Company, or their cattle, before you got to Everett, South Dakota, did you? A. No, sir.

224 Q. Knew nothing about their affairs until that time, did you? A. I didn't know anything about that, only I knew that they were going to that country and knew that the cattle was in here with these all the time during the flood.

Q. Well, the first you knew anything about them was when they were caught in the flood here in Kansas? A. No; we were together at Strong City.

Q. At Strong City, is that the first you knew anything about them? A. First I knew anything about them.

Q. First time you had ever heard of the Minnesota & Dakota Cattle Company or knew anything about their business was when you saw them at Strong City? A. First I knew anything about them? Oh, I had heard of the company, but never had anything to do with them.

Q. And knew nothing about their cattle or their business prior to that time, did you? A. No, sir, I did not.

Q. How many train loads of cattle did the Empire State Cattle Company bring from Texas at the time you have spoken of? A. How many train loads?

Q. Yes? A. Well there were two train loads of cattle shipped out of there on the 25th, out of Hereford, Texas.

Q. And you came with Mr. Frost with the second train, did you? A. Second train, yes, sir.

Q. Do you know whether the Minnesota & Dakota Cattle Company's cattle started ahead of you or behind you? Know anything about it? A. I don't know anything about it.

Q. Knew nothing about it until you saw one train of them come into Strong City? A. That is at Strong City is the first I knew anything about their cattle.

225 Q. Never heard of it, before, is that correct? A. Never heard of it before, no.

Q. Where were you at Strong City when their train of cattle came in? A. Where was I at Strong City?

Q. Yes? A. I don't know where I was.

Q. Did you see the train come in? A. No, I didn't.

Q. Did you see it before you left there to come away? A. Yes sir.

Q. Where did you first see it? A. See the train?

Q. Yes? A. First saw them loading it up.

Q. Loading where? A. At the stock yards.

Q. The Minnesota & Dakota Cattle Company's train? A. Yes, sir.

Q. You didn't know anything about it then until they went to reload, to reship? A. I knew they were in the yards.

Q. You hadn't see them? A. I had seen the cattle, but hadn't seen them put them in there.

Q. And you didn't then know whose cattle they were, did you? A. No, sir.

Q. And you don't know now only by hearsay, do you? A. Yes, I know—well, I know only just what they say, that they belonged to the Minnesota & Dakota Cattle Company. Of course, I didn't see them buy the cattle or—

Q. Who was it told you they belonged to the Minnesota & Dakota Cattle Company? A. Well, Frost and Welch.

Q. Mr. Frost was the man you were working for, was he? A. Man I was with.

Q. And that is all you know about whose cattle they were, isn't it? A. That is all I knew at that time. Mr. Welch is foreman.

Q. Foreman of whom? A. Minnesota & Dakota Cattle Company.

Q. And you say he is one of the men who told you they belonged to the Minnesota & Dakota Cattle Company? A. Yes, sir.

226 Q. And that is all you knew about it then was by hearsay, what those men told you? A. Certainly.

Mr. Angevine: The defendant moves to strike out the testimony of this witness concerning the ownership of the cattle alleged to be the property of the Minnesota & Dakota Cattle Company, for the reason that the witness has shown that his testimony on that point is hearsay.

By the Court: I cannot see it is material, it will be sustained.

Q. Had the cattle that you came with been fed from the time they left Hereford, Texas, until they arrived at Strong City? A. No sir.

Q. And you say they were first unloaded there to be fed and watered? A. At Strong City, yes, sir.

Q. Did you assist in unloading them at that time? A. No, sir, I did not.

Q. Did Mr. Frost assist in unloading them? A. No sir.

Q. How do you know he didn't? A. Well, I was right with him.

Q. You were right with him all the time, was you? A. Certainly; all the time during the unloading of the cattle.

Q. Did Mr. Frost assist in feeding them at Strong City? A. No, sir, he did not.

Q. Did you assist in feeding them there? A. No, sir.

Q. Did you assist in reloading them when they were first reloaded? A. No, sir.

Q. Were you present when they were reloaded? A. Yes, sir.

Q. Standing there where the load was being taken, were you? A. Yes sir.

Q. Was Mr. Frost present when they were being unloaded? A. Yes sir.

Q. Was he directing what cars they should be put in, or how many in each car? A. No, sir.

Q. What did he say about the reloading at that time? A. I didn't hear him say anything.

227 Q. Who was putting the cattle in the cars? A. The railroad company.

Mr. Angevine: I move to strike out the last answer of the witness, as not responsive to the question.

By the Court: Motion overruled; defendant then and there duly excepting.

Q. You may state what persons were putting the cattle in the cars? A. What persons?

Q. Yes? A. Their names?

Q. Yes, if you know? A. I don't know their names; they were employees of the railroad company.

Q. How do you know they were employees of the railroad company? A. Well, I know they were working and that is all I know.

Q. Could you tell by the looks of them whether they were employees of the railroad company? A. We could tell by where they were working.

Q. Why by where they were working? A. Well, because they were working at the stock yards.

Q. And that is why you say they were railroad employees, is it, because they were working at the stock yards? A. That is why I say they were employed by the railroad.

Q. Yes; is that all you know about their being employed by the railroad? A. That is all.

Q. How long did those cattle remain at Strong City before they were reloaded? A. You mean the second train?

Q. The first—the train that you were with? A. Well, they remained there until the next day.

Q. What time was it when they were unloaded the first time? A. They commenced unloading about eleven o'clock.

Q. At night was it? A. Yes, sir.

228 Q. And got them unloaded by about what time? A. By about one o'clock.

Q. In the morning? A. In the morning.

Q. And what time was it then that they commenced to reload them on the trains? A. They commenced to reload them—they didn't reload them the next day, but the next.

Q. The next day? A. Yes, sir.

Q. Did they commence to reload them on the day that they finished unloading them? You say they finished unloading by one o'clock in the morning. Now, did they commence to reload them at any time during that day? A. No, sir.

Q. I believe you said that somebody told you that it was on account of high water or washout on the road was it? A. On account of high water, yes.

Q. Who told you that? A. Well, I heard, of course, I heard several times about it.

Judge Botsford: He asked you from whom.

The Witness: Well, I heard from Frost and I heard it from the agent.

Judge Botsford: What agent? A. Depot agent.

Mr. Angevine: Did the depot agent tell you that the Burlington road was washed out or had high water so that they couldn't receive the cattle at that time? A. No sir.

Q. What did the agent say about it? A. He just said it was on account of high water.

Q. Did he say where the high water was? A. No.

Q. Who was he telling that to? A. Well, I don't know who he was telling.

Q. Who to? A. Well, I don't know who he told it to.

Q. Who was present when he told it? A. I was present.

Q. Who else was? A. I think Mr. Frost was present.

229 Q. Now, what was the language he used in telling you? A. I don't know just exactly the words he used.

Q. Can you tell the substance of the language used by him at that time? A. Well, he said they couldn't take the cattle on account of high water.

Q. Said who couldn't take the cattle? A. The railroad company.

Q. What railroad company couldn't take the cattle on account of the high water? A. The Santa Fe.

Q. Did he say the Santa Fe couldn't take the cattle on account of high water? A. Couldn't take the cattle.

Q. Is that the language he used, "the Santa Fe couldn't take the cattle on account of high water"? A. Couldn't take them any further.

Q. Couldn't take them any further on account of the high water. Did he say where the high water was? A. Yes sir.

Q. Did he say the Santa Fe couldn't take the cattle on account of the high water? A. Yes, sir.

Q. Is that the language he used? A. To the best of my knowledge.

Q. Didn't he say that the Burlington Road wouldn't receive the cattle on account of a washout on the Burlington Road? A. No, sir.

Q. Was that said in your presence at any time while you were at Strong City? A. No, sir; I did not hear it.

Q. You didn't hear it? A. No, sir.

Q. You knew before you left Strong City, didn't you, that the Burlington road was washed out? A. Before I left Strong City?

Q. Yes, sir. A. No, sir, I didn't.

Q. Who else besides the agent at Strong City told you, or Mr. Frost in your presence, about the high water? A. I didn't hear anyone else.

Q. The agent at Strong City is the man, and the
230 only man, that you heard tell that, is it? A. Tell that, yes.

Q. That the cattle couldn't be moved on account of high water? A. Yes, sir.

Q. And you say that was the station agent of the Santa Fe Railway at Strong City? A. Strong City.

Q. That made that statement? A. Yes, sir.

Q. And he is the only man that you heard make the statement while you were at Strong City? A. Only man that I heard make that statement, yes.

Q. That is, that the cattle couldn't be moved further on account of high water? A. Yes, sir.

Q. That is correct, is it? A. Yes, sir.

Q. Now, what other statements did you hear made by anyone while you were at Strong City in regard to the high water? A. Why, I heard several, but then, of course, I don't know who they were that made them.

Q. Well, I mean of your party? A. Oh, what other—ask the question again.

Q. I will change the question so as to make it definite: who of your party, of those with you in charge of the cattle did you hear speak of the high water while you were at Strong City? A. Well, Mr. Frost spoke of it; said that that was the report, that it was on account of high water.

Q. That was the report? That a telegram had been received by the agent at Strong City on account of high water the cattle could not go forward; was that it? A. Well, I didn't see the telegram.

Q. Well, Mr. Frost said that a telegram had been received at Strong City stating that on account of the high water the cattle could not be moved forward, did he not? A.
231 I did not see it.

Q. Didn't ask you if you saw it? A. No, I didn't hear him say so.

Q. Did you hear Mr. Frost say anything about a telegram being received to the effect that the cattle could not be moved further on account of the high water? A. I heard him say something about he had received a telegram, but I don't know just what he said.

Q. You heard Mr. Frost say that he had received a telegram concerning the high water? A. I don't know whether he said high water, or what he said.

Q. What is your best recollection as to what he said the telegram was about? A. Well, he was—he received a telegram to unload the cattle—that they had received a telegram—I don't know whether he received or who received it, but they received a telegram to unload the cattle.

Q. Did Mr. Frost send any telegrams that you know of? A. I didn't see him send any.

Q. Do you know whether he sent any while he was at Strong City? A. No, sir; I didn't see him.

Q. Did he have any conversation with the agent of the Santa Fe Railway Company at Strong City in your presence concerning the unloading or reloading of the cattle while you were at Strong City? A. No, sir.

Q. Did you hear any conversation between Mr. Frost and any agent of the Santa Fe Railway Company while you were at Strong City concerning the loading or unloading of those cattle? A. No, sir.

Q. Did you hear Mr. Frost say anything to any
232 agent of the Santa Fe Railway Company at Strong City about the loading or unloading of the cattle? A. No, sir.

Q. Did you hear Mr. Frost say anything to any agent or employees of the Santa Fe Railway Company concerning the routeing of the cattle from Strong City? A. The routeing?

Q. Yes? A. I didn't hear him say anything to the agent or anything. I knew he told me they were to go to Atchison.

Q. He told you, when did he tell you that? A. At Strong City.

Q. Before you unloaded the first time or after? A. After that—wait, he had told me before that; before we left Hereford he told me the route.

Q. While you were at Strong City, or at anytime after that, did you hear Mr. Frost say anything to anybody about what route the cattle were to take from Strong City? A. No, I didn't hear him say it to anyone except me.

The last question is here read to the witness by the Notary.

A. No, I didn't.

Q. What time was it when your train of cattle left Strong City? A. One thirty in the afternoon of the 29th.

Q. On the 29th? A. 1903.

Q. What time was it when you arrived at Emporia? A. It was something near two o'clock; I don't know just what time.

Q. How long did you stay at Emporia? A. I don't know just how long.

Q. About how long? A. About, well, I don't know just how long we stayed at Emporia.

Q. Was it a day? A. No, sir, it wasn't a day. We came on into Kansas City.

Q. Well, can't you tell about how long you stayed at
233 Emporia? A. No; it wasn't over two or three hours.

Q. Was it a half hour? A. I don't know; I don't know whether it was half an hour or not.

Q. Did you hear Mr. Frost say anything to anyone, or did you hear any one say anything to Mr. Frost, while you were at Emporia about the route the cattle were to take from Emporia? A. No, sir.

Q. What time did you arrive at Kansas City with those cattle? A. About six-thirty in the morning of the thirtieth.

Q Did you say you didn't know until you arrived in Kansas City that you were to come to Kansas City? A. That is what I say.

Q. Yes; were you asleep all night? A. No sir, not all night.

Q. You slept most of the night, did you? A. No, I didn't sleep very much.

Q. Were you out along the train with the cattle at any time during the night? A. Yes, sir.

Q. You say you were out? A. Yes, sir; they stopped a time or two, or two or three times.

Q. Did you go out along the train? A. What.

Q. Did you go out along the train of cattle when they stopped? A. Yes, sir.

Q. When at what stations? A. Well, I don't know what stations. It was after night; I don't know what stations.

Q. You know what road you came into Kansas City over? A. Came over the Santa Fe; suppose so, I guess, I don't know.

Q. You don't know, do you? A. No, I don't know what road they came over.

Q. How long had you been awake in the morning before you arrived at Kansas City? A. Well, I had been
234 awake some time.

Q. Did you assist in unloading the cattle at the stock yards? A. No, sir.

Q. Where were you when the cattle were unloaded? A. I was there at the stock yards.

Q. Did you see them unloaded? A. Yes, I saw them unloaded.

Q. You stayed there until they were unloaded? A. Yes, sir.

Q. Did Mr. Frost stay there until they were unloaded? A. Yes, sir.

Q. What conversation did you have with Mr. Frost while the cattle were being unloaded at Kansas City, or prior thereto, about unloading them? A. Well, I didn't have any.

Q. Did you hear anyone have any conversation with Mr. Frost at Kansas City about unloading those cattle? A. No, sir.

Q. Did Mr. Frost assist in any way in unloading them? A. No, sir.

Q. Did he say anything to anyone in your presence about unloading them? A. He did not.

Q. After the cattle were unloaded where did you go? A. Where did I go?

Q. Yes? A. I went over to the Transit House.

Q. How long did you stay at the Transit House? A. I stayed there over night.

Q. The Transit House is a hotel in front of the Live Stock Exchange building, which is situated in the stock yards, is it not? A. It is near the Exchange Building, yes.

Q. Is it by the side of the stock yards? A. Yes, sir.

Q. Was there any water in the streets by the Transit House at that time? A. No, sir, there wasn't.

Q. Was there any water in the stock yards when the cattle were unloaded? A. No, sir.

235 Q. You stayed at the Transit House over night, you say? A. Yes, sir.

Q. Was there any water in the stock yards or in the streets by the Transit House at any time during the 29th? A. During the 29th?

Q. Yes? A. No, sir.

Q. What time did you get up on the morning of the thirtieth? A. We arrived here on the morning of the thirtieth.

Q. Oh yes, thirtieth. And there was no water in the stock yards at any time on the thirtieth then so far as you know? A. No, sir.

Q. When did the water first come into the stock yards, if you know? A. The first I knew anything about it was on the Sunday morning, the 31st.

Q. Sunday morning, the thirty-first, was the first water you knew of up in the stock yards? A. Yes, sir.

Q. About what time in the day did the water commence to come into the stock yards on Sunday, the Thirty-first? A. Well, it was early in the morning, about, first I knew of it was about eight o'clock.

Q. Was there any water in the street in front of the Transit House at that time? A. Well, there was water there by nine or ten o'clock. I don't know just what time it was; I don't know, I couldn't say just about what time of day it was, but it was in the morning.

Q. In the forenoon? A. In the morning.

Q. Was there water in the streets in front of the Transit House when you got up that morning? A. No, sir.

Q. Now, what conversation did you have with Mr. Frost at any time on the thirtieth of May in Kansas City about moving those cattle forward? A. I didn't have any.

236 Q. What conversation did Mr. Frost have with anyone in your presence on the thirtieth of May about sending those cattle forward? A. Didn't have any in my presence.

Q. You didn't hear Mr. Frost have any conversation with anybody about sending the cattle forward on the 30th of May, 1903? A. I did not.

Q. Then so far as you know Mr. Frost had no conversation with anyone during May 30th or 31st about forwarding those cattle? A. So far as I know he did not.

Q. Those cattle you said were fed and watered on the 30th, were they? A. No, I didn't say so.

Q. What? A. Thirtieth—oh yes, they were fed and watered the 30th.

Q. By the stock yards company? A. Yes, sir.

Q. About what time on the day of the thirtieth did they finish unloading those cattle into the stock yards? A. About ten o'clock.

Q. In the forenoon? A. Yes, sir.

Q. Do you know how many times they were fed and watered on the 30th? A. One time.

Q. When was that? A. Well, they were commencing to feed them as soon as they got them in there and they finished in the afternoon.

Q. Did you hear Mr. Frost have any conversation with anybody on that day about feeding or watering those cattle? A. No, sir.

Q. Who was in charge of the other cattle, the Minnesota & Dakota Cattle Company's cattle, at Kansas City? A. Who were in charge of them?

Q. Yes? A. Well, Mr. Welch was in charge of them at Strong City.

Q. Well, do you know who was in charge of them at Kansas City after they arrived there? A. No, sir.

237 Q. Was Mr. Welch there? A. No, sir—Mr. Welch was with the train, yes.

Q. And he is the man that had charge of them at Strong City? A. Yes, sir.

Q. Did you hear Mr. Welch have any conversation with anyone at Kansas City about feeding or watering those cattle on the 30th? A. No, sir.

Q. Or on the thirty-first? A. No, sir.

Q. Or at any other time while they were at Kansas City? A. I did not.

Q. Did you hear Mr. Frost have any conversation with anyone about feeding or watering the cattle at any time while they were in Kansas City? A. I did not.

Q. Mr. Frost had charge of the Empire State Cattle Company's cattle at Kansas City, did he? A. At Strong City he did.

Q. Well, after he arrived in Kansas City he was the man in charge? A. He was with them.

Q. Well, he was a member of the corporation and he was the man who had charge of them on that trip? A. He was interested in the cattle, yes, sir.

Q. Well, he was the man you worked under, was he? A. He is the man I was with.

Q. Was he the man you worked under? A. No, I wasn't working. I was working with him for transportation.

Q. Who did you make that arrangement with to go with them for transportation? A. Mr. Frost.

Q. So far as you know he is the man who had charge of that shipment of cattle for the Empire State Cattle Company?

Judge Botsford: Plaintiffs object to the last question, for the reason that the witness has already answered that
238 Mr. Frost was with the cattle. The railroad company had charge of the cattle and the question simply calls for a conclusion, and not a statement of facts. The witness has already answered the question of fact as to what Mr. Frost was doing there by stating that he was with the cattle. We, therefore, object to the question.

By the Court: Objection overruled; plaintiffs then and there duly excepting.

Mr. Angevine: Answer the question. Who had charge of them? A. He did up until they were at Strong City.

Q. Who had charge of them after that time?

Plaintiffs object to the last question, for the reasons last above stated.

Objection overruled.

A. The Snat- Fe Railroad Company.

Q. Now your last answer, that the Santa Fe Railroad Company had charge of them, is based on the objection just made by counsel, is it? A. I suppose they had charge of them.

Q. Yes; your answer is based on the statements made by the attorneys for the Empire State Cattle Company just now, is it? A. No, sir.

Q. What is your statement based on? A. Well, the Santa Fe Railroad Company had charge of the cattle, were shipping the cattle over their line, and I suppose they had charge of them cattle after they left Strong City, but they wasn't billed to them at Kansas City at all.

Q. They weren't billed to them at Kansas City, how do you know? Did you ever see the bill of lading? A. I never see it.

Q. How do you know they were not billed to Kansas City? A. Well, I did see the contract.

Q. What contract did you see? A. Well, it was drawn up at Hereford.

Q. What contract did you see? A. What contract?
239 Q. Yes? A. The contract that was drawn up by the railroad company for shipping the cattle.

Q. By whom was that signed? A. I don't know who it was signed by.

Q. Did Mr. Frost sign it? A. It will show for itself.

Q. Answer—you just heard one of the attorneys for the plaintiff make that statement to you that it would show for itself? Answer that [quewstion]. A. Why, it will show for itself.

Q. Never mind now, answer the question that I asked you. You just heard Mr. Ball, one of the attorneys for the plaintiff, say before you made an answer that the contract would show for itself, did you? A. Yes, I heard him say it.

Q. And that is why you made that answer, is it? A. No, sir, it is not.

Q. Why did you make the answer then? A. Well, because the contract will show for it; that is why.

Q. You say you saw that contract made up at Hereford, Texas, for the shipment of those cattle? A. I didn't see it made up. I saw it after it was made up

Q. Where did you see it? A. I saw it at Hereford, Texas.

Q. In whose possession did you see it? A. In Mr. Frost; saw him take the contract.

Q. Was it signed by Mr. Frost?

Plaintiffs object to the question, because the contract itself will show how it was signed and is the best evidence of how it was signed.

By the Court: Objection sustained.

A. I suppose it was; I don't know.

Q. Now, is that the contract you spoke of that said the cattle were not to go by way of Kansas City?

Plaintiffs object to the last question, for the reason that the witness didn't say that and question assumes a
240 statement the witness never made.

By the Court: Objection overruled; plaintiffs then and there duly excepting.

A. Well, the contract said the cattle were to go by the way of Atchison.

Q. Did that contract that you saw Mr. Frost have at Hereford, Texas, say that the cattle were to go by way of Atchison? A. That is what I said.

Q. Is that true, or is it not true? A. Well, I guess it is true.

Q. You say you never saw the way bills of the cattle? A. Way bills?

Q. Yes? A. What do you mean?

Q. Did you not state a minute ago that you didn't see the way bills or bill of lading? A. I saw the contract.

Q. Answer the question through: did you see the way bills accompanying the cattle? A. I said I saw one of them, one of the contracts.

Q. That was the contract for the shipment of the cattle that you saw, wasn't it? A. Yes, sir.

Q. Is that the only written paper that you saw concerning the shipment of those cattle? A. That is the only one.

Q. Did that paper say the cattle were to go by way of Atchison? No answer.

Q. Answer the question. A. Yes, sir.

Q. It was so stated in that paper, was it? A. Yes, sir.

Q. And that is the paper that was delivered by the railroad company to Mr. Frost, was it? A. I suppose so.

Q. Well, you saw Mr. Frost get it from the agent of the railroad company, did you? A. Yes, sir.

Q. And Mr. Frost kept it and brought it with him on the trip, did he? A. I suppose he did; I don't know.

241 Q. Now, isn't it a fact that someone has told you since you knew that you were to be a witness here that the cattle were billed by way of Atchison? A. No, sir. I knew they were billed; knew they were going that way.

Q. Why did you say awhile ago that the cattle were billed by way of Atchison? A. Why?

Q. Yes? A. Because the contract said so.

Q. This contract that you have spoken of, now, isn't it fact that there isn't a word said in that contract about the lines that those cattle were to go over? A. Get the contract and see.

Q. Answer the question? A. No, it isn't a fact.

Q. The contract does specify the lines that the cattle are to go over and the destination of Atchison, does it? A. Certainly.

Q. Does that contract specify that the Santa Fe road is to deliver them to some other road? A. I suppose it does.

Q. Do you know whether it does or not? A. No, I don't know.

Q. Did you ever read it? A. I read part of it.

Q. How much of it did you read? A. I don't know how much.

Q. Did you read any but the part that said the cattle were to go by way of Atchison? A. Well, I read some other little things on it; I don't remember.

Q. How large a paper was the contract written on? A. I didn't measure it.

Q. Well, answer the question: was it a small paper or a large one? A. Well, it was tolerably large.

Q. Was it as large as a sheet of foots cap paper? A. I think it was larger.

Q. The contract was partly printed, was it? A. I suppose it was.

Q. Well, do you know whether it was or not? A.
242 Most of it was printed.

Q. How did you come to come from Colorado here as a witness? A. How did I come to?

Q. Yes? Who told you to? A. Mr. Frost.

Q. He wrote to you to come here? A. Certainly.

Q. How many times have you talked with Mr. Frost since you have been here about your testimony? A. I haven't talked with him at all.

Q. Have you talked with the attorneys for the plaintiffs about your testimony in this case? A. No, sir.

Q. Have you talked with anyone about your testimony in this case since you have been here? A. No, sir.

Q. Has anyone ever mentioned to you the question of your testifying in this case since you have been here? A. Of course, they wanted me to come up here and testify today.

Q. Has anyone talked with you about what your testimony would be before you were sworn as a witness and testified here before the Notary? A. No, sir.

Q. The only questions that have been asked you or answers made by you concerning your testimony, or what it would be, are those made here in the presence of the Notary, are they? A. Certainly.

Q. You didn't know what questions were to be asked you when you came here and were sworn as a witness, di you? A. I did not.

Q. The attorneys for the plaintiffs didn't know what your answers would be, did they? A. No, sir.

Q. You never had talked with anybody about what testimony you would give? A. No, sir.

Q. You didn't know that you were to say the cattle were to go by way of Atchison, did you? A. What?

243 Q. You didn't know when you came into this room that you were to say that the cattle were to go by way of Atchison? A. I knew they were billed that way.

Q. Did you know that you were to testify that they were to go by way of Atchison? A. Certainly.

Q. You knew that? A. I knew that.

Q. Knew you would be asked to testify to that? A. Be asked?

Q. Yes? A. I suposed I would be.

Q. You supposed you would be, why? A. Just because that was the line, that is the way they were billed.

Q. Because that was the line as you saw it in that contract that Mr. Frost has? A. Certainly.

Q. You have seen that contract since you have been here, have you? A. I have not.

Q. Never saw it but the one time? A. One time.

Q. And never saw but the one paper? A. That is all.

Q. And that was a sheet as long as a sheet of fools cap paper or longer? A. Yes, I think it was a little longer.

Q. And as wide or wider than a sheet of fools cap paper? A. Yes, probably it was.

Q. Well, that is your best judgment as to the size of that paper? A. I didn't measure it, of course; couldn't tell the exact size of it.

Q. No, but you say it was as long or longer and as wide or wider, do you not, than a sheet of fools cap paper? A. That is what I said; that is what I said to the best of my knowledge.

Q. Did you have it in your hand? A. No, I didn't; I just looked over it while there at the office at Hereford, Texas. It was lying on the desk.

Q. On the 31st of May the water came into the
244 stock pens, did it? at the stock yards in Kansas City?
A. Certainly.

Q. About what time was it when the cattle were moved up into the shutes? A. Up on the viaducts?

Q. Yes? A. Moved up there, they began to move them up there Sunday morning, the 31st.

Q. Sunday morning? A. The thirty-first.

Q. What time in the morning? A. I don't know just what time they began to move them, about ten o'clock, I suppose, nine or ten.

Q. Did you see them move the first ones up? A. See them move the first ones?

Q. Yes? A. No, I didn't.

Q. Did you see them move any of them up? A. Yes, sir, I did.

Q. What time was it when you saw them moving the cattle up? A. It was about eleven o'clock.

Q. Was there water in the street in front of the Transit House at that time? A. At eleven?

Q. Yes? A. Yes, sir.

Q. How much water was in the street? A. Well, I don't know. It was about—I don't know just how much, quite a bit.

Q. About how deep was it? A. Four or five inches maybe right in front of the Transit; maybe two or three.

Q. Where were you at that time? A. I was there.

Q. At the Transit House? A. Yes, sir.

Q. How long did you stay at the Transit House? A. Stayed there and around the yards there until about one o'clock.

Q. Of Sunday, the 31st? A. Yes, sir.

Q. Where did you go then? A. Went up into Kansas City, Missouri.

245 Q. Had you been in the stock yards at any time on that day? A. Yes, I had been around in the stoc yards some that morning.

Q. In what part of the yards? A. There near the Transit House.

Q. Did you go in the yards or in the entrance of the Stock Exchange building? A. Went in the yards.

Q. Where were the Minnesota & Dakota Cattle Company's cattle at that time? A. They were in the yards, I suppose.

Q. Well, do you know where? A. No, sir, I do not.

Q. Did you see them in the yards at all on that day? A. No, I didn't.

Q. Did you see them in the yards on the 30th after they were finished unloading? A. Certainly. [A.] I saw them feeding them there.

Q. In what part of the yard were they then placed? A. What part?

Q. Yes, sir? A. They were placed in the feed pens in the afternoon.

Q. Which way from the Live Stock Exchange were they located? A. Well, they were located—I always get turned around when I go down [down] there. I don't know east from west, but you take the right when you come out of the Exchange; they were on the right.

Q. When you came out of the Exchange they were on the right? A. Yes.

Judge Botsford: That is, of the front of the Exchange?

Q. When you came out of the Exchange Building, going towards the Transit House, the cattle, the Minnesota & Dakota Cattle Company's cattle were located on the right? A. I think so; I am not sure.

Q. You say you are not sure? A. No, I am not sure.

Q. Did you examine them at any time on the 30th? A. I did not.

Q. The fence along there as you come out from the Exchange, Stock Exchange, is about six or seven feet high, is it not, or eight feet? A. Certainly.

Q. Person cannot see over the fence walking along the sidewalk there, can they? A. No, sir.

246 Q. Did you go over the fence or upon the fence there and look at the cattle at that time, as you came out of the exchange? A. I just walked up on the fence there and saw there were some cattle in there.

Q. You are sure there were some cattle there? A. I didn't examine them or go about them.

Q. Did you know about what cattle they were that was in there? A. I suppose they were the Minnesota & Dakota Company's cattle and the Empire cattle.

Q. Well, do you know whether they were or not? A. No, I don't know.

Q. You didn't examine them for the purpose of ascertaining? A. I didn't examine them.

Q. Didn't examine them for the purpose of seeing whether they were those cattle or not? A. No, sir, I didn't.

Q. Do you know whether those cattle when unloaded were driven over the viaduct into the main part of the yards? A. Driven over the viaduct in the afternoon?

Q. Yes, when the cattle were first unloaded were they driven over the viaduct? A. No, sir.

Q. Where were you when the cattle were being unloaded? A. I was right there at the shute.

Q. Were you on the cars? A. No, I wasn't on the cars.

Q. You were at the shutes? A. Down and around the shutes; part of the time there at the yards.

Q. And as soon as they were unloaded did you go to the Transit House? A. Not just as soon, no.

Q. And that is the only time that you saw the cattle in the yards, was the one time that you spoke of when you came out of the Exchange? You saw them you think then, they were on your right as you came out? A. That the 31st?

247 Q. The 30th, that was the 30th, wasn't it? A. You said 31st awhile ago.

Q. Did I? Did you see the cattle after they were unloaded on the 30th day of May? A. Yes, sir; saw them feeding them.

Q. Did you see them after the time that you say they fed them? A. Yes, sir, I saw them.

Q. How late in the day did you last see them on the 30th? A. Well, I don't remember just what time in the day it was.

Q. About what time was it? A. I was around there all the afternoon, around the Transit House and around the yards there all the afternoon.

Q. Were there other cattle in the yards at that time, other than those of the Minnesota & Dakota Cattle Company and the Empire State Cattle Company? A. I don't know whether there was or not I suppose there was a few more. Never saw the yards without any cattle in them yet.

Q. And you didn't see the cattle at all on Sunday until you saw them driving them up on the viaducts, I believe you said? A. I said I didn't know for sure. I saw some cattle before I seen them driving them up.

Q. But I believe you said you didn't examine them so as to ascertain whether they were the Empire State Cattle Company's cattle or not? A. No, I didn't.

Q. You didn't see them at any other time on the 31st until they were driven up on the viaducts, did you? A. Saw them driving them up.

Q. And those are the only two times that you saw them, if they were those cattle? A. I suppose so—on the 31st you mean?

248 Q. Yes. But you don't know whether they were fed or watered on the 31st or not, do you? A. I do not know.

Q. Then shortly after noon you say you went up into Kansas City, Missouri? A. Yes, sir.

Q. On the 31st. When did you next go to the stock yards? A. Came down Tuesday.

Q. Didn't you come down until Tuesday? A. Tuesday.

Q. Did you go out to the stock yards on Tuesday? A. Yes, siri.

Q. Took a boat and went out? A. Yes, sir.

Q. Eh? A. Came out on a boat Tuesday.

Q. Who came with you? A. I don't know who it was, man that run the boat.

Q. Was Mr. Frost with you? A. No, sir.

Q. Was Mr. Frost up town at the same hotel you were stopping at? A. Yes, sir, he was up there at the hotel.

Q. What hotel did you stop at up there, up town? A. Stopped at the New Century.

Q. New Century? A. Ventury, or New Century, whatever it is.

Q. Do you know whether Mr. Frost went down to the stock yards on Monday? A. No, sir, he didn't go down.

Q. What time in the day was it on Tuesday that you went to the stock yards? A. Went down Tuesday about eleven o'clock.

Q. You don't know whether they fed the cattle on Monday or not? A. I know they said they didn't feed them.

Q. Who said they didn't? A. The boy that ran the boat there said there wasn't anyone over there at all.

Q. That is all you know about it then, is what the boy that ran the boat told you A. I guess I could see from there and I know they didn't feed them.

249 Q. You could see from where? A. From Kansas City, Missouri, I could see the cattle.

Q. From the Century Hotel? A. No, sir; from the Twelfth Street viaduct.

Q. Did you go up to the Twelfth Street viaduct on Monday? A. Yes, sir.

Q. What part of it? A. Why, I was right down, I was up right at the edge of it and then I was clear down by the water.

Q. At the end next to the water? A. Yes, sir; and up where, up nearest to the bank.

Q. From where could you see the cattle? A. Could see them from up the bank, up where the viaduct strikes the bank.

Q. How far is it from that place to the stock yards where those cattle were? A. I don't know.

Q. Give the best of your knowledge as to the distance? A. Well, about a quarter.

Judge Botsford:

Q. Quarter of what? A. Mile.

Q. Isn't it near a mile? A. I couldn't tell; I never measured.

Q. Is it your best judgment that it is only a quarter of a mile? A. Yes; just straight across.

Q. Aren't there tall buildings in the way so that you can't see the yards from Twelfth Street viaduct? A. You can see the viaduct.

Q. You can see the— A. From the yards.

Q. You could see it from where were? A. Yes, sir.

Q. You could see the cattle? A. Yes, sir.

Q. You could see and know that they hadn't been fed, could you? A. Well, I know they wasn't fed.

250 Q. How do you know? A. Just because I know it.

Q. Tell the Notary how you know it? A. Because I know there was nobody over there to feed them.

Q. What time was it when you first came down to the Twelfth Street Viaduct? A. [C'mae] down early Monday morning.

Q. And stayed there all day? A. No, sir, didn't stay there all day.

Q. How long did you stay? A. Stayed around an hour or so.

Q. And you say that you know that those cattle weren't fed on Monday, you swear to that, do you? A. Well, I know they wasn't fed.

Q. Now, will you explain just how you know that they weren't fed on Monday? A. Well, I know from what I

heard the men there handling the feed, the men that did the feeding. They said they wasn't over there and they said they didn't feed them.

Q. And you came here and testified under oath that they weren't fed because somebody here told you they weren't fed? (No answer)

Q. Answer the question. A. You heard what I said.

Q. Yes, and that is your reason for testifying to it, because some one told you they were not fed, is it? A. And the reason they couldn't get there on account of the water.

Q. They had boats didn't they? A. They had boats, but they had no, there was men there to run the boats, but didn't have men enough over there to feed the cattle; no way of getting the hay to the cattle.

Q. Do you know how many men they had there at the stock yards?

Judge Botsford: That is on Monday.

A. Didn't have any.

Q. They didn't have any? A. They all came out.

Q. And you were not nearer than the Twelfth Street viaduct at any time on Monday? A. Not Monday, no.

251 Q. Did you have a field glass with you when you were on the viaduct at Twelfth Street? A. No, sir; I got eyes, though.

Q. Yes, very good eyes. An ordinary man couldn't see the stock yards from where you were to see whether the cattle were being fed or not, could he? A. I suppose anybody could.

Q. Where were you on Tuesday? A. Tuesday? Why, I came over to the yards Tuesday.

Q. How did you get there? A. Over on the boat.

Q. Who came with you? A. Man that ran the boat and some of the yard men.

Q. What did you go over to the yards for? A. Just went over there just to be agoing.

Q. Just to be going, not to look at the cattle? A. I wanted to see the cattle, of course.

Q. Were the cattle fed on that day? A. They were a part of them fed.

Q. When were they fed? A. They were, they commenced to feed them about eleven o'clock, part of them.

Q. What time did you go over there on a boat on that day? A. I went over there something near eleven.

Q. Was it before they commenced to feed or after? A. They commenced to feed just after I got over there.

Q. Just after about [telven] o'clock? A. Yes, sir.

Q. Took [they] hay out in boats, did they? A. Yes, sir.

Q. How many boats were out at the stock yards when you were there? A. I don't know; I didn't count.

Q. Can't you give any more definite idea than that as to how many boats were there? A. Oh, there was three or four; I don't know how many; I didn't count the boats.

Q. Do you know how far it is from Strong City to
252 Kansas City? A. No, sir, I don't.

Q. About how far is it? A. I judge it to be about three, four hundred miles.

Q. Three, four hundred. Do you know how far it is from Strong City to Atchison? A. No, sir.

Q. Have you any idea how far it is? A. No; never been over the road.

Q. Never been over the road? A. No—yes, I was over the road too; from Emporia I went over it by the way of Atchison.

Q. Is a thousand miles from Emporia to Atchison? A. No.

Q. About how far is it? A. I guess about 150, 200 miles.

Q. When the cattle arrived at Everett were they all unloaded in one lot or pasture, or turned and mingled together? A. No, sir; they were separated; after they were unloaded there in the yards they were separated, the Minnesota & Dakota and the—

Q. (Interrupting) While they were in the yards?

Judge Botsford: Wait, he hasn't finished his answer yet. Go on.

The Witness: Minnesota & Dakota and the Empire.

Q. Were they separated while they were in the yards? A. Yes, sir.

Q. Who separated them? A. Who separated them?

Q. Yes? A. Why, I suppose the men that were working for the company.

Q. You suppose so? You don't know of your own knowledge who separated them, do you? A. Well, I wasn't acquainted with the—I just—I was a stranger there, I don't know; I guess the—

Q. (Interrupting) You didn't separate them? A. The stock yards company helped, I guess.

Q. You didn't help separate them, did you? A. No, sir.

Q. You had nothing to do with the separation? A. No.

Q. When did you next have anything to do with any
253 of those cattle A. Well, I commenced to work for the Minnesota & Dakota Cattle Company the 15th of July.

Q. How long was that after you arrived at Everett? A. That was the next day.

Q. The next day. Where were the cattle at that time? A. They were out there close to Everett.

Q. Out on the range, were they? A. Yes; just taken them across the river.

Q. And you went and assisted in driving the cattle, did you? A. Yes, sir; from there to the pasture.

Q. That is all that you had to do with those cattle after arriving at Everett was to assist? A. I mean the Minnesota & Dakota Cattle Company. I didn't have anything to do with the Empire after that.

Q. You had nothing to do with the Empire Company's cattle after they arrived at Everett? A. After they arrived at Everett.

Q. Had you anything to do with the Minnesota & Dakota Cattle Company's cattle after they had arrived at Everett and were separated and were out on the prairie? A. You see I had nothing to do with the Minnesota & Dakota Cattle Company until the 15th of July, when I commenced to work for them.

Q. And at that time the cattle had been separated and the Minnesota & Dakota Cattle Company's cattle were out on the prairie, were they? A. Yes, sir.

Q. The cattle, so far as you know, if they were ever counted, were counted as they separated them, were they? A. Yes, sir.

Q. You didn't assist in doing that? A. No, I didn't count them at all.

Q. Never did count them yourself? A. No, I never counted them myself at all.

254 Q. And all you knew about the number of cattle was what those that did the separating told you about them, was it? A. Why, I saw them separated down there and seen, and seen them counted out.

Q. You didn't have anything to do with that? A. I didn't count them out, no.

Q. And you didn't participate in separating them, did you? A. No, sir.

Q. So all you know about the numbers is what somebody told you afterwards? A. Well, I know I seen the railroad company count them into the cars. I know the number they put in the cars and all that.

Q. I am talking about the arrival of the cattle up at Everett? A. Yes sir.

Q. You knew nothing about the number there, except as other people told you about the number? A. No, I didn't count them.

196

Q. That is what I was trying to get at? You personally had nothing to do with the separation or counting of the cattle up there? A. No, sir.

Q. How was the current in the vicinity of the stock yards on Tuesday when you went out to the stock yards in a boat? A. How was the current?

Q. Yes? Was it a swift current? A. Yes, sir; pretty swift in some places.

Q. Was there much drift wood in the stream? A. Well, I didn't see very much, no.

Q. At that time was the water over the top of the stock yards' fence? A. Was it over the top of the fence?

Q. Yes, sir? A. Yes, sir.

Q. And the cattle were up in the shutes or viaducts above the top of the fence? A. Above the water.

255 Redirect Examination

By Judge Botsford:

Q. Mr. Newton did you participate in the counting of the cattle at Emporia when they were reloaded to go North? A. At Emporia?

Q. Yes, in the pasture at Emporia? A. Yes, I helped count them at Emporia.

Q. You know how many of the cattle were missing in that count? A. Oh, there were 99 head missing. 99 head missing in the cattle we were with.

Q. In the entire bunch of 3000? A. In the bunch of 3000?

Q. Yes, how many were missing? A. Well, there was about, something near over 400 head missing.

Q. I believe you have stated already that there were 500 that died? A. How is that?

Q. You have stated already in your examination in chief that there were 500 in all that died?

Defendant objects to the last question as leading.

(Question withdrawn)

A. Yes, sir.

Q. How many of the entire bunch of 300 that died and were missing? A. Well, there were over five hundred, as well as I remember, after they got through.

Q. You know how many were missing in the recount at Emporia when they were reshipped? A. I don't remember just how many were missing.

Q. Well, who participated and was present in that count? A. Mr. Frost and—

Q. (Interrupting) who was there for the Minnesota & Dakota Cattle Company, do you remember? A. Mr. Stube.

Q. Mr. Stube was there? He and Mr. Frost counted the cattle, did they? A. I think they did.

256 Q. And who counted the cattle at Everett, South Dakota? A. Mr. Frost was one of them.

Q. Well, any body else? A. Mr. Coombs.

Q. Coombs, who was Mr. Coombs? A. The Santa Fe man.

Q. Did he go along with the cattle up there? A. Yes, sir.

Q. From Emporia to Everett? A. Well, I don't know that he was with the cattle, but he was up there when the cattle were unloaded at Everett.

Q. Well, was he at Emporia about the time they left Emporia? A. He was there about the time they left Emporia, yes sir.

Q. Mr. Coombs? A. Young Mr. Coombs.

Q. What position did he hold with the Santa Fe Company? A. I don't know.

Mr. Angevine: He says this is the young man.

Q. Son of another Coombs that was here? A. Yes, sir; son of another Coombs that is employed by the Santa Fe Railroad Company.

Q. You are at the present time employed by whom, Mr. Newton? A. Well, from the time they left—

Q. (Interrupting) No, no, I say under whose employ are you now? A. At that time?

Q. At this time? A. Mr. L. E. Ross.

Q. And you desire to return to Colorado, do you, to resume your employment? A. Yes, sir.

Q. Is that the reason that you requested your deposition to be taken to-day? A. Yes sir.

Q. Could you conveniently stay until next Monday to testify as a witness? A. Well, sir, I don't think I could.

Q. You are liable to lose your place if you should stay a week or ten days? A. Yes sir.

257 Q. Is that the reason that you requested that your deposition be taken now? A. Yes, sir; I am expected back there.

It is agreed by and between the attorneys of the plaintiffs, Messrs. Botsford, Deatherage & Young for the Empire State Cattle Company, et al, plaintiffs in their suit, and Mr. R. E. Ball for the Minnesota & Dakota Cattle Company, the plaintiff in its suit, and by Mr. Angevine, who has been present and

examined as attorney of the defendant, Atchison, Topeka & Santa Fe Railroad Company, that the above and foregoing deposition given by Albert Newton may be transcribed from the foregoing shorthand notes by the undersigned notary and stenographer and filed as a deposition in said cause and that the signature of the said Albert N. Newton to the said deposition is waived, and that said deposition may be read at the trial of the said cause, or either of them, subject to all objections which counsel on either side may desire to make on the grounds of incompetency, irrelevancy or immateriality, and on such other specific objections as are already contained in said deposition.

258 Mr J. E. Hurley—sworn, testified on behalf of the plaintiffs as follows on

Direct Examination.

[Q.] By the Court: There has been a great deal of time squandered in taking such deposition as the one just read and I would suggest that we get down into the merits of this case.

It does not appear here once from the testimony, in the matter I was to rule on, I heard the deposition of this man Newton, all the testimony does not appear to have shown the necessity of the use of horses down there in Lyons County, unless there is other evidence of the necessity of horses in caring for these cattle I will have to exclude the item of horses in the account.

Plaintiffs then and there duly excepting.

By Mr Botsford:

Q. Please state your full name. A. James E. Hurley.

Q. Where do you reside? A. Topeka, Kansas.

Q. How long have you lived in Topeka, Kansas? A. The last time, since July, 1902.

Q. What is your present business or position there Mr Hurley? A. General Superintendent of the eastern division of the Atchison Topeka & Santa Fe Railway.

Q. How long have you held that position? A. Since July, 1902.

Q. Continuously? A. Continuously.

Q. You spoke of some division, please state to the court and jury briefly, what line the defendant company is embraced within your division and jurisdiction? A. The eastern terminus at Chicago, Illinois. I am in charge of territory so far west on our main line as Newton, Kansas, in-

clusive, and all tributary lines north and south of
259 Newton, Kansas, Purcell, Indian Territory, all lines from Mulvane to Wellington and from Winfield to Wellington west of the main line south to Purcell.

Q. Is Strong City, Kansas in your division. A. Yes sir.

Q. That is this side of Newton? 9. That is east of Newton.

Q. In the shipment of cattle from Texas to points north destined to [fo] to Atchison, Kansas, on your line, state whether or not there is a feeding point between on your line, between Texas and Atchison, Kansas? A. Yes sir there are a number of feeding points and they might come from Texas by way of Purcell or by way of Woodward Oklahoma; there is a feeding yard at Wellington and another at Emporia, and one at Strong City.

Q. Wellington, Emporia and Strong City all feeding points? A. Yes sir.

Q. Do you have stock yards at Atchison, Kansas? A. We have a very small yard, we do not have,—I could not tell exactly the capacity of the yards, probably three or four car loads.

Q. You had those yards in 1903, had you? A. We have feed yards since that time, I could not give you the exact facilities we have at Atchison now.

Q. Were those yards namely, Wellington, Strong City and Emporia feeding yards in 1903? A. Yes sir.

Q. Did your road in 1903 connect at Atchison with the, what is known as the St. Joe and Council Bluffs railroad? which is a part of the Burlington system? A. Yes sir.

Q. In the transit of live stock from Texas to Atch-
260 ison, Kansas, through what points does the line used by your company pass, and did pass in 1903? A. Live stock shipments from Texas, might come to us in my territory by Purcell, and by Wellington; if it was in the north part of Texas and west of our line, would probably come by way of Amarillo, Texas, Woodward Oklahoma and Wellington and then east to Emporia.

Q. In either event would they pass this feeding station Strong City and to Emporia? A. No sir in the event of going by the way of Purcell, they would pass Arkansas City stock yards in the place of the Wellington yards.

Q. In either event would they pas- Strong City to Emporia? A. In either event they would pass both Strong City and Emporia by way of Atchison.

Q. The shipment in controversy as I understand it were all from Amarillo Texas, now by which one of these feeding points, in 1903, would they usually pass in transit? A.

Wellington, Kansas, Strong City, Kansas, to Emporia, Kansas.

Q. And then from Emporia, Kansas, through what towns in going to Atchison? A. There are a number of towns through Kansas, Osage City, Burlingame, Carbondale, Topeka, Valley Falls and Nortonville.

Q. That was the line customarily used? A. Yes sir.

Q. For all trains of live stock, dead freight, passenger and everything, between Amarillo, Texas to Atchison, Kansas, in 1903, that is correct, is it? A. Yes sir.

Q. Has your company now, or has it ever had a line of road between Kansas City, Missouri, of Kansas City, Kansas, and Atchison, Kansas? A. Yes, sir, by using part
261 of the same territory I mentioned before; we have a line between Kansas City, Missouri, that runs and occupies our main line or uses it so far west of Holiday thirteen miles west of Kansas or rather to Wilder.

Q. I mean direct from Kansas City, Missouri, to Kansas City, Kansas, and to Atchison, along the Missouri river, have you? A. We are not along the Missouri river, we have a direct line so far as that is concerned, a rapid through train, between Argentine and Atchison, Kansas, and back by our own line and did at that time.

Q. That goes west by the way of Wilder? A. Holliday to Leavenworth and Junction to Hawthorne and Atchison.

Q. But the line you have described by way of Burlingame, Strong City, Emporia, Osage City, Topeka, Valley Falls and Atchison was the usual and customary route between Texas, and Atchison, for live stock and other shipments of this character? A. Yes sir.

Q. You spoke of Holliday, Kansas, I believe, which you could go to Atchison on your own line from here to Holliday? A. Yes sir.

Q. Holliday is how far west of here? A. 13 miles.

Q. On the line between here and Topeka? A. Yes and we have a line diverges from there to Emporia.

Q. That is you can go to Kansas City, from Emporia by two ways, one of what is known as the cut-off by Ottawa, and by the main line from Topeka that is correct? A. Yes sir.

Q. That was so in 1903, wasn't it? A. Yes sir.

Q. And those two lines separated at Emporia and met again at Holliday, is that correct? A. Yes sir.

Q. You have a line from Holliday north to Leavenworth?

A. Yes sir, it diverges at Wilder just west of our Topeka line.

Q. Is this the official map of your road?

262 By Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial; the map is wholly immaterial so far as the portions of it involved in this suit. The object of it is to get in a lot of lines of road which do not belong to the Santa Fe, I presume is the object.

Mr. Botsford: I don't know as you have any right to presume anything of the kind. I have not offered the map only for identification.

Mr. Angevine: We object to it as immaterial.

By the Court: I can't see its materiality.

By Mr. Botsford: I want to show the lines of road of the defendant in the state of Kansas primarily at this time.

By the Court: As far as it relates to this case, I see no objection; I can hardly see how the putting the map in the record—

Mr. Botsford: I want to confirm the other testimony it is the direct line from Amarillo, Texas, to Atchison.

Mr. Angevine: Witnesses have already testified which is the usual road.

Mr. Botsford: If we have the map to show it, the court and jury we will have the matter as to the course of these lines.

By the Court: What is the purpose of offering that.

Mr. Botsford: To show the course of the lines in the state of Kansas of the defendant company.

Mr. Ball: It shows also the different points over which these shipments were made, and get that before the jury, and the country through which the shipments had been made.

Mr. Angevine: That is wholly immaterial; there is no complaint made whatever beyond Strong City. The allegations are that the shipments were made over another line of road to Amarillo and then over the Santa Fe road,

263 and there is no complaint made of any kind beyond Strong City, it is wholly immaterial.

By Mr. Ball: There is no complaint I expect beyond Strong City; it simply gives a definite map of the route.

Mr. Botsford: And shows from Strong City to Topeka Valley Falls and Atchison, was the direct line.

Mr. Angevine: Witnesses have testified to that.

Mr. Botsford: They have testified it is the usual and customary line, but the line of the road on the map is not before the jury.

By Mr. Angevine: I suppose the court will take notice that maps printed on paper of that kind, do not purport to give the exact line of the road, they aim to make it as direct as possible, I do not see that it can elucidate any point in this case.

By Mr. Botsford: I will ask him if it is an official map?

By the Court: It is complained and contended by the plaintiff that these cattle could have been shipped by way of Topeka to Atchison; this shows they were shipped by way of Ottawa to Holliday and then to Kansas City.

I do not think it is necessary to encumber the record with this map, for any purpose, I will sustain the objection.

Plaintiffs then and there duly excepting.

By Mr. Angevine: There is one thing the court may have misapprehended or misspoken, by way of Ottawa and Holliday and Kansas City, I don't [there] there is any testimony of Holliday.

By the Court: It was Olathe instead of Holliday.

Mr. Angevine: Yes sir.

By the Court: Very well then whatever the facts
264 are, the record may show that.

Q. By Mr. Botsford: I understand you then the line from Wellington, Strong City, Osage City, Topeka, Valley Falls, and Atchison, was and is the direct route or line of transportation to Atchison? A. Yes sir.

Q. Mr. Hurley, what is the distance between Strong City, over the line of your road by way of Topeka, Valley Falls, to Atchison? A. About 132 miles.

Q. How long ordinarily does it take for a stock train of 21 or 22 cars to pass from Strong City to Atchison over that line? A. I should say about eight and half or nine hours ordinarily, and make it at times less than that, possibly at times more than that.

Q. That is about the average time? A. Yes sir, that is the average time.

Q. That was true in 1902, 1903 and 1904? A. Yes sir.

Q. I believe the orders diverting this train at Emporia to Kansas City, were by you? A. Yes sir, or by my office.

Q. By you or under your authority? A. Yes sir.

Q. I exhibit to you certain telegrams accompanying a stipulation in this cause, filed January 5th, 1905, by the clerk, in this cause, with a stipulation for reading same, and ask you to examine those telegrams or copies of telegrams annexed to that stipulation, signed by you, and those which were addressed to you, and ask you to state upon looking at them whether those telegrams or copies of telegrams an-

nexed to that stipulation, related to those two bunches of cattle in controversy in these two causes.

Mr. Angevine: I wish you would take them in pencil and number them consecutively.

265 Mr. Botsford: I don't like to have that done.

Mr. Angevine: I want to know what is going to be used.

Mr. Botsford: I am going to use them all; you have a list of all these telegrams.

Mr. Angevine: I want to know what is going to be used.

Mr. Botsford: I will offer all, every one of them.

By the Court: I think the telegrams may be read under the stipulation, if any do not relate to these cattle, the court, or the counsel will know it.

Mr. Botsford: That is what I want to get at.

By the Court: Do these telegrams relate to these cattle in controversy?

Yes sir. I can't tell whether there are more telegrams than these or not; I don't know where these copies came from.

By Mr. Botsford: I will state to the court and jury how these telegrams—

By the Court: You have a stipulation?

By Mr. Botsford: Yes sir.

By the Court: You may read them.

By Mr. Angevine: Are you going to read them in consecutive order.

Mr. Botsford: I am going to read them in the order of their dates; provided Mr. Hurd endorsed on the telegrams the hour when they were sent and received.

By the Court: Their connection will show.

By Mr. Botsford: I think I would read them in the order of their dates, taken by the dates.

By the Court: Has this stipulation with these telegrams been filed in the case?

Mr. Botsford: A. Yes sir.

Mr. Angevine: I have never been able to get them to number them.

266 Mr. Botsford: I shall object to you numbering them.

By the Court: Proceed and read the telegrams.

Mr. Botsford: I will first read the telegrams sent on the 27th, I think it was the first day.

By the Court: The telegrams show they were sent and received from Strong City?

Mr. Angevine: A good many of them sent or received at Strong City, most of them were from the general office some at Strong City, I suppose.

Mr. Botsford: Now accompanying this list of telegrams is a memorandum that indicates by agreement the positions which these people held who signed these telegrams, and which said stipulation and list are as follows:

In the United States Circuit Court for the District of Kansas
First Division.

Empire State Cattle Company, et al, Plaintiffs,
vs.
Atchison, Topeka & Santa Fe Railway Co., Defendant.

Minnesota & Dakota Cattle Company
vs.
Atchison, Topeka & Santa Fe Railway Co., Defendant.

Stipulation.

It is agreed by and between the parties to each of the above causes that on the trial of either of said causes the annexed copies of certain telegrams may be used as evidence by either party with the same effect that the original of said copies of telegrams might be used subject to all objections on the ground of incompetency, irrelevancy and immateriality.

And it is further agreed that in connection with said telegrams the memorandum preceding said copies of telegrams hereto annexed may be used by both parties as indicating the station and positions filled by the signers of said tele-
267 grams at the time they were sent respectively.

It is further agreed that Mr. A. A. Hurd, attorney and counsel of defendant in said causes shall cause to be indorsed on said copies of telegrams hereto annexed the hours when they were sent respectively.

BOTSFORD, DEATHERAGE & YOUNG,
Attys. for Empire State Cattle Company.
R. E. BALL,
Atty. for Minnesota & Dakota Cattle Co.
A. A. HURD,
Atty. for A. T. & S. F. Railway Company.

H. G. Clark, Supt. Mo. Pac. Atchison.
J. E. Hurley, Genl. Supt. A. T. & S. F. Topeka.
E. A. Austin, Train Master, A. T. & S. F. Topeka.
H. W. Sharp, Supt. A. T. & S. F., Kansas City.
C. T. McLellan, Supt. A. T. & S. F. Topeka.
W. K. Etter, Chief Clerk, to Genl. Supt. Hurley.
F. C. Fox, Supt. A. T & S. F. Newton, Kans.

E. A. Gould, Genl. Supt. Mo. Pac. Kansas City.
C. W. Cook, Asst. Gen. Freight Agent, A. T. & S. F., Topeka.
W. J. Healy, Freight Auditor, A. T. & S. F., Topeka.
A. T. Perkins, Supt. K. C. St. J. & C. B. R. R., St. Joe., Mo.
J. O'Byrne, Conductor, A. T. & S. F.
J. H. Garside, Agent A. T. & S. F., Atchison.
H. B. M.—H. B. Morse, Yardmaster, A. T. & S. F. Emporia, Kan.
L. E. M.—L. E. McClure, Trainmaster, A. T. & S. F. Newton.

Mr. Botsford: I first offer in evidence telegram from J. H. Garside, who was the agent of the Atchison Topeka &
268 Santa Fe at Atchison to E A A, which are the initials I understand of E A Austin.

Atchison, 5/26/03.

E. A. A.

Following from Burlington, "Pls. notify A T & S F. that on account of washout we cannot accept at Atchison the 20 cars cattle Evarts reported arrive Atchison 10:30 a m, and the 22 cars reported arrive Atchison about noon. Will advise later about the 3rd train". Sent message asking when probably be able to take them, have not recd. answer yet.

J. H. GARSIDE.

By the Witness: Are you asking me to identify that telegram?

Mr. Botsford: No sir, I asked you about the position.

Witness: I just want to invite your attention, it was not directed to me.

Mr. Botsford: The next is the telegram: Topeka 26th from Mr Austin to J H Garside:

J. H. G. Atchison. Topeka, 5/26/03.

The 20 cars Evarts stock reported to reach Atchison 1 a m will not now reach Atchison before 4 a m and possibly later. Will advise definitely soon as possible.

E. A. A.

Then on the same day following the telegram from E. A. Austin to J. H. Garside.

Topeka, 5/26/03.

J H G.

Will have no stock for Evarts to night. First train now reach Atchison to morrow p m, two other trains in sight. Will advise soon as possible.

E. A. A.

269 J. H. G.

Atchison. Topeka, 5/26/03.

20 cars cattle Evarts S D via Q now feeding at Strong City probably reload this p m and reach Atchison about 1 a m tomorrow. Two other trains in sight probably reach Atchison Wednesday p m.

E A A.

Topeka, Kansas, May 27th.

F. C. Fox,
Newton,

My wire this morning. You may let the stock for Evarts come forward.

J. E. HURLEY.

Topeka, Kansas, May 27th, 1903.

J. E. Hurley,
Kansas City.

Burlington now advise that they are open and can accept stock. Have arranged.

W. K. ETTER.

Kansas City, May 27th 1903.

W. K. Etter,
Topeka, Kansas.

Notice that Burlington declines to take any stock for Evart. If we did not have advice previous to the time that stock was loaded they should stand for any extra expense to us as well as any claims that may arise. So advise them. Also see that freight department understand that stock must boe be loaded for them until they advise us that line is open.

J. E. HURLEY, 8:49 A M.

Topeka, May 27th, 1903.

J E H. G. O.

7.00 a. m. We received advice from Burlington at Atchison that account of washout on their line they will not accept stock for their line at Atchison. Have train 22 cars now at Burlington for Evarts, S. D. to unload. Two other trains supposed to be feeding at Wellington and Strong City. Have wired Mid. Div. to hold until further notice.

C. T. McLELLAN.

270 Western Union D. H. 7653
G. O. May 27th, 1903.

H. Miller, Genl. Supt.
Burlington Route, St. Joe.

Just received notice from you at 7:00 a m. that you cannot accept stock at Atchison for Evarts. We have 22 cars en route now which we will be obliged to run to feeding pens. Also have two more trains en route. Will be necessary to look to you to stand extra expense and any claims that may arise on stock that was loaded previous to your advice that you could not accept. Please advise when you will be able to accept shipments.

J. E. HURLEY.

G. O. May 27th, 1903.

C. W. Cook, Bldg.
W. J. Healy, Bldg.

Burlington advise on account of washouts on their line they will not accept stock destined to points via their line at Atchison. Please see that stock is not loaded for them until they advise that their line is open.

J. E. HURLEY.

G. O. May 27th, 1903.

F. C. Fox,
Newton.

Burlington advise account washouts on their line they cannot accept stock for South Dakota. Understand you have train feeding at Strong City and one at Wellington. Please do not load them until further advised.

J. E. HURLEY.

G. O. May 27th, 1903.

J. E. Hurley,
Kansas City.

McLellan received notice at 7:00 a m. from the Q today saying that they could not accept stock at Atchison. He had 22 cars en route at Burlingame, which he returned to Emporia. We also have trains feeding at Strong City and Wellington. I have taken the matter up with Mr. Miller as per your message and will also shut off on loading.

W. K. ETTER.

271 150 S M ND
St Joe, May 27th, 1903.

J. E. Hurley
Topeka, Kansas.

Telegrams about live stock for Evarts S. D. recd. Our line is now open for business and believe you have been notified to that effect.

HENRY MILLER, 5:51 p.m.

Topeka, Kansas, May 27th 1903.

C. W. Cook, Bldg.
W. J. Healy, Bldg.

My wire this morning. Burlington now advises their line is open and can accept stock.

J. E. HURLEY.

St Joe., 5/27/03.

C. T. McLellan,
Topeka.

We are now in shape to accept South Dakota stock at Atchison. Advise when it will be delivered.

A. T. PERKINS.

Atchison, 5/27/03.

E A Austin,
Topeka.

Burlington now advise open for all business. Please give figures on the six stock trains.

J. H. GARSIDE.

Topeka, 5/27/03.

J. O'Byrne,
B-705 A.

Take your Atchison stock back to Emporia to be unloaded. The Burlington is washed out and cannot take it. Leave balance of your train at Burlingame.

E A A.

272 51/27 03 10:40 a. m.

1 train Evarts stock at Emporia.
2 trains " " at Strong City.
1 train " " at Wellington
2 trains " " to reach Wellington this p m.

6

Topeka, 5/27/03.

HBM Yd.
LE M N

Burlington cannot accept the stock account washout. Please stop loading at once and if the train out Strong City will have to unload at Emporia or return to Strong City. Joint.

E A A.

Atchison 5/27.03.

E A A 9-40 A

See following filed at St Joe before yours recd. in regard to turning stock back.

J H G.

J H G.

Acct. of washout we cannot accept stock. Suggest you take the Evarts stock to St Joe where it can be taken care of and when our line is open we will accept the stock at St Joe and take it ford.

A. T. PERKINS.

Topeka, 5/27/03.

J. H. G.

Pls. notify the Burlington that we now have six trains of Evarts stock in sight for them all told, will hold in pens until advised they can handle unless we get deversion to some other road.

E A A.

Topeka, May 27, 1903.

J. H. G.

Atchison.

5:45 Ex. J. O'Byrne with first train 22 cars Evarts stock now reach Atchison 11:00 a m. Second train 22 cars Evarts stock reloading 6:00 a m. reach Atchison about 2:00 p. m. This train now feeding at Wellington and will reload some time this a m. and will not reach Atchison before 10:00 p m. (All held now)

E A A.

273 Topeka, 5/27/03.

J H G.

Atchison.

3: A. M. Please make stock report read as follows: 22 cars Evarts stk. loaded 1 p m. 26th, reach Atchison 10:30 a m. 22 cars loaded 1 a m. 27th, reach Atchison about noon. 20 cars loaded 6 a m. 27th, reach Atchison, about 1 p m.

E A A.

Topeka, 5/27/03.

J. H. G.
Atchison.

20 cars stk Evarts S D. via Q reach Atchison about 1 p m. Cattle reloaded at Strong City 6 a m.

E A A.

Topeka, 5/27/03.

J. H. G.
Atchison—3 a m.

Please make stock report read as follows—22 cars Evarts stock loaded 1 p m. 26th reach Atchison 10:30 a m. 22 cars loaded 1 a m. 27th reach Atchison about noon, 20 cars loaded 6 a m. 27th reach Atchison about 1 p m.

E A A.

Topeka, 5/27/03.
W—C 2:50

J H G
Atchison.

20 cars stock Evarts S D via Q reach Atchison about 1 p m cattle reload at Strong City 6 a m.

E A A.

Topeka, 5/27/03 A-W-C-10-25 P.

J H G,
Atchison.

1st train of Evarts stock reloaded this p m. should reach Atchison about 4 a m, 2nd train of 20 cars reloaded this p m. should reach Atchison about 8 a m, 3rd train of 20 cars reloaded at 7 p m should reach, Atchison about 8:30. On account of high water we may be unable to handle this stock over the Atchison line, in which case it will be about 2 hours later.

E A A.

274 Topeka, 5/27/03.

J. H. G.
Atchison,

Your wire this a m regarding washout on Burlington. Will hold what stock is in yard at Wellington and Strong City for Evarts, will turn one train 22 cars back from Burlingame to Emporia to unload. Advise us promptly when we may reload this stock.

E A A.

Topeka, 5/27/03.

L E M Newton.

Burlington cannot accept the stock acct washout. Please stop loading at once and if the train out Strong City will have to unload at Emporia or return to Strong City. Joint.

E A A.

G O. Topeka, 5/28/03

H G Clark,
Atchison.

The stock goes to you on revenue basis. Is not detoured therefore cannot accept any responsibility. We loaded it on your previous acceptance and have it in transit. Will you protect at Kansas City. Answer quick.

J E HURLEY.

Topeka, Kansas, May 28th 1903.

Pink
E A Gould, Genl. Supt. Kansa. City.

We have three trains stock destined Evarts S D by Burlington from Atchison, which Burlington cannot accept account washouts. Is your line open so that you can accept them and handle to connection with C M & St. P.

J E HURLEY. sent 12:45 a m.

275 Pink-Tipeka, Kans. May 28th, 1903.
H. G. Clark, Supt.
Missouri Pacific, Atchison, Kans.

We have three train loads stock for Evarts S D. via Burlington, which latter line cannot accept account washouts. Are you in a position to accept.

J E HURLEY.

Atchison, Kansas May 28th, 1903.
11:52 a m. recd.

J E Hurley, Topeka, Kans.

This line is open. How many cars for Evarts S D. When and how many cars will you deliver at a time. Assume you will deliver at Atchison and stock to be delivered C M & St. P. at Omaha.

H G CLARK.

Topeka, Kansas May 28th 1903.

C T McLellan,
Topeka, Kans.

Let the stock for Evarts S D. go to Kansas City and deliver to Missouri Pacific.

J E HURLEY.

Topeka, Kans. May 28th, 1903.

H G Clark, Supt.
Missouri Pacific, Atchison, Kans.

We will deliver stock to you at Kansas City. Will advise you number of cars and how they will arrive later.

J E HURLEY.

Topeka, Kans. May 28th, 1903.

J E Hurley,
Kansas City.

Burlington advised at 1:00 a m. that they could not accept stock for Evarts S D. I have just received advice from Missouri Pacific that they can accept it. Our track at Valley Falls is very bad and no certainty as to how long it will be passable. Will arrange to load stock and deliver to Missouri Pacific at Kansas City.

W K ETTER.

276 Western Union DH 7653
Topeka, Kans. May 28th 1903.

H. Miller, Genl. Supt.
Burlington, St. Joe, Mo.

Understand you are again unable to accept stock account washouts. We have a number of shipments in sight for you and should be given prompt notice when you cannot accept them and as to what prospects are for accepting them. Please keep me posted.

J E HURLEY.

Topeka, Kans. May 28th 1903.

H G Clark, Supt.
Missouri Pacific,
Atchison, Kans.

We will deliver you 22 cars of stock for Sioux City and 20 cars for Evarts S D about 2:00 a m. to morrow 29th.

J E HURLEY.

Newton, Kans. May 28th 1903.

J E Hurley, G. O.

Your pink. We will let Evarts stock go to Kansas City. We have two trains 41 cars at Strong City and one crew there which be ready to start soon as they can load out, also have two trains 39 cars at Wellington and crews waiting there to protect, also will have one train with two cars horses and 18 cattle reach Wellington at 5:00 p m. destination Stair, Canada, via Atchison and K C St. J & C. B. which suppose will also have to go to Kansas City.

F C. Fox sent 3:28 p m.

Topeka, Kas. May 28th, 1903.

H G Clark, Supt.
Missouri Pacific, St Joe Mo.

In addition to the 42 cars of stock which we will deliver to you at Kansas City tinight, we have 100 cars in transit and which will reach you at Kansas City some time to morrow morning. 20 of these are destined to Stair, Canada.

J E HURLEY.

Kansas City, May 28th, 1903.
recd. 4:49 p m.

J E Hurley, G. O.

Our line north of Atchison is in bad condition account high water and recent rains, being washed out and cribbed up in a good many places, but we may manage to get through. We will endeavor to handle your three trains of stock from Kansas City or Atchison to Omaha, with the distinct understanding that you assume all responsibility for damage to your equipment and stock and to our equipment on account of any accident to which the shipment may be involved from any cause whatsoever, and to pay usual detourage charges. Please advise if you desire it handled on this basis, and where
277 you will deliver our trains and what time. Give us ample notice.

E A Gould.

Pink-Topeka, Kans., May 28th, 1903.

E. A. Gould,
Kansas City.

Cannot give you the stock under conditions referred to in your telegram. Your traffic dept. have advised our traffic dept. as to participation in rate and your Supt. at Atchison advised you could accept the stock. If you don't want to accept on this basis wire at once, as stock is now loading. Ans. quick.

J. E. Hurley.

Topeka, Kans., May 28th, 1903.

C. T. McLellan,
Topeka, Kans.

Fox advises that he has 80 cars stock for Evarts and 20 for Stair, Canada, which will load up tonight. These should be moved via Kansas City instead of Atchison and delivered to the Missouri Pacific.

J. E. Hurley.

Pink-Topeka, Kansas, May 28th, 1903.

F. C. Fox,
Newton, Kans.

Hold off on loading the Evarts stock and other routed via Burlington from Atchison. Missouri Pacific are now in bad shape and probably will not be able to accept.

J. E. Hurley, sent 5:40 p. m.
Western Union, D. H 7653.

Topeka, Kans., May 28th, 1903.

H Miller,
Genl. Supt Burlington,
St. Joe, Mo.

We have 142 cars stock for you destined Sioux City, Iowa, Evarts, S. D., and Stair, Canada. Can you not accept this at Kansas City and handle it through. Answer quick.

J. E. Hurley.

Atchison, Kansas, May 28th, 1903.

J E Hurley, G. O.

Will accept the 42 cars stock at Kansas City for Sioux City and Evarts, S. D., with the distinct understanding your line will accept all responsibility and pay any claims that may arise by reason of delay due to high water. Our line is threatened by high water, but desire to accommodate you if possible, and think will get through, but cannot accept responsibility for delays.

278 Stock will not move unless above accepted. Answer quick.

H. G. Clark, recd. 7:36 a. m.

Kansas City, May 28th, 1903.

J. E. Hurley,
Topeka, Kans.

Confirming phone, we will accept stock coming from your line here. Your wires to out Supt. Clark, Atchison, this date.

E. A. Gould; recd. 8:32 p. m.

Atchison, Kans., May 28th, 1903.

J E Hurley, G. O.

Cannot accept 100 additional cars stock at Kansas City until further advised.

H G Clark, 7.57 p. m.

Topeka, Kansas, May 28th, 1903.

H. G. Clark,
Atchison, Kans.

The stock goes to you on revenue basis, is not detoured, therefore cannot accept any responsibility. We loaded it on your previous acceptance and have it in transit. Will you protect at Kansas City? Answer.

J. E. Hurley.

Topeka, Kansas, May 28th, 1903.

C T McLellan,
Topeka, Kansas.

I have told Fox to load stock held at Strong City and Wellington, which amounts to 100 cars. K. C. St. J. & C. B. now advise us they are open and can accept it. If anything arises so they cannot accept it before it reaches Kansas City deliver to Missouri Pacific.

J. E. Hurley.

Topeka, Kans. May 29th, 1903.

F C Fox, Newton, Kans.

You may load the stock for Evarts, S. D. and Stair Canada, letting it come forward. Will handle via Kansas City.

J. E. Hurley.

279 Atchison, Kans., May 28th, 1903.

J E Hurley,
Topeka, Kansas.

Will accept the stock at Kansas City. Advise when you will deliver the 100 car lot.

H G Clark, 9:52 p. m. recd.

Topeka, Kansas, May 28th, 1903.

J. E. Hurley,
Building.

Mr. Barnes of the Burlington wires at 6:10 p. m. expects to have washout at Hamburg repaired by 3:30 p. m. today and if no further trouble can handle business over K. C. road as usual. At 7:26 p. m. he wires, yes, can handle stock for Evarts, S. D. Kansas City to Council Bluffs.

C. W. Kouns.

Topeka, Kans., May 28th, 1903.

C T McLellan, Topeka,
H W Sharp, Kansas City.

See that Missouri Pacific is kept advised as to when the 100 cars stock for them will reach Kansas City. Also see that Burlington is closely advised as to time you will deliver any stock that you may have for them.

J. E. Hurley.

Topeka, 5/28/03.

C L M

Do not know which train of stock you refer to. We had two trains leaving Wellington tonight Evarts S D which will be delivered Mo. Pac. at Kan. City. E A A.

Topeka, 5/28/03

H W S, Kansas City

Ex McNeal has 18 PV-124, 4 PV 121-20 PV 127. This the Evarts and Sioux City stock to be deld to Mo. Pac. E A A.

Topeka, 5/28/03.

280 L E M & H B M

2 p. m. We have now arranged to deliver the Evarts stock to the Mo. Pac. at Kan. City. H B M will begin at once to reload and start it soon as possible and we will take all in sight. Pls. advise quick how many cars in Emporia, how many in Strong City and Wellington.

E. A. A.

Topeka, 5/28/03.

L E M

Your message in regard to Evarts stock just received. We are now instructed to handle all this stock via K. C. and will be able to do so unless more high water prevents. Let it come. E. A. A.

Topeka, 5/28/03.

H B M Yd.

Go ahead and load Evarts stock, will advise you within hour or so in regard to Sioux City stock, have taken up with Mo. P. E. A. A.

Topeka, 5/28/03.

H. B. M.

Emporia.

Yes, load the Sioux City stock and send in same train with the Evarts stock—42 cars stock and nothing else. What time have you ordered engs for? E A A

Topeka, 5/28/03—5:52 p. m.

F C Fox, Newton.

Hold off on loading Evarts stock and other routed via Burlington from Atchison. Mo. Pac. are now in bad shape and probably will not be able to accept.

J E Hurley.

Newton, 5/28/03

C F S
W S M
E R
Fisk (Condr)

The Burlington cannot accept stock. Return to Strong City with your train from Saffordville and unload it.

L E M

281 Newton 5/28/03

C F S & Connor
Cn

The Burlington now advise cannot accept the stock. Unload what you have loaded and do not reload until further advised. Connor will report for instructions when stock unloaded.

L E M.

Topeka, 5/28/03

L E M

Burlington just advise cannot accept stock for Evarts. Pls hold all this stock until you are advised further

PV 130—21 cars E A A 1:13 a m.
PV 129—20 cars Held at Cn.

Newton, 5/28/03

D D B

Genl Supt. advises we will move stock for Evarts S D to Kans. City and deliver to Mo. Pac there.

F. C. Fox.

Topeka, 5/28.03

L E M

Referring to L E M's wire at 3 p m. please reload the entire 41 cars at Strong City for one train, as we want to handle via cut-off in one train. Joint.

E A A 4:36 a.

Atchison, Kans. May 29th, 1903.

J E Hurley, G. O.

All arrangements made to handle the 142 cars cattle. Am now advised first 42 cars delivered Burlington. Advise. Also inform me in regard to other 100 cars. When will it be delivered.

H G Clark.

Kansas City, May 29th, 1903.

J E Hurley, aTopeka
E A Austin, Topeka.

Your various wires in regard to stock for Burlington and Mo. Pac. at Kansas City are not clear. E A A advised 3:23 a m. 29th that the first two trains McNeal and Vertin, 42 and 19 cars respectively were to be delivered to Burlington. The first train, 42 cars, was delivered the Q. The 19 cars referred to feed at stock yards. Will instruct that they be given the Mo. Pac. and that following 81 cars be given Mo. Pac. After that to be delivered as routed. Please advise if my understanding is correct. Also please ad-
282 vise probable arrival time in order that we may notify connecting lines.

Joint. JE H E A A.

H W Sharp.

Topeka, Kans. May 29th 1903.

C T McLellan, Topeka.
H W Sharp, Kansas City.

My wire this morning in regard stock to be diverted to Missouri Pacific. Following are shipments: Cymbol, P. V. 129. 20 cars Evarts S D Symbol, P. V. 13021 cars Evarts S D. all reloaded at Strong City today. Symbol P. V. 142, 18 cars cattle, 2 cars horses destined Medicine Hat. Canada. Reloaded at Wellington 5:00 p m. reach Emporia at 11 p. m. Symbol P. V. L44 19 cars cattle destined Evarts S D. reloaded at Wellington this p m. and fed. Symbol 138, 20 cars destined Evarts, S. D. reloaded at Wellington this a. m. All other shipments should be delivered to Burlington. Answer if understood.

J E Hurley.

Newton, Kansas, May 28th 1903.

J E Hurley, G. O.

20 cars Evarts stock arrived Emporia 12:30 p m. 41 cars Evarts stock arrived Emporia 1:45 p m. 20 cars Medicine Hat, Canada, via Atchison, K C St. J & C B. and C M & St. P. reach Emporia about 11 K p m. and 19 cars Evarts, S D reach Emporia about 5:30 a. m. and 20 cars for Medicine Hat, Canada, via Atchison, C B & Q and C M & St. P. to feed at Wellington, not heard when it will reload, and 16 cars for Billings Mont. formerly routed via St Joe., should reach Emporia about 11 K p m. and 36 cars loading at Protection for Billings, Mont. reach Emporia some time tomorrow.

F C Fox.

Pink, 1:55 p m.

Topeka, Kans. May 29th 1903.

F C Fox,

Newton, Kans.

We will move stock for Evarts, S D to Kansas City and deliver to Missouri Pacific there. How many cars have you, where are they, and when will they load out.

J E Hurley.

Topeka, Kans. May 28th, 1903.

H G Clark, Supt, Missouri Pacific,

Atchison, Kans.

The first twenty cars stock for Evarts S. D. will reach Kansas City about 8:00 p. m. 41 cars more destined Evarts about 8:30 p m. 20 cars more destined Medicine Hat, Canada, will reach Kansas City earty tomorrow morning. 19 cars more destined Evarts S D being delayed and cannot say when they will reach you.

J E Hurley.

283 Topeka, May 29th, 1903.

C T McLellan, Topeka.

H W Sharp, Kansas City.

Understand the forty-two cars of Evarts S D and Sioux City stock was delivered to Burlington, Kansas City, this morning. This should have been delivered to Missouri Pacific as per previous arrangement. Fox has eighty cars for Evarts S D and 20 cars for Stair, Canada, which he will deliver to day at Emporia. This stock was originally routed via Burlington from Atchison. See that it is delivered to Missouri Pacific at Kansas City. If any more stock is received after this first one hundred routed via Burlington from Atchison, deliver it to Burlington at Kansas City.

Answer. J E Hurley.

P K. May 29th.

J E Hurley, G. O.

Your message even date regarding delivering of Evarts S D stock on the Burlington, Kansas City. The matter is understood.

C T McLellan.

Topeka, Kansas, May 29th 1903.

F C Fox, Newton.

See your wire 28th, referring to stock at Strong City and Wellington, amounting to 100 cars for Evarts, S D. and Stair, Canada. Keep me closely advised as to when this will reach Emporia that I may take care of routing.

J E Hurley.

Atchison, Kans. May 29th, 1903.

J E Hurley,
Topeka, Kans.

We are holding crews at Kansas City to protect stock. Am now advised you turned the 43 cars over to Burlington. Can you say if we will get the 100 cars? If not, wish to turn the crews back to Atchison. Please answer quick.

H G Clark, 9:14 a m.

Topeka, Kansas, May 29th, 1903.

H G Clark,
Supt. Missouri Pacific,
Atchison, Kans.

Your wire in regard stock. 19 cars will reach Kansas City about one thirty p. m. today. Balance of it will reach Kansas City late this evening or to-night. Cannot give you correct figures on it now, but will do so as early as possible.

J E Hurley.

284 Western Union,

Atchison, Kans. May 29th, 1903.

J E Hurley, Topeka, Kans.

The 19 cars stock on arrival at Kansas City were set to yards to be unloaded for feed and rest. Please advise quick when other 81 cars will reach Kansas City and if they will require feed and rest at that point.

H G Clark.

Topeka, Kans. May 30th, 1903.

J E Hurley, Kansas City.

The Burlington got 42 cars stock yesterday morning. The other 100 was sent to Missouri Pacific account unable to get any advice from Burlington as to what they would be able to

do. They also failed to give us prompt notice when they could not accept shipments. There is still one or two trains in sight for them, but cannot say now when it will reach Kansas City.

W K Etter.

(Mr Botsford—Continuing examination of Mr Hurley)

Q. Do you know Mr Frost. A. I do not.

Q. Never met him? A. No sir.

Q. Do you know Mr Mullen, president of the Minnesota & Dakota Cattle Company? A. I do not.

Q. You had no communication with him in making these orders and sending these telegrams, did you? A. No sir, I did not.

Q. Or with anybody representing the plaintiffs in either of these cases? A. No sir.

Q. These orders you made on your own motion, didn't you? A. Yes sir. That is right.

Q. All of which was done by you or any of your subordinates, in respect to the movement of these trains or done of your own motion? A. That is right.

Q. State on which day the tracks or track of your line from Strong City, Osage City, Topeka, Valley Falls and Atchison continued to be open for transportation of
285 trains. A. In order to give you the exact information I will have to refer to the records I have with me.

Q. I did not know but what you remembered. A. The information will be, I received from my office record, otherwise, it will not.

By the Court: Get the record. (Record produced)

Witness: Let me understand your question.

Q. State on which day the tracks or track of your line from Strong City, Osage City, Topeka, Valley Falls and Atchison continued to be open for transportation of trains, during the last week of May, 1903. A. On the eastern division the last train from Topeka to Holliday, before the track was disabled,—

Q. I did not ask for that, I asked for the line Strong City to Atchison? A. The last train over the district between Topeka, Kansas and Emporia Kansas, prior to the time of the highwater covered, was west bound passenger train leaving Topeka 2:55 p m, May 29th arriving Emporia 6:55 same date.

Q. That is going west, that is from Topeka to Emporia? A. Yes sir covering that district.

Q. The track was open from Emporia to Strong City at the same time was it? A. I will tell you about that, the last train

between Topeka Kansas and Atchison and Topeka, before the high water stopped trains moving, was train number 122, was train leaving Topeka three o'clock a m. May 29th.

Q. That was Friday May 29th? A. Yes sir.

Q. Now please give us between Emporia and Strong City? A. I don't think I have a record of the track being disabled between Strong City and Emporia, is that what you have reference to or further west.

286 Q. At any time? A. Did you have reference to further west than Strong City?

Q. No I don't care for that? A. No I don't have a record of that.

Q. Let me understand you, as far as your record shows, was train between Strong City and Emporia stopped at any time? A. No sir.

Cross-Examination.

By Mr. Angevine:

Q. Mr. Hurley, do you know why your road was closed between Atchison and Topeka, on what account, whether washed out at Valley Falls or White Clay Creek or other places? A. Our first washout occurred at bridge number five just west of Atchison; we also had trouble at Valley Falls and at Topeka.

Q. The first washout was at bridge number five you say? A. Yes sir.

Q. That is near Atchison? A. Yes sir.

Q. That bridge went out did it? A. It was disabled, part of it disabled and part of it was out.

Q. Is that between about Hawthorne Junction and Atchison? A. Yes sir.

Q. So that when that bridge went out it would also disable the line from Holliday, Ottawa Leavenworth to Atchison would it? A. Yes sir it would.

Q. So no train could go through there? A. No sir.

Q. And before your track was disabled between Topeka and Atchison, Kansas, you had been notified by the Burlington, as by the telegrams which have been read, that they could not receive freight, owing to the washouts on [there] line, were you?

287 Mr. Botsford: Plaintiffs object to that.

By the Court: I think the telegrams are the best evidence; defendant then and there duly excepting.

Q. Was it by reason of these telegrams which you received from the Burlington that you changed the routing of this stock from Atchison to Kansas City?

Mr. Botsford: Objected to by the plaintiffs; there is no telegram shown from the Burlington to Mr. Hurley.

Objection overruled; plaintiffs then and there duly excepting.

A. Yes sir.

Q. Your office in Topeka, is in the general office building is it? A. Yes sir.

Q. Where is Mr. Austin's office? A. At that time, in the local freight office building at Topeka, at the yards.

Q. At the yards, about how far from your general office building? A. It is about twelve blocks I should say.

Q. At that time where was Mr. McLellan's office. A. In the same building as Mr. Austin's.

Q. Down by the freight yards? A. Yes sir.

Q. Were you kept advised by telephone and otherwise from time to time of dispatches which they received from the Burlington in regard to the receipt and forwarding of these cattle?

Mr. Botsford: Objected to by the plaintiffs, there is not any in any part of the record to Mr. Hurley, that he had any communication with the Burlington; these telegrams show what they are.

Objection overruled, plaintiffs then and there duly excepting.

A. Yes sir.

288 Q. You knew from day to day and hour to hour of the various telegrams passing between your office and the Missouri Pacific and between your office and the Burlington road, between the Burlington road and Mr. Austin's office and between the Missouri Pacific road and Mr. Austin's office, did you? That is each department of your road kept all of their department advised of the condition of your own road and the other roads with which you were doing business, did you? A. I was informed in that way, yes sir.

Q. Did you also inform the other offices of information which you received concerning the condition of your own track and the Burlington and Missouri Pacific tracks? A. Yes sir.

Q. Was it necessary to do so in order to properly run your own trains and transport your cars for delivery to other roads was that necessary? A. Yes sir.

Q. What was the condition of the telegraphic service of the Santa Fe road during the 28th and 29th and 30th of May, 1903, was it good or was it somewhat demoralized by this condition? A. Why the telegraph service was badly crippled, and we lost telegraph poles and wires.

Q. By reason of the electric storms which occurred about that time? Or high water? A. Both it lost wires and poles, and which crossed the wires, it lost all the wires.

Q. Now about when was it that the bridge number four I believe you have spoken of near Atchison? A. No. 5.

Q. Now when was it that bridge went out or was rendered unsafe? A. Sometime the morning of the 29th of May.

Q. No trains ran over the line between Atchison
289 and Topeka after that until after the flood subsided, was there. A. By reference to my records I can give you the date.

Q. For several days? A. No sir not until several days.

Q. Until the waters went down? A. Yes sir.

Q. And you say that the condition of your track on that line at Valley Falls was also bad? A. Yes sir.

Q. Your track impaired there to such an extent as to render it unsafe for use? A. Yes sir.

Q. It was not open to run stock over it at that time? A. No sir.

Q. From early on the 29th until after the flood subsided that line of your road was out of business? A. Yes sir disabled.

Q. Were these telegrams from the Burlington road showing that their line was washed out and could not receive stock, received by your company before your line between Topeka and Atchison went out of business? A. Yes sir.

Q. How many times during the 27th and 28th and 29th of May, 1903 was your company notified by the Burlington company that owing to washouts they could not receive stock in question?

Mr. Botsford: Objected to by plaintiffs; the wire would show any such notice.

By the Court: I think the communication in writing is the best evidence.

Defendant then and there duly excepting.

Q. Mr. Angevine: Were there any other telegrams passing between the Burlington and the Santa Fe roads at that time concerning washouts than those read here in evidence?

Mr. Botsford: Objected to by the plaintiffs, unless it is confined to such telegrams as Mr. Hurley may have personal knowledge of.

290 By the Court: If he does not know he will not tell; overruled.

A. I can't tell you.

Q. You can't tell? A. No sir; I can't recall all telegrams, which I might have handled personally or through the office, than in addition to those which have been read.

Q. How many times during the progress of that flood did you start, or did your road start to load and forward those trains from Strong City and vicinity and then stop and unload on account of the information which you had from the Burlington road?

Mr. Botsford: Objected to by the plaintiffs, because it is shown that Mr. Hurley was not present at all, he could not testify and it is an unnecessary [consumtion] of time.

By the Court: As far [—] the telegrams show, the telegrams themselves are the best evidence, and the parties on the ground no more about this situation.

Q. Do you remember how many times you or your office ordered that stock loaded and then had it unloaded again on account of the washouts on the Burlington?

By Mr. Botsford: Objected to by the plaintiffs, because the wires will show how often orders were made.

By the Court: Those orders were given by telegrams?

By Mr. Botsford: Yes sir.

By the Court: Objection sustained, defendant then and there duly excepting.

Q. Was it by reason of the information which you had from the Burlington road concerning their washouts that you and your office ordered the loading and reloading and unloading of the stock at Strong City as indicated by the telegrams which have been read.

291 By Mr. Botsford: Objected to by the plaintiffs, as incompetent, irrelevant and immaterial and hearsay.

By the Court: Objection overruled; plaintiffs then and there duly excepting.

A. Yes sir.

Q. When were you advised by the Burlington road that their line was washed out and that they could not receive the stock, did you have any lines, by which you could have cared for it at Atchison, if you had taken the stock forward to Atchison? A. We did not.

Q. What was the limit or capacity of your stock yards at Atchison at that time. A. My recollection, is at that time we did not have any stock yards at Atchison.

Q. Did you at that time have any facilities for holding a train load of stock at Atchison while waiting for a connecting carrier to repair her road or for any other purpose? A. We

did not, and it is not one of our established feed yards and we did not provide facilities at that place.

Q. Did you have any other feeding station between Topeka and Atchison of the capacity to unload a train load of stock and [and] hold it and feed it and care for it at that time? A. No sir, we did not.

Q. Your nearest feed yards to Atchison, those which you have spoken of, at Emporia and Strong City, were they? A. They were, Emporia was the nearest, Strong City, is 20 miles further west than Emporia.

Q. Is the Emporia division a point for freight traffic on your road? A. It is a freight division terminal, yes sir.

Q. You have a round house there and keep engines and crews there, do you? A. Yes sir.

292 Q. Strong City is not a division point I believe, is it? A. Strong City, is a division point only from line diverging from Neva, which is west of Strong City, called our Strong City district, to Superior, Nebraska.

Q. It is the division point for Superior line is it? A. Yes sir it is the terminal point for freight and passenger trains for that line.

Q. As a matter of fact that Superior line was out of business on the 28th, 29th and 30th of May?

By Mr. Botsford: Objected to by plaintiffs as not proper cross-examination.

By Mr. Angevine: They have asked about a division of these cattle.

By the Court: Was this witness asked anything in relation to that?

By Mr. Angevine: No sir, but the reasonableness of the division, whether or not it would have been practical to send it that way or any other way; he testified he acted on his own judgment, I want to show now about the only course was open for him.

By the Court: Objection overruled; plaintiffs then and there duly excepting.

A. Strong City district was also disabled on account of the high water and washouts.

Q. That included the Superior line? A. Yes sir.

Q. When? A. The 28th, 29th and 30-, as I understood the question.

By the Court: When was it first disabled?

A. On the 28th if I recollect correctly; I can tell it exactly by reference to the records. (Looking at his records) The track was impassable after 10 p. m. May 28th.

Q. And the Superior branch diverges from the main
293 line at the first station west of Strong City, does it not?
A. Yes sir Neva.

Q. Your road has a double track through Strong City and passes that diverging point, has it not? A. Yes sir.

Q. And on east as far as Emporia has it not? A. Double track between Florence and Emporia.

Q. Now you may state whether or not both of those tracks of the main line were in use or fit for use during the 29th and 30th of May, 1903 between Strong City and that diverging point Neva or was your traffic both ways required to go over the one track? A. May I refer to my records.

Q. Certainly? A. I do not find it in my records here as I recollect it was on the 29th of May, that the east bound or south track was out of commission between Neva and Strong City.

Q. By reason of the flood was it? A. By the track being submerged.

By Mr. Botsford: What was your question.

By Mr. Angevine: I am asking as a matter of fact if one of the tracks between Neva and Strong City was not out of business at that time.

Mr. Botsford: Where is Neva;

Mr. Angevine: The point where the Superior line diverges.

Mr. Ball: What time?

Witness: On the 29th as I recollect.

Q. By Mr. Angevine: What was the condition of the line tracks at Holliday between Topeka and Kansas City where the lines diverge one to go to Leavenworth and another to
Olathe and Ottawa by the cut-off, on the 30th and 31st
294 of May and afterward until the flood subsided. A.
They were impassable on account of being submerged and having washouts at Holliday.

Q. Was there any train over your line past Holliday on the 30th and 31st of May, 1903? A. No sir.

Q. There were trains passed over your line on the 29th were there? A. You have reference at Holliday or between Holliday and Topeka.

Q. No, as far west as Holliday and from there over the cut-off? A. There was on the 29th and up to the night of the 29th.

Q. Up until the night of the 29th? A. Yes sir, I recollect about 10:30 p. m. The last train from Emporia passed over this track and through water.

Q. So that it would have been impossible for you to send that stock on the Leavenworth line at any time after the evening of the 29th would it? A. Yes sir.

Q. Did you have any yards sufficient to hold a train load of cattle on the Emporia cut-off, this side of Emporia at any place between Emporia and Kansas City? A. No sir.

Q. Did you have any place that you could have held those cattle this side of Emporia except in the cars? A. No sir.

Q. How long have you been in the railroad business? A. About 25 years.

Q. Have you been in the employ of the Santa Fe road all that time? A. Yes sir.

Q. What was your first employment for that road? A. I was a track layer at Strong City.

Q. Track layer or laborer? A. Track laborer.

Q. At Strong City? A. Yes sir.

Q. You are familiar with the track there at Strong
295 City? A. Yes sir.

Q. What other positions have you occupied. A. I have been in the train service as brakeman, station clerk, telegraph operator, station agent, covered all clerical positions in the station, station baggageman, freight handler and check clerk, and relief agent, chief clerk of the general superintendent, and after that train master; assistant superintendent, division superintendent, general superintendent on the west coast, general superintendent of the western grand division, and general superintendent of the eastern division.

Q. Which is the position which you now occupy? A. Yes sir.

Q. As general superintendent of the eastern grand division, do your duties require you to be [—] constant communication with other roads in regard to traffic between your road and other roads?

By Mr. Botsford: Objected to by the plaintiffs, as incompetent, irrelevant and immaterial, and does not tend to prove any issue on the trial.

By the Court: Objection sustained; defendant then and there duly excepting.

Q. Do you know the custom of railroads in this country in regard to shipments of stock where a line of road over which the stock is billed to go is disabled by washouts or otherwise? Do you know the custom as to the manner of handling that stock?

Objected to by the plaintiffs on the ground there is no pleading of any custom here.

Objection overruled; plaintiffs then and there duly excepting.

A. Yes sir.

296 Q. What is the custom among railroads of this country in that regard where a carrier to which you are to deliver stock notifies your road that you can not; that they cannot receive it on account of washouts or other reasons, what is the practice. A. If it is possible secure a route that will carry the stock to its destination.

Q. Is that the universal practice as far as you know? A. Yes sir.

Q. Is that what you immediately attempted to do upon being notified by the Burlington that they could not receive the stock? A. Yes sir it was my aim and intention to move, not only, the stock, but all sorts of traffic that the Atchison Topeka and Santa Fe Railway company had to their destination by using any line we could have the use of by divergence or detouring in case it was from a point on our line to a point on another line.

Q. Now in this case did you as soon as you were informed by the Burlington, that they would not receive the stock commence negotiations with the Missouri Pacific to receive it?

By Mr. Botsford: Objected to by the plaintiffs, because the negotiations were by wire.

Objection overruled, plaintiffs then and there duly excepting.

A. Yes sir.

Q. Was there any time lost more than was absolutely necessary after you were notified that the Burlington would not receive the stock before you took up the question with the Missouri Pacific, as soon as you could do so after being notified that the Burlington would not receive it? A. As soon as we could transact that kind of business.

297 Q. Is there any other direct line between Kansas City or Atchison and Council Bluffs, than the Missouri Pacific and the Burlington? A. They are the only two roads, I know of.

Q. And as the Burlington had refused the stock, the Missouri Pacific was the only road open to you then was it.

Mr. Botsford: Objected to by the plaintiffs because it has not been testified to that the Burlington refused the

stock at Kansas City, it has not been testified to by anybody. It is not true besides.

By Mr. Angevine: The telegram shows that the Burlington had refused it.

By the Court: Objection sustained. Defendant duly excepted.

Mr. Angevine: I will ask another question: Does the Burlington line from Atchison to Council Bluffs run by way of the same track that the Atchison line runs to Council Bluffs?

Q. I do not think it is necessary for the Burlington line to go into Atchison to go to Omaha; go by way of St. Joe, as well.

Q. The main line of the Kansas City, St. Joe and Council Bluffs road runs along the east side of the Missouri river from Kansas City to Council Bluffs? A. Yes sir.

Q. And Atchison is on the west side of the Missouri river? A. Yes sir.

Q. And is connected with the main line of the Council Bluffs road by a stub road three or four miles long? A. Yes sir. They have a stub above that point.

Q. That is the way Atchison connected with that road by the Burlington? A. Yes sir.

Q. So if there was a washout on the Burlington north of Atchison it would necessarily have disabled the Kansas City St. Joe and Council Bluffs line, would it not? A. If north of St. Joe, yes sir.

298 Q. By the Court: Do you know at what point the Burlington road was disabled? A. Yes sir.

By Mr. Angevine: Was that point north of St. Joe? A. Yes sir.

Q. At Hamburg, Iowa? A. Yes sir.

Q. That is a considerable distance north of St. Joe? A. Yes sir.

Q. So if they could not take the stock from Atchison to Council Bluffs they could not from Kansas City to Council Bluffs, could they? A. That is correct.

Q. Was it by reason of that fact and your knowledge of that fact that you commenced negotiations with the Missouri Pacific for them to take the stock? A. Yes sir.

Q. Now you may state whether or not you had that stock brought to Kansas City, as soon as you practically could, as soon as it was practical after you had completed your arrangements with the Missouri Pacific to take it? A. Yes sir.

Q. Was there any other course or method that you could have adopted to forward that stock other than the one you did adopt, to your knowledge?

By Mr. Botsford: Objected to by the plaintiffs as calling for a conclusion and not stating the facts.

A. It was the only and best method known to me.

Q. It was the only and best method you knew of? A. Yes sir.

Q. Now did your road have other trains of stock in transit at that time and through freight to be handled at the same time? A. Yes sir I could not tell you the volume of stock which we had detained or in transit, but I do recollect almost all of our stock yards were occupied.

Mr. Botsford: We object to this as not proper cross-examination and not pertaining to the issue in the
299 case.

Mr. Angevine: It goes directly to the question and reasonableness of the division.

By the Court: Objection overruled; plaintiff then and there duly excepting.

Q. Now had you any other stock yards in the vicinity of Kansas City where you could have held that stock? A. We did not.

Q. Were you in Kansas City during the flood? A. Yes sir.

Q. Were you here on the 29th of May? A. I was here from May 26th until June 13th or 14th, that is in the vicinity of Kansas City.

Q. The cattle in question were brought to Kansas City and most of it I believe turned into the stock yards; now I will ask you, if you know, whether that was the usual and customary method of delivering the cattle in Kansas City to connecting carrier where it is to be forwarded by the connecting carrier?

By Mr. Botsford: Objected to by the plaintiffs as incompetent, irrelevant and immaterial, and on the further ground that these cattle were not billed to Kansas City and to be there delivered at Kansas City to connecting carrier.

By the Court: These cattle were all to be delivered by the Santa Fe to some other company.

Mr. Botsford: At Atchison.

Objection overruled—plaintiffs then and there duly excepting.

A. Yes sir.

Q. Was that the usual and customary manner of delivering cattle from one carrier to another at Kansas City on May 30", 1903, and prior thereto? A. Yes sir.

Q. After cattle are delivered by a railroad to the stock yards at Kansas City for delivery to the forwarding
300 carrier, does the carrier delivering the stock to the stock yards have any control over it after it is unloaded into the stock yards?

By Mr. Ball: Objected to by the plaintiffs, for the reasons just before assigned by Mr. Botsford and for the further reason that the evidence so far shows that these cattle never left the custody or control of the Santa Fe railroad until they were taken back to Emporia and thereafter transported to—the evidence shows affirmatively the railroad company retained the cattle in their custody and control and took them to the pasture, and afterward forwarded them in July, so that any custom would not bear on this particular question.

By the Court: Read the question—question read.

By Mr. Angevine: We are still introducing testimony to show it is the universal custom—

By the Court: I will sustain the objection at this time.

Defendant then and there duly excepting.

Q. What control or custody does the carrier delivering stock to the stock yards have of it after it is delivered to the stock yards, for delivery to the next carrier?

Objected to by plaintiffs for the same reason, the stock in controversy was always in the custody as shown by the testimony, of the Santa Fe.

By Mr. Angevine: It is a question of custom when it passes from one to the other, whether he acted reasonably or not in accordance with the custom.

By Mr. Ball: Everything shows that the Santa Fe railroad retained these cattle and took them back to Emporia and afterwards forwarded them over its line to Atchison, and never parted with the control until they were turned over to the connecting carrier at Atchison, and therefore this question is incompetent, irrelevant and immaterial.

301 By the Court: Read the question—question read.

I will sustain this objection. Defendant then and there duly excepting.

Q. What is the usual custom at the Kansas City stock yards in regard to delivering cattle by one carrier to another?

By Mr. Ball: Objected to by the plaintiffs for the same reason. Objection overruled, plaintiffs then and there duly excepting.

A. Delivery in the yards is delivery to connecting carrier.
Q. Is that the universal custom at the yards there in regard to delivering cattle?

Mr. Ball: Same objection as above; objection overruled, plaintiffs then and there duly excepting.

A. Yes sir.
Q. After you delivered the cattle to the stock yards company for the connecting carrier, you had no authority or control over the cattle did you or your company?

Mr. Ball: Objected to by the plaintiffs, it assumes the cattle in controversy were delivered by the defendant company to the stock yards or delivered to connecting carrier.
Objection sustained; defendant then and there duly excepting.
By the Court: I think what the facts are in regard to these matters, I have indicated, should be given to the jury and then the jury is to determine questions of this character.

By Mr. Angevine: You may state whether or not these cattle were delivered to the stock yards for the connecting carrier?

Mr. Ball: Objected to by plaintiffs, unless Mr. Hurley was personally acquainted with and knew about delivery.

By the Court: Do you know what was done with the cattle when they reached the stock yards?
302 A. No sir, not from personal observation, only from the records.

By the Court: Objection sustained; defendant then and there duly excepting.

Q. By Mr. Angevine: After the cattle were brought to Kansas City and put in the stock yards, was there anything else which your road could have done, which you know of, or within your knowledge, or power, to protect that stock from the flood?

Mr. Ball: Objected to by the plaintiffs for the same reasons above assigned, and further, calls for the conclusion of the witness and not a statement of facts, and asserts the province of the jury, and is incompetent, irrelevant and immaterial.

By the Court: Objection sustained; defendant then and there duly excepting.

Q. By Mr. Angevine: What is the custom in receiving cattle from the stock yards at Kansas City, Missouri, can they be received by a railroad company without some authority from the person or carrier for whom they were delivered to the stock yards?

By Mr. Ball: Objected to by plaintiffs as incompetent irrelevant and immaterial.

By the Court: Objection overruled; plaintiffs then and there duly excepting.

Witness: I don't believe I fully understand the question.

Q. By Mr. Angevine: That is, is it not necessary for the carrier asking to have the cattle delivered to them to show some authority from the person for whom they are delivered?

Objected to by the plaintiffs as incompetent, irrelevant and immaterial in this case; and the evidence shows that the delivery was without consultation with or permission of the plaintiffs.

By the Court: Do you know what the custom is in
303 this respect at the yards. A. Yes sir.

By the Court: You may state.

Objection overruled; plaintiffs then and there duly excepting.

A. No sir.

Q. They cannot be received without the authority of the person for whom they were placed in the yards, can they? A. No.

Q. Now was there any water in the stock yards or in the vicinity of the stock yards in the Kansas river bottom, west bottoms, of Kansas City, Missouri, at any time during the 30th day of May, 1903? A. I was not at the stock yards.

Q. Where were you? A. I was at the Union station and at Argentine, and along our line I think as far west about as Turner station.

Q. Did you have your private car here? A. I did at the union depot.

Q. Now how near do your tracks over which you went go to the stock yards? A. At that time you want to know in 1903?

[A.] Yes sir. A. We delivered our stock over the St. Louis & San Francisco tracks by trackage [tright] contract connection, crossing St. Louis & San Francisco railroad and our line.

Q. You stated you went from the union depot to Argentine on that day? A. Yes sir.

Q. You went over your own tracks did you? A. Yes sir.

Q. How close do those tracks run to the stock yards? A. I should judge it is a quarter of a mile.

Q. You know where the stock yards are? A. Very well.

Q. They are in the river bottoms on the east side of
304 the Kaw river? A. Yes sir.

Q. And your tracks in that vicinity were also in the river bottoms east of the Kaw river? A. Yes sir.

[A.] And the union station is in the bottoms on the east side of the Kaw river? A. Yes sir.

Q. Your freight house is in the west bottoms in the same river bottoms? in what is called in Missouri, west bottoms? A. Yes sir.

Q. That is the east side of the Kaw river? A. Yes sir, east side of the Kaw river.

Q. Were you in the river bottoms there during most of the time on the 29th, 30th and 31st of May, 1903? A. Yes sir.

Q. Do you know whether or not or did you ever hear of your tracks in that vicinity being submerged prior to that time, prior to that flood.

Objected to by plaintiffs as not proper cross-examination.

Mr. Angevine: The point is to show the reasonableness of his change of routing and conduct as to the management of those cattle; that is the only purpose of it.

By the Court: That is true, but, of course, I did allow you, being no objection to go entirely into your defense; I did it quite a while.

Redirect Examination.

Q. By Mr. Ball: I believe you stated that bridge number five near Atchison, on the main line from Emporia to Atchison by way of Topeka went out on the morning of the 29th? A. Yes sir, some time I can't tell you exactly, I do not have any data with me to show, but it was on the 29th, sometime in the morning.

Q. Some time in the forenoon? A. Yes sir.

Q. You stated, I believe that the last freight train
305 went over from Topeka to Atchison, left Topeka about three o'clock in the morning of the 29th? A. Yes, that is correct.

Q. That train got through? A. Yes got through to Atchison, but I do not have my records of the time it arrived there unfortunately, it should have arrived there seven o'clock in the morning.

Q. So that the disabling of bridge number five whenever it occurred in the morning, was after the passage of that train? A. Yes sir.

Q. Did I understand you to say that the Santa Fe at that time had no stock yards at Atchison? A. That is my recollection I think I stated that in direct examination; I know we have built small yards, stock yards since, my recollection is that we used the B & M stock yards, small stock yard up to the time we built our own.

Q. No stock yards there to, take care of these cattle? A. Not that I know of I am not familiar with them there.

Q. You do not say there was not? A. No sir, that is possible there might be and I not know it; not on our line.

Q. I understand the B & M there is part of the Burlington system? A. Yes sir, it is possible they might have them.

Q. So that, you did not fail to forward these trains to Atchison by reason of any apprehension that there was no pens there that you could put these cattle in? A. Yes sir, I did not know of any of ours we could have fed them in, we did know we could take care of them where they were.

Q. You knew you could take care of them where they were? A. Yes sir.

Q. At Kansas City? A. That is before we forwarded them to Strong City and Emporia.

Q. Why didn't you keep them at Strong City? A. We found an outlet for them by way of Kansas City.

306 Q. Did you find an outlet led by way of Kansas City. A. We had advices of an outlet so far as I know, we found it we made the delivery.

Q. The outlet did not let them out? A. I am advised since it did not.

Q. How did you bring those cattle into Kansas City? A. Brought them in by the Emporia district.

Q. By way of the cutoff from Olathe? A. Yes sir.

Q. Why didn't you bring them along the main line of the Kaw valley.

By Mr Angevine: Objected to by defendant as incompetent, irrelevant and immaterial and not proper re-examination.

By the Court: I do not think it is material why they did not bring them that way.

By Mr Ball: I want to show that the flood was all up over there and they knew they were running into it and had to go around the flood to get in around it.

By the Court: Go ahead.

A. As our stock is handled, not by Topeka when it is destined to Kansas City, but is handled by what we call our second district or cut-off on account of the [loaw] grade of the line and shorter haulage, and where we do not have passenger trains in large numbers to delay them.

Q. That was submerged was it not down the Kaw valley. A. What time?

Q. 28th and 29th? A. It was submerged on the Kaw valley between Topeka and Holliday, but we ran trains by the cut-off until the night of the 29th through Leavenworth.

Q. Didn't you have some of those trains turned back at Holliday and go back by Olathe on the other track where it struck here, before you could get them into Kansas
307 City? A. Not on the 29th that I could recollect of.

Q. Did you on the 28th? A. Not that I recollect of.

Q. Was there anything of that kind happened in this shipment where you had to back back down there? A. Yes sir that is a fact after we could not get in by our own road.

Q. After you could not get in by your own road? A. Yes sir.

Q. The reason you could not get in, was that the Kaw river was then so high, what time was that? A. I think on the 30th.

Q. That was on the 30th? A. Yes sir we ran trains by our line up until 10:30 p m. the night of the 29th through Holliday and Argentine on our own road.

Q. Is it not true part of these cattle which arrived at Kansas City, some of them on Friday evening the 29th about 6:30 and the remainder of them on the morning of the 30th about from six to seven o'clock, is not that true, some of these cattle of these trains were sent back because they could not get through on your line on account of the flood by Olathe, and came around the other way? A. I do not recollect these cattle and I do not recollect of any of them being turned back before 10 p m. of the 29th; it is possible it might have been done, but I do not recollect it until the morning of the 30th.

Q. You had ample pens at Strong City, did you not? A. Well, we have enlarged the pens at Strong City since, they were ample for what we had at that time.

Q. They were ample for this bunch of cattle when they were there? A. Yes sir.

Q. That was a safe place? A. Yes sir.

Q. There was not any danger there of being
308 drowned there by overflow or anything of that kind?
A. I did not anticipate such danger.

Q. Was there any as a matter of fact? A. Over on the creek it is possible for it to be submerged.

Q. Has it ever been submerged? A. There has been water through our stock yards since.

Q. Since 1903? A. Yes sir.

Q. Was there any in 1903? A. Not that I know of; it was not.

Q. It was not to such a depth as to imperil this stock if it had been there? A. No sir if there was I did not know it.

Q. Now after you saw the advice of these telegrams about the Burlington saying there was a washout on the Burlington north of St. Joe, you were advised before these cattle ever were sent in here to Kansas City, that the Burlington was all right and ready to take the cattle was you not? A. I think the telegrams show that, there were a number of telegrams I can't recollect all of them.

Q. You stated in answer to Judge Angevine's question I believe, that you knew where the Burlington was washed out north of St. Joe, that was a mere matter of information? A. Yes sure.

Q. No personal knowledge? A. No sir, not of the washout whatever.

Q. You do not know the time when it occurred or when it was remedied? A. I know only in regard to their washout as we were advised by them.

Q. Then the information and advice of that fact is what is contained in this telegram which was received from your man at Atchison repeating the wire which he had received from the Burlington man at St. Joe, is it not? A. I would not say that is the only information, I think perhaps
309 there may have been other telegrams.

Q. If you had any other telegrams to that effect at any other time and date, your office files would contain them? A. Yes sir, they should contain them.

Q. You aimed to give to the counsel of the road all of the wires pertaining to the movement of this stock, did you not? A. I did not know that the counsel of our road had gotten those telegrams; I don't know yet how they got them as far as I am concerned, they did not ask me.

Q. As far as you were personally concerned? A. Yes sir.

Q. You do not know whether there was any other advice except as contained in those telegrams which were read? A. I could not recite the language of some of the telegrams; but my memory is that we did have more telegrams; I think I know of more.

Q. If you do where are they? A. They must be in my office.

Q. Did you look for them? A. I have not looked for them; I have not been told I needed them or any telegrams in this case.

Q. You don't mean to say you left the file of telegrams furnished counsel incomplete? A. I mean to tell you I do not know how counsel got those telegrams as far as I am concerned, they never got them from me personally and I do not know it.

Q. You don't know where they did get them? A. No sir.

Q. And in any selection, which ones would go in and which ones would not go? A. I could not tell you as long as I did not furnish them.

Q. You have not since been asked to produce any
310 additional or other telegrams than this batch we have had here? A. At Topeka, when yourself and Judge Botsford, and Mr. Hurd were questioning me, it was agreed I believe, certain excepted telegrams would be sent to show the hour and minute of the transmission of these telegrams, I have not heard anything about it personally since; it is possible that our counsel may have gone to my office for that information, but personally I don't know anything about it, he has not called on me for it.

Q. You spoke about the Superior line being disabled—Referring to your last answer, do you not recollect that this transcript of this bunch of telegrams we have read here to-day was left there at Mr. Hurd's office for the purpose of having those hours or minutes put on by you? or some of your office force?

A. Really, I have not any recollection whether they were left or not, I recollect that was decided you would leave them with me.

Q. At any rate they were not sent to your office as far as you know for that purpose? A. As far as I know, I do not know.

Q. You spoke about the Superior line being disabled, where was it disabled; near the station just the other side of Strong City? A. May I refer to my record?

Q. Yes—I believe you stated it was afte- 10 p m. of May 28th? A. That is my recollection.

Q. Where was that disabled? At various places between Abilene and Neva? A. Yes sir, first station west of Strong City.

Q. Between Abilene and Neva? A. Yes sir.

311 Q. How long did it remain in that way? A. I was going to continue; also at other points, but the last train passing over this district was number 338 freight train

left Abilene 5:10 p m. and passed Enterprise 5:50 May 28th. That is further north.

Q. That was the last train [untul] when? A. The next train left Abilene, a passenger train 306, 5:40 p m. June 10th.

Q. So that between ten o'clock p m May 28th, and June 10th, there was no traffic over that line between Neva and Abilene? A. No sir.

Recross-Examination.

Q. By Mr. Angevine: In regard to the flood conditions at Holliday, your tracks and station at Holliday are quite low ground are they not? A. Yes sir.

Q. They are frequently flooded in there when your yards in Kansas City are not, are they not. A. Yes sir.

Q. That has occurred ever since you have been familiar with the road has it not? A. Yes sir.

Q. And never flooded in your yards in Kansas City, Missouri, before the flood of 1903, has there? A. Not that I know of.

Q. Never heard of one? A. No sir.

Q. Nor in the stock yards? A. No sir.

Q. Now in regard to the stock yards at Strong City, they are built in the river bottoms of the Cottonwood river, are they not? A. On a tributary of Fox creek as I recollect it.

Q. Coming in from the north? A. Yes sir.

Q. And is not that lower ground comparatively
312 than the ground where the stock yards at Kansas City, Missouri are built? A. I could not tell you.

Q. More subject to overflow? A. I could not tell you as to that as they had not been overflowed to my knowledge, and neither the Kansas City stock yards, overflowed to my knowledge.

Q. You say your stock yards at Strong City have never been overflowed prior to that time? A. Not to my knowledge.

Q. And neither at the stock yards at Kansas City? A. No sir.

Q. You had no reason to suppose it would be overflowed? A. I had no idea they ever would be.

Q. Did you have any idea at any time on the 30th day of May, 1903, that the flood would rise to the stock yards at Kansas City? A. No sir I did not.

Q. Did you have any information which would indicate to you that the flood would rise to the stock yards at that time? A. I did not; I thought we were in better shape in Kansas City and for that reason I went to Argentine and

took our engines and coaches to what I took to be high ground just opposite the stock yards at Kansas City, Missouri, yard.

Q. What happened to them there? A. They were eventually flooded and had a washout opposite the stock yards and lost some coaches and engines in there, four engines, pullman car and some coaches.

Q. Right in the middle of your yard there? A. Yes sir hole washed out.

Q. How deep a hole? A. 220 feet long and about 38 feet deep and about 110 feet wide.

Q. What happened to your California limited train
313 standing at the union station at that time?

Objected to by the plaintiffs as not recross-examination.

Objection overruled, plaintiffs then and there duly excepting.

A. It was submerged on the tracks of the union station.

Q. Now was the locomotive which was detached from that train while it was standing there waiting to go out, and sent it up to be coaled and arranged for the purpose of taking that train out? A. Yes sir the train arrived here from the north, the east end the engine was detached from the train to run to the south end of our yard, which is opposite the Kansas City stock yards to be coaled; it never got back.

Q. It never got back, the flood came on so rapidly it never got back, and you never got that train out of there? A. No sir we got the people out and I think the baggage and the mail out of the car.

Q. Can you state what the rise of the river was at Kansas City from midnight on the night of the 30th until 12 o'clock of the night of the 31st of May; that night.

Objected to by plaintiffs as not proper cross-examination.

Objection sustained—defendant then and there duly excepting.

Redirect Examination.

By Mr. Ball: You say that Holliday, up the river is lower than the land down here at the stock yards? A. Yes sir.

Q. Is low ground? A. Yes sir.

Q. Does the Kaw run up stream coming this way? A. That don't always mean that place would be higher; it is rather up stream, there may be a depression at that
314 place; on account of the depression in the ground there Holliday is in a hole.

Q. You say Holliday is lower above the river, than the stock yards? A. The best way to submit that would be the profile of our line to show the elevation, I know the water submerges our track earlier at Holliday than at points this side, and for that matter it submerges our tracks, just east of Rex mill, than it does at Argentine, further up the river.

Adjourned to January 19th, 10 o'clock.

January 19th, 1905, resumed.

D. D. Denham, sworn on behalf of plaintiffs testified as follows, on

Direct Examination.

Q. By Mr. Ball: You are a stenographer in my office? A. Yes sir.

Q. Were in the year 1903? A. Yes sir.

Q. Did you at my request and of the plaintiff the Minnesota and Dakota Cattle Company, serve that paper at any time, a paper of which that is a copy? A. Yes sir, I did.

Q. On whom did you serve it?

Mr. Angevine: Objected to by defendant as calling for a conclusion of the witness as to the service.

By Mr. Ball: Who he gave it to.

By the Court: Very well.

A. I served it on Mr. Eli Titus.

Q. Where? A. At the stock yards exchange.

Q. Kansas City stock yards exchange? A. Yes sir.

Q. In what office? A. In the office of the Atchison, Topeka and Santa Fe.

Q. On what date? A. On the 31st of August 1903.

(Plaintiffs exhibit number 7.)

Q. Did you also furnish him at the same time copies of the papers of which those are copies? A. Yes sir, I did.

(Plaintiff's exhibit 8 and 9.)

Q. On this copy which you have identified were these marks under amount on there file marks? A. No sir, not at the time I served it.

Mr. Ball: We will offer number 7 in evidence.

Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial and not tending to prove any issue in the case.

By the Court: For what purpose is the offer made.

By Mr. Ball: For the purpose of showing that he served on Mr. Titus the general live stock agent of the Santa Fe railroad, account of the damages at that time.

By the Court: In pursuance of the contract?

By Mr. Ball: Yes sir.

By the Court: Objection overruled, defendant then and there duly excepting.

Mr. Ball: We will not read them at this time.

(Which said exhibits are in words and figures as follows, to-wit:

316 EXHIBIT A.

The Atchison, Topeka & Santa Fe Railway Company to the Minnesota and Dakota Cattle Company, Dr.

To expenses and damages as follows, resulting from the taking and unloading by said Railway company of 2294 head of two year old steers, belonging to the Minnesota and Dakota Cattle Company, at Kansas City, Missouri, stock yards, on May 29 and 30, 1903, contrary to the routing provisions of the contract for the transportation of said cattle entered into between said railway company and said Minnesota and Dakota Cattle Company, to-wit:

To 465 cattle lost to us at $22.00 per head	$10,230.00
To damages on 1820 head of cattle at $10.00 per head	18,290.00
To freight on 8 cars of cattle which were required since we could load only 35 head to the car instead of 39, on account of their weak condition at $111.00 per car	888.00
To expenses of Charles Stuebe as per itemized bill assisting in caring for said cattle	265.73
To personal expenses of M. Mullen as per itemized bill assisting in caring for said cattle	423.14
Time lost by L. B. Elliott and six men going to Evarts to get these cattle in May and June, 22 days, as per itemized statement, making in all 154 days time at $1.75 per day	269.50
Use of 30 horses for 22 days at 25 cents per day	165.00
Total	$30,521.37

The A. T. & S. F. Ry. Co.
Claim Department
Aug. 31, 1903.
Asst. Gen. Live Stock Agt.
Kansas City, Mo.

Indorsed: (From 1863 A Standard) Santa Fe Live Stock Department. Claims Division. Loss and Damage. Claim No. 2050. Claimant Minn. & Dak. C. Co. Amount, $30,-521.37. Loss and Damage.

317 The Minnesota & Dakota Cattle Co.,
To Charles Stube, Dr.

To my personal expense in Kansas City, traveling, hotel bills &c. while caring for and looking after cattle during and after the Kansas City floods.

Hotel bill in Kansas City	$ 48.60
Railroad fare Emporia to Atchison	3.35
Atchison to Council Bluffs	4.50
Council Bluffs to St James	8.20
St James to New Ulm,	1.83
Meals while on the road	2.50
July the 6th, R. R. fare, New Ulm to Kansas City,	13.40
Berth in Sleeper	2.00
Hotel in Kansas City	3.40
Dinner at Emporia	40
For board for Cleveland & Jack Clanton & horse feed	65.55
For telegrams	2.00
22 days time in caring for cattle at $5.00 per day	110.00
Total	$265.73

318 The Minnesota & Dakota Cattle Co.,
To M. Mullen Dr.

Expense one extra trip to Kansas City and return, June 4th to 15th	$ 68.00
Expense to Kansas City and return July 6th to 13th	41.47
For 17 days time on two extra trips at $5.00 per day.	85.00
Time of R. Cleveland one month and 10 days	40.00
" " Jack Clanton " " " "	40.00
Board for those men each 40 days $40.00	80.00
Time and board of Wm Welch Range foreman	46.00
R. R. fare for Welch Kansas City to Pierre, S. Dak.	17.67
Meals for Welch on the road	2.00
For telegraphing	3.00
Total	$423.14

319 Mr Ball: We offer the deposition of Nova C. Douthitt in evidence.

By the Court: Does this record show what relation Mr Titus sustains to this railroad company.

Mr. Ball: I am not sure that the evidence does at this time, but Mr Angevine in his opening statement said he was the general live stock agent of the railroad company at Kansas City; that will be proven no doubt about that.

Mr. Angevine: I don't think so.

By the Court: It might have some effect on the admission of this testimony.

Mr. Ball: It will be admitted that Mr. Titus was the general live stock agent.

Mr Angevine: We admit it

By the Court: Such agent at the time this notice was served on him?

Mr. Angevine: Yes sir, he was, as I understand it.

And thereupon the plaintiffs offered and read in evidence the depositions of T. B. Jennings, W. E. King and T. S. Cafferty, and which as so offered and read in evidence appear in words and figures following towit:

320 Direct Examination

By J. S. Botsford:

Q. What is you- name? A. T. B. Jennings.

Q. Where do you live? A. In Potwin, Topeka, Kansas.

Q. How long have you lived here? A. Since the last week in October, 1886.

Q. What official position, if any, do you hold now? A. In charge of the Weather Bureau Office.

Q. The Weather Bureau of the State of Kansas? A. Of the United States.

Q. You are the superintendent in charge of the United States Weather Bureau here? A. Yes, sir.

Q. What district or territory is within your jurisdiction? A. State of Kansas.

Q. How long have you held that position? A. Since I came here in 1886.

Q. Were you here during the flood of 1903? A. I was.

Q. The last week of May and the early part of June, 1903? A. Yes, sir.

Q. Please describe as briefly as you can in your own way how long and the extent of the rains that had prevailed and over what territory they had prevailed that caused that flood in the Kaw river at that time? A. That is a matter of record.

Q. Well, so far as you remember it, either from your own knowledge or with your memory refreshed from your records? A. Well, now, I have a written report upon that

showing the rainfall over the territory drained by the Kaw river and if you want the information you will have to call for the record.

Q. Have you that record here? A. I have it not here; it is at the office. I should have been informed what was wanted.

321 Q. That is our fault, Mr. Jennings. A. I can state in a general way. (I don't like to do anything of that kind when we have the records.) The rainfall for the first twenty days of May averaged about four inches, or possibly a little over four inches throughout the territory east of Norton and Trego counties north of the Smoky Hill river. Then from the 21st to the 28th of May, 1903, it averaged another four inches.

Q. You mean averaged four inches during that period? A. During the seven days, and on the 28th came the tremendous rainfall which was about five inches and a quarter at Salina, and was evidently considerable more, because it washed away the rain gauge at Abilene and the river was already bank full when this water came.

Q. What is the date in May you say when that rain fell that you describe? A. Well, we got a month's rainfall during the first twenty days. We got an average May rainfall. Then during the next seven days that was repeated, and on the 28th we had the tremendous downpour in the central counties extending over Saline county northeastward into Marshall.

Q. You say that during the first twenty days you had an average May rainfall; what do you mean by that? A. We had about an average month's rainfall during the first twenty days.

Q. You mean the average rainfall during the entire month? A. About the normal amount for the month of May.

Q. What territory have you in mind in what you have stated? All the territory tributary to the Kaw river? A. The territory east of Norton and Trego counties and north of the Smoky Hill and Kaw rivers.

322 Q. The Smoky Hill is a tributary of the Kaw? A. It is the Kaw river watershed.

Q. These two counties, Norton and Trego, where are they? A. (Witness indicating on map) Using this as a line, here is Norton and here is Trego. The Smoky Hill passes through Trego and the Solomon and the forks of the Republican cut through this way. It is the counties east of that portion of the State.

Q. State whether this rainfall from the 1st to the 21st of May was over a country that flowed into the Kaw river? A. I just stated that that is the Kaw river watershed. I am giving

the rainfall that fell in the territory that flows its waters into the Kaw river finally. The Kaw draws from ten miles south of the Platte river in Nebraska; draws all the water to ten miles south of the Kaw in Kansas. In other words, the Kaw river watershed is all on the north side of the river.

Q. You have stated the amount of rainfall from the 21st to the 28th of May? A. It repeated the amount that fell up to the 20th.

Q. The rainfall during each of these periods was equivalent to the usual rainfall for the month, if I understand you? A. Yes, sir.

Q. When did those rainfalls commence to create the flood in the Kaw? A. That is a matter I have no record of. We did not establish a guage here and did not commence taking observations until the first of August this year.

Q. What was the amount of the rainfall on the last four days of May? A. Well, most of the rainfall that fell occurred on the 28th. There was but little west of Manhattan after that. We had a rain Sunday—it rained up to Sunday here.

Q. Which Sunday? A. Sunday the 31st. I would
323 not say that Sunday—yes, I am pretty sure that Sunday was the day the bitter cold rain fell all day.

Q. Can you state the amount of rainfall on the 28th and 29th over this same territory? A. It would average, if I remember right, about two inches over the territory on the 28th and 29th, or rather on the 28th.

Q. What was the total rainfall then over this territory from May 1 to May 28? A. The total rainfall for the whole territory was somewhere near nine or ten inches.

Q. Do you remember whether the rainfall from the 1st to the 21st was daily, or how in that respect? A. You mean over the state?

Q. Over this territory? A. We had rain every day; I think we had rain over the territory every day during May, somewhere.

Q. Is this report of which you speak as part of the records of your office in such shape as that a copy of it could be appended to your deposition in this case? A. It has been submitted and printed by the Central Office in Washington.

Q. How many copies have you? A. I will send Mr. Hurd a copy for his library and you can use that, but you could not append it to the deposition. You would have to copy it.

Q. Please state how long it took the waters of that flood in the Kaw river to flow from Manhattan to Topeka? A. I do not like to state anything on a guess, and yet that is what it would have to be. It depends largely on the conditions prevailing. We had this last month, the month of October,
324 a very heavy rainfall up through the northern tier of

counties that are drained by the Blue that raised the Blue river bank full. The Blue empties into the Kaw at Manhattan and it was some five days afterward before we got the rise here; five or six days after the rain in the Blue watershed before we got it here. They had the heavy rain five inches and a quarter at Salina on the 28th of May, 1903, and the crest reached Topeka somewhere around nine o'clock Saturday night of the 30th of May.

Q. What time on the 28th did it leave Manhattan? A. They had this big rain on the 28th and the crest of the high water reached Topeka sometime Saturday evening on the 30th.

Q. Well, do you know how long prior to that time the waters of the Kaw at Topeka here had been rising? A. I do not. I know it was up, but when it started up and when it got up and so on, I do not know. Saturday was practically the first we commenced paying attention to it—Friday afternoon late or Saturday, because the stock yards at Kansas City asked us to wire them the conditions every three hours.

Q. When was that request made? A. That was on the 29th and 30th. All we could do was to wire them the rise of the river from one period to another, because there was no gauge here.

Q. How long did it take for this rise that you have been speaking of from the 28th to the 30th to get from Topeka to Kansas City? A. You will have to ask Mr. Connor at Kansas City about that, I guess. We had our hands full here and did not pay any attention to Kansas City.

Q. What streams above Topeka, Kansas? flow into the Kaw?
A. The main streams are; the Blue river, comes in at
325 Manhattan; the Republican, comes in at Junction City, and the Saline and the Solomon; the Solomon comes in at Solomon City. The other streams are mainly creeks.

Q. You spoke awhile ago about the Smoky Hill? A. Well, the Smoky Hill and the Kaw river are one and the same river; that is, they commence calling it the Kaw river after the Republican joins the Smoky Hill at Junction City. Kansas is the name of the river. Kaw is just the common and popular name.

Q. These different streams you have mentioned that flow in to the Kaw, where do they rise? A. The Saline and Solomon rise in the western counties of Kansas, Trego and Sheridan counties; the Republican rises in the eastern part of Colorado, and the northwestern part of Kansas. The Blue rises up in Nebraska in the neighborhood of Lincoln; that is, it covers quite a block of counties south of Lincoln, Nebraska.

Cross-Examination

By A. A. Hurd:

Q. Mr. Jennings, I believe you say you have been here in charge of the Weather Bureau since 1886? A. Yes, sir.

Q. Have there been other floods in the Kaw river during that period of time prior to May, 1903? A. Not out of its banks since I was here.

Q. State whether the flood of May, 1903, latter part of May, and the first of June was an unprecedented flood, so far as your experience went in keeping the records of the Bureau? A. Yes, sir.

Q. State how much higher it was than any previous flood you had known of, as near as you can estimate it? A. That is trenching on your territory, Mr. King. I think Mr. King could answer that better than I could.

326 Q. Give it as near as you can if you cannot give it exactly? A. Our highest preceding flood was along about eighteen feet according to that gauge they had on the street car pier, and this one was thirty-two and six-tenths; that would make a rise of about fourteen feet.

Q. About fourteen feet higher than any previous flood? A. Yes, sir.

Witness Excused.

T. B. JENNINGS.

327 Direct Examination

By J. S. Botsford:

Q. What is your full name? A. W. E. King.

Q. You live here in Topeka? A. Yes, sir.

Q. How long? A. About twenty-eight years.

Q. What is your occupation? A. At present assistant city engineer; occupation, civil engineer.

Q. How long have you been assistant city engineer of Topeka? A. Since July, 1902.

Q. You held that office in May, 1903, and June, 1903? A. Yes, sir.

Q. Were you in Topeka, Kansas, during the flood of the last week of May, 1903? A. I was.

Q. Do you remember about the rainfall over the valley of the Kaw river during the month of May, 1903? A. Only as I got it from the Weather Bureau. Mr. Jennings and I only had occasion to get that after the water was up to the danger point here. Then I got the information to ascertain what was coming.

Q. Do you remember, Mr. King, about the fact of there being heavy rains in the month of May, 1903? A. Exceptionally so.

Q. State briefly in your own way, Mr. King, the extent of the rainfall over the Kaw valley in the month of May, 1903, and when the heavy rains began and the extent to which they continued? A. We had considerable work here in the city and we were laid out by continuous rains; not every day, but it seemed as if they were pretty close together. I had no occasion to look at the western watershed until the river got to the danger point. Then I got the reports from Mr. Jennings similar to what he gave here to-day.

Q. When did you first notice the rise in the Kaw river here? A. I took the first observation on the morning of May 28 at 8:30 o'clock.

Q. What was the situation at that time in the Kaw
328 river? A. It was 6:08 above city datum.

Q. What do you mean by that? A. It is a base that we establish from which to make our calculations. It is an imaginary base that is 10.8 above low water mark. Low water mark is the stage of the river at ordinary times.

Q. This measurement you made was how many feet above 10.8? A. 6.08 at 8:30 A. M. on the morning of the 28th.

Q. That would be sixteen feet and how many inches above low water? A. Eighty-eight hundredths, or eleven inches. Sixteen feet and eleven inches above low water mark at 8:30 on the morning of the 28th.

Q. State whether the Kaw river continued to rise after that? A. It did. I kept men stationed at that point until the crest of the flood.

Q. Give that, will you? A. I have it [wvery] thirty minutes continuous report from May 28 at 8:30 to June 6 at 10:30.

Q. State the entire rise during that period? A. From the morning of the 28th at 8:30 with an elevation of plus 6.08 it went to at 9 P. M. on May 30 plus 16.18.

Q. How much was that altogether above low water mark? A. You mean at the crest of the flood what was the total above low water?

Q. Yes? A. Practically twenty-seven feet, 26.98.

Q. That was reached when, that crest? A. At nine P. M. May 30.

Q. Between 8:30 that morning of the 28th and the crest it rose about thirteen feet; is that correct? A. Ten feet and one-tenth.

Q. Do you know when the river commenced rising above that danger point that you fixed there of ten feet, or
329 some point you fixed there? A. We start to taking elevations whenever the river rises at a point plus six feet, the same being practically seventeen feet above low water mark.

Q. Do you know when the rise in the Kaw there above low water mark began? A. No, sir.

Q. Was it continuous? A. I would suppose so. I have not paid particular attention to it. We never notice the [river] until it covers the mouth of the main sewer. If we happen to be near the river and see it is up, we very often take it, but we pay no particular attention to it until it gets to that elevation.

Witness Excused.

W. E. KING.

330 Direct Examination

By J. S. Botsford:

Q. What is your name? A. Theron Samuel Cafferty.

Q. You live here in Topeka? A. Yes, sir.

Q. How long? A. Seventeen years.

Q. You are in the employ of the Atchison, Topeka & Santa Fe Railroad Company? A. Yes, sir.

Q. In what capacity? A. Roadmaster.

Q. How long have you been in such employ? A. Since 1887.

Q. Do you remember the flood of 1903 in the Kaw river valley? A. Yes.

Q. Do you remember when the road from Topeka to Atchison of the Atchison, Topeka and Santa Fe Railroad Company became impassable? A. Yes, sir.

Q. When was it? A. It was May 29, 1903.

Q. What time on May 29? A. The last train on May 29 was the work train that I had charge of that left here at six o'clock in the morning, got as far as Valley Falls and saw the condition of things there was so bad I sent this work train to Leavenworth and came back to Topeka on the hand-car.

Q. That was the last train until the flood subsided? A. The last train on the morning of May 29.

Q. Now, up to that time did all passenger trains, freight trains and stock trains destined for Atchison over your road from Emporia pass as usual? A. They were tied up at Topeka.

Q. When did the tie-up at Topeka begin? A. On the 29th.

Q. Up to the 29th I ask you had all the trains pasesd as usual? A. Yes, sir.

Q. No obstruction prior to the 29th? A. Not on my Division.

Q. That is from Emporia to Atchison? A. I cannot tell from Emporia. From Topeka to Atchison it was all right on the Atchison Division.

331 Q. Up to the 29th? A. Yes, sir.

Q. Do you remember anything about these train in controversy in this case, containing cattle that were shipped out from Texas and came up by way of Wellington, Newton and Strong City and Emporia, destined for Atchison; do you know anything about them or did you at the time? A. No, sir; don't know anything about them.

Witness excused.

THERON SAMUEL CAFFERTY.

332 L. A. Allen sworn, testified on behalf of the plaintiffs as follows on

Direct Examination.

Q. By Mr. Ball: What is your name? A. L. A. Allen.

Q. Where do you live? A. Kansas City, Missouri.

Q. How long have you lived in Kansas City, Mo.? A. About thirty years.

Q. What is your business? A. Live stock commission merchant.

Q. How long have you been engaged in that business? A. 39 years.

Q. At what point? A. Kansas City Stock yards.

Q. All of that time? A. Yes sir.

Q. What experience have you had in reference to the handling and shipment of live stock during that time, how extensive? A. It has been very extensive about all could be done by any one.

Q. Are you familiar with the various kinds of cattle and localities which cattle are raised on the range? A. Quite familiar with all sections.

Q. Over what territory? A. From the Mississippi river to California, Mexico and Montana.

Q. Do you know Mr. Mullen and Steube of the Minnesota and Dakota Cattle Company? A. Yes sir.

Q. Do you know Mr. Frost of the Empire State Cattle Company? A. Yes sir.

Q. Do you know the shipment of cattle by those two companies in the latter part of May 1903, from the Panhandle of Texas, and New Mexico in the Amarillo district there? A. Yes sir.

Q. Did you ever see those cattle? A. Yes sir.

Q. When was the first time you saw them? A. I saw them on the range in Texas and when they arrived
333 here in Kansas City, at the yards.

Q. You saw them here in Kansas City at the stock yards? A. Yes sir.

Q. When prior to their arrival here at the yards had you seen them? A. The year before.

Q. Whose ranch were they on in Texas? A. Littlefield Cattle Company.

Q. Did you know about the purchase of these cattle by the Empire State Cattle Company and the purchase by the Minnesota and Dakota Cattle Company? A. Yes sir I was the agent of the Littlefield Cattle Company selling the cattle to these parties.

Q. About what time did the Minnesota and Dakota Cattle Company and the Empire State Cattle Company make this purchase? A. In April, about the 20th or 25th of April.

Q. When they contracted for the cattle? A. Yes sir.

Q. Where were they when that was done? A. On Mr. Littlefield's pastures in Texas, and Eastern New Mexico, along the line of Texas.

Q. Were you present at any arrangement that Mr. Mullen made with the Santa Fe Railway Company for the shipment of those cattle? A. Yes sir, I went with Mr. Mullen and Stuebe to see the Santa Fe Live stock agent about the rates and routing.

Q. Where and when was that? A. That was first when they went down to look at the cattle before they traded for them, and next when they went to ship the cattle in May.

Q. You say you went with them on both occasions? A Yes sir.

Q. To what office of the Santa Fe Railway Company? A. The live stock agent's office, Mr. Titus.

334 Q. Was he the general live stock agent? A. Yes sir.

Q. Did you know a man in that office at that time by the name of Jasper, known as Jasper? A. I think I know him but there is so many of those men in the office, I know Mr. Brown, and Mr. Robinson and Mr. Titus the claim agent Mr. Coombs; I think I know him, I ain't positive, I know him by name of Jasper, I know all of the men in the office.

Q. Do you know Brown's name? A. Yes sir, Sylvester Brown, the- call him Ves.

Q. Now state to the court and jury what passed between Mr. Titus and Mr. Mullen at the time you say these arrangements were made for the shipment of these cattle?

By Mr. Angevine: Objected to by the defendant, as incompetent, irrelevant and immaterial, and does not tend to prove any issue in this case.

If it is sought to prove the contract of shipment, the contract, whatever it was in regard to the shipment was re-

duced to writing, and is the best evidence; and if it is not for that purpose it is immaterial.

By the Court: Objection sustained—plaintiffs then and there duly excepting.

Q. After that visit to the General live stock agent's office the last one, where did Mr. Mullen and Steube go? A. They went to New Mexico, Kenna.

Q. Did you go down there at that time? A. No sir the first time I gave them a letter to Mr. White Mr. Littlefield's manager, and the last time they had no occasion they went on down and received the cattle.

Q. When did you next see them, either one of them? A. The latter part of May when the trains came into Kansas City with the cattle.

335 Q. The trains got here Friday evening 29th and Saturday morning of the 30th, when was it, what hour of the day you saw them? A. I saw Mr. Stuebe early Saturday morning about 7:30.

Q. Where did you meet him? A. He came to my office.

Q. At the stock yards? A. Yes sir.

Q. Did you go anywhere with him then? A. I went to the Santa Fe office to see what they were going to do.

Q. Who did you see at the Santa Fe office? A. Mr. Brown was there at the time I think.

Q. Who was Brown? A. Mr. Titus's deputy or head clerk.

Q. In the office of Mr. Titus the general agent? A. Yes sir.

Q. What passed between you and the agent there? A. We wanted to know when the cattle were going out.

Mr. Angevine: Defendant objects to this as incompetent, irrelevant and immaterial, and hear say, between Brown Stuebe and Titus.

By the Court: What is the object of the testimony?

By Mr. Ball: I want to show that they knew they could get them out of there; and I want to show how many times they importuned them to get these cattle out of there, and that the situation was discussed.

By the Court: When was this?

By Mr. Ball: Saturday morning the 30th.

By the Court: He may answer.

Defendant then and there duly excepting.

Q. Now state fully what was said between you and the agent on the occasion of your first visit that morning to

the Santa Fe live stock office? A. When Mr. Stuebe
336 came to me first I said what are you doing here, and I said ain't you going on north with these cattle and he says yes as soon as I can, and I says let us go down and see Titus and Brown and see what show there is to get out of here, I was surprised to see the trains in not looking for it.

Mr. Angevine: Defendant objects to that statement and asks the court to strike it out; motion sustained.

Witness: Anyway, we went to Brown and they said they were arranging to get the cattle out; I thought they ought to be gotten out as soon as possible.

By the Court: Is that the remark you made to Brown at the time? A. Yes sir.

Mr. Ball: Did you state to him why you thought they ought to be gotten out as soon as possible.

Mr. Angevine: Objected to by the defendant, it is not shown that the defendant had any means of taking these cattle north, or there was any way of getting them north; and there is no claim that this defendant could or should have taken them north; they had no line running from there north.

Mr. Ball: We claim they could have taken them north as far as that was concerned, but they should have taken them out of there which this evidence will show, they knew the condition, and that they could have gotten out of those yards.

By the Court: Proceed. Objection overruled.

Defendant then and there duly excepting.

Q. I told him I says you know there is a big flood coming and you ought to get these cattle out of there before the flood comes here, and he said they were making an effort to
337 do it and get them out as soon as possible, and making every effort with Kendrick the agent of the Burlington, and then we came out of Brown's office and went over to Kendrick's office and he says--

Objected to by defendant—sustained.

Mr. Ball: After you went to Kendrick's office, did you go back any more to the Santa Fe office to see Mr. Brown?

A. Several times in the forenoon, yes sir.

Q. What was said to him the next time you went back?

A. Every time we went back we urged him to get them out.

By Mr. Angevine: Objected to by the defendant and move to strike it out. Sustained.

Q. Mr. Ball: Can you remember what you said to him. A. I says what is the trouble you don't get these cattle out of here and he said they would get them out as soon as possible.

Q. Did you notify him about the conference you had with Kendrick? A. Yes sir, he said he was ready to take the cattle at any time they were ready to turn them over to him.

Q. You told him that? A. Yes sir.

Q. How early in the day did you tell him that? A. It must have been along about nine o'clock I guess that time.

Q. What was it you told him Kendrick said? A. He had the cars and engines to take the cattle out.

Q. What did Brown say to that. A. He said we are arranging the matter between them and the Burlington people to get them out as soon as possible.

Q. Between who? A. The Burlington Company, he did not say just what the reasons were they could not get them out.

Q. Who is Kendrick? A. He is the live stock agent for the Burlington.

Q. When did you first see these cattle after they
338 came in the yard? A. When the stock came in we went to the Santa Fe office, I went with Mr. Stuebe out to see the cattle out to the shipping division.

Q. Where were they located? A. South of the live stock exchange in what is called the shipping division.

Q. They were in the shipping division? A. Yes sir.

Q. Were all of them in there? A. Yes sir. [A.] The railroad there, shipped right around in the shipping division.

Q. How long would it take to unload a train of 20 or 25 cars? A. That class of cattle about 35 or 40 minutes, where all of one kind.

Q. About how long does it take to load up a train?

By Mr. Angevine: Objected to by defendant as incompetent, irrelevant and immaterial.

Objection overruled, defendant then and there duly excepting.

A. Most any train of one class of cattle can be loaded in thirty or forty minutes.

Q. How long would it have taken to load three or four trains of cattle as they were in the shipping pens or shipping division?

By Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial.

By the Court: I suppose by that if he had the cars already?
Mr. Ball: Yes sir.

Objection overruled; defendant then and there duly excepting.

A. About thirty or forty minutes to each train.

Q. Mr. Allen, were the cars these cattle came in there?

Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial.

339 Objection sustained, plaintiffs then and there duly excepting.

Q. Were any cars on the tracks in and around the shipping division which could have been utilized for taking these cattle out of there.

By Mr. Angevine: Objected to by defendant as incompetent, irrelevant and immaterial.

Objection overruled,—defendant then and there duly excepting.

A. Yes sir because the tracks were full of cars all along there.

Q. [Sttock] cars? A. Stock cars.

Q. Was there sufficient of them to have taken these cattle out of there?

By Mr. Angevine: Objected to by the defendant unless it is shown that they were cars that this defendant had control of, and the defendant was under obligation, and they should show for that purpose some liability on our part to take them.

By the Court: Yes I think it should be shown.

By Mr. Ball: I will ask you if there were Santa Fe cars there enough to take these cattle?

A. I did not count the cars there seemed to be quite a number of cars over on the track. I suppose some of the cars the cattle came in there, I did not count them I did not notice the number; along the yard and switch tracks, I did not count the cars, I don't know just how many there was.

Q. Do you know Mr. Allen how long these cattle remained in that shipping division? A. One train arrived Friday evening late and the other Saturday morning about five or six o'clock somewhere along there, and they remained there until Sunday morning.

340 Q. What was done with them then? A. They were taken up on the viaducts.

Q. Were they taken from what is called the shipping division up on the viaducts? A. Yes sir.

Q. Where does that shipping division lay with reference to the exchange building? A. It is immediately south or a little south east.

Q. South? A. Yes sir and south east.

Q. What is its eastern boundary? A. It is Tennessee street, and its north boundary is 16[ht] street the street goes in front of the exchange.

Q. That is 16th street runs right straight out from the stock exchange building? A. Yes sir.

Q. This shipping division is immediately south of that? A. Yes sir.

Q. Does this rough sketch here correctly represent and indicate the relative positions of the exchange building and this shipping division? A. Yes sir about so.

Q. Does it correctly represent the line of the Santa Fe company coming into the stock yards there from the west.

By Mr. Angevine: Objected to by the defendant as assuming something which is not correct and has not been given in evidence by anybody that the Santa Fe at that time had any track coming in there from the west; Genl. Supt. Hurley said they ran their stock in at that time over the Frisco.

By Mr. Ball: I will ask if it represents correctly the track used by the Santa Fe at that time to get into the stock yards.

A. Yes sir, I think so, about so; the Santa Fe tracks, they used [—] came down on the east side of the Kaw river into the yards and into their loading chutes, just south of the
341 exchange building south and west of the exchange.

Q. Does that rough draft there indicate the tracts that the Santa Fe at that time used in going out of the yards and going east or north east? A. They loaded up at the chutes along there on the west side of the shipping division and go up to the Belt line and go out that way.

Q. Where does the Belt line run? A. Across near the water works building and across the other railroads and across the Kaw river and bridge.

Q. How does it go on east? A. It goes around through the central part of the city on the south side up the creek valley.

Q. Was that the way the Santa Fe had in getting out on its main line for Chicago, at that time?

By Mr. Angevine: Objected to by defendant as incompetent, irrelevant and immaterial.

By the Court: Objection overruled, defendant then and there duly excepting.

A. Yes sir.

Mr. Ball: This little drawing, I offer it in evidence.

By Mr. Angevine: Objected to by defendant as immaterial; it is not necessary to put a map of that kind in the record, it don't show anything more than can be described by the witness,

and has been described by the witness, and it cannot be made any more intelligible; it is immaterial.

By the Court: Overruled, let it go in.

Defendant duly excepting.

Which is as follows:

343 Q. When was the heavy and sudden increase in the flood; when did that reach Kansas City and the stock yards? A. Sunday morning.

Q. About what time Sunday morning? A. I went down to the stock yards Sunday morning about ten o'clock, at least I started to go and I did not get over on account of being about a foot of water over the yards, between ten and 11 o'clock Sunday morning.

Q. What time did you leave there Saturday evening? A. About six o'clock, late in the evening.

Q. Now state whether or not there had been any warning of this great volume of water publicly circulated around there and through the yards Saturday or Friday.

By Mr Angevine: Objected to by defendant as calling for the conclusion of the witness, and hearsay testimony, and as incompetent, irrelevant and immaterial; if there was any notices sent out that can be produced and accounted for.

By the Court: Objection sustained; plaintiffs then and there duly excepting.

Q. State whether from your experience in the yards there and in loading and unloading in and out of live stock there was or was not time enough for the railroad company to have taken these cattle out of there to place them in a place of safety before the arrival of this heavy flood Sunday morning and after the cattle came in there.

By Mr Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial and calling for the conclusion of the witness; the witness can state the facts and the jury draw the conclusion, if it is a question for the jury.

By the Court: Under the circumstances which existed there, do you know how long it would have taken to remove these cattle from there? A. Yes sir.

344 By the Court: Proceed.

By Mr Angevine: The defendant objects to the question by the court as incompetent, irrelevant and immaterial, and calling for the conclusion of the witness; the witness has not shown himself competent to testify.

By the Court: Answer the question.

Defendant then and there duly excepting.

A. Move them out on the cars away from the shipping division.

Q. Got them out to a place of safety? A. They could have all been driven out or taken out or shipped out in a few hours, all day Saturday.

Q. About how many hours.

Mr Angevine: The defendant moves to strike out that they could have been driven out, as not being within the business of this defendant they were to do.

By the Court: Sustained.

By Mr Ball: About how many hours would it have taken them to load them in the cars and hauled them out?

Mr. Mr Angevine: Objected to by thedefendant as incompetent, irrelevant and immaterial, and not shown any facilities at the command of the defendant for doing so or any request to the defendant to do so.

By the Court: Objection sustained; plaintiffs then and there duly excepting.

Q. After you and Mr Stuebe were down in there and looked at the cattle and after you had gone a second time to the defendant's Santa Fe company, office, did you go back to the office any more? A. I don't remember exactly the number of times, I think it was three or four times in the forenoon; he was anxious to get them out and I was anxious to help him get the cattle out; we went a number of times, three or four times at least, between the railroad office and the yards.

345 Q. Did you see the same men on each of these occasions? A. Yes sir the same men in the office.

Q. Who, did you see? A. I think Mr Brown I know as in the office all the time; Kendrick was in his office all of the time; I think all of the men were to stay there.

Q. Was there any discussion between you and Mr. Brown and Mr Stuebe on any of those occasions about the imminence of the flood coming? A. Stuebe made the remark the flood was coming, and we all told him the flood was coming and we ought to get the [—] out of there; he was very much excited, Mr. Stuebe was of getting his cattle out and I was anxious to help him, and we were doing all we could with the railroad people to get them taken out.

Mr Angevine: Defendant objects to the last statement of the witness, and moves the court to strike it out.

Motion sustained.

By the Court: He was doing all the could—let him state what was done.

By Mr Ball—I do not want to be persistent, but I want to renew the question—by Mr Stuebe to get the cattle out—re-

new the question as to whether you know the time it would take to have taken the Santa Fe to load them in cars and get them out of there.

Objected to by the defendant as before stated.

By the Court: He may answer.

A. No sir.

Q. About how many hours would it have taken that railroad company to load up those cattle.

By the Court: Find out whether he knows or not.

By Mr Ball: He said he did in answer to that question.

346

By the Court: Very well, go ahead.

By Mr Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial and it has not been shown that the Santa Fe was requested to take the cattle out or that it had any facilities for taking them out or had any place to keep them if it did take them out.

By the Court: He may answer. Defendant then and there duly excepting.

A. Each train could have been loaded in about an hour and started out, it would not have taken over an hour to load each train.

Q. How long would it have taken to pull out of that Kaw valley? A. Perhaps another hour to go away from the chutes out of the valley.

Cross Examination.

By Mr Angevine:

Q. You are the gentleman who sold these cattle to the plaintiffs are you? A. Yes sir.

Q. And you are also on their bonds in this case, are you not, surety on their bonds? A. I don't know exactly in this case I am security on one bond.

Q. For the plaintiffs in this case? A. Well I don't think it is in this case.

Q. Bond in reference to these cattle? A. Bond for some charges of pasture.

Q. You are interested in the plaintiffs winning this case? A. No sir.

Q. You are to the extent of that bond are you not? A. I did not consider it so when I signed it; I signed it, the parties are perfectly good.

Q. Now you had no personal interest in these cattle at the time you have spoken of during the flood and before
347 the flood had you? A. Selling them for Mr. Littlefield.

Q. You had no personal interest in the cattle at the time of the flood? A. No sir no money interest.

Q. You did interest yourself very much with Mr. Stuebe and Frost in going around the [the] different offices? A. Yes sir I was very anxious to assist them because they were my customers.

Q. Where is your office in the live stock exchange? A. In the second story from the Interstate Bank.

Q. The basement floor is all occupied by offices is it? A. Yes sir.

Q. The first floor is all occupied by the Interstate Bank and by offices is it? A. Yes sir.

Q. And the third floor? A. Yes sir.

Q. When the flood finally came it filled the basement and several feet on the Interstate Bank floor of that building, didn't it?

Objected to by plaintiffs as not proper cross-examination
By the Court: I think it is; objection overruled.

Mr. Angevine: Did it not? A. Yes sir.

Q. And every office on those floors was ruined was it not? A. The rear is about two feet or two feet and a half lower. than the front part of the building, where the lower part of that floor was, about two feet or foot and a half of water and about five inches on the next floor.

Q. About five inches of water on the highest part of the second floor of the building? A. Highest part of the first floor.

Q. Not counting the basement? A. No sir.

Q. About two feet and a half or three feet of water on the floor the Interstate Bank was on? A. I think about two feet and a half.

Q. About how many offices are there on that entire floor of that building? A. The first basement or the first
348 floor.

Q. The floor which the Interstate Bank is on? A. I don't know exactly, I suppose 25 or 30, 25 perhaps.

Q. There was nobody in any of those offices moved their effects out of there on account of the expected flood was there? A. Not prior to the flood, no, sir.

Q. The bank did not move anything out in anticipation of the flood? A. I don't think it did.

Q. You know their property was all in the bank at the time of the flood, don't you? A. No sir, I do not.

Q. That is everything to all appearances, their property was all there? A. That is seemingly so.

Q. You know as a matter of fact from your personal observation that the money was there, you were told by officers and shown the damaged money were you not? A. I assume the money was there; I did not see any of it.

Q. You saw it? A. I don't think I noticed any damaged money.

Q. You saw the ruined papers, didn't you? A. Yes sir.

Q. You were in the bank frequently? A. Yes sir.

Q. Had business there? A. Yes sir.

Q. You know that the Interstate Bank had made no calculation on the flood rising to that head? A. Not that I know of.

Q. You know that they had not moved anything? A. Apparently not.

Q. And nobody having offices on that floor removed anything did they? A. Not that I know of

Q. Nobody having an office in the basement removed anything did they? A. Yes, there is quite a number of those moved on Saturday.

Q. Moved up into the building? A. Yes sir.

349 Q. Up on the second floor or other floors? A. Yes sir.

Q. But that was on account of water in the sewer, wasn't it? A. There was a seepage of water came from overflowing some place.

Q. There was a seepage from some place? A. Yes sir.

Q. The live stock office of the Santa Fe road is in the basement floor? A. Yes sir.

Q. They moved nothing did they? A. Not that I know of.

Q. The live stock offices of the Missouri Pacific road is in the basement, is it not? A. Yes sir it was at that time.

Q. They moved nothing, did they? A. Not that I know of.

Q. The live stock offices of the Burlington road were in the basement also, were they not? A. Yes sir.

Q. And they moved nothing, did they? A. Not that I know of.

Q. The live stock offices of all the roads doing business at the stock yards were in that basement at the time, were they not? A. I think so.

Q. And not one of them moved their things [of] of the office did they? A. I can't say to that positively.

Q. You don't know of any? A. No sir.

Q. You know the most of them did not, don't you? A. I don't think they did.

Q. You know that that flood came on there sudden when it did come, don't you? A. Yes sir, it rose very fast.

Q. How wide was the river after it overflowed its banks, was it not from bluff to bluff about two miles or more? A. No sir I do not suppose it was that wide, may be some wide places.

Q. In the vicinity of the stock yards the river was two miles wide from bluff to bluff or more? A. No, sir,
350 I would not call it two miles.

Q. How wide would you think it was? A. I heard it estimated about seven or eight thousand feet, I don't know, I did not measure it.

Q. Do you know what the width of the Kaw river channel is in the vicinity of the stock yards? A. It would be simply guess work.

Q. About a thousand feet. A. It may be. It would be all guess work.

Q. What would you estimate it to be?

Plaintiffs object on the ground that the witness ought not to be required to guess.

Objection overruled.

A. It would be all guess work as to the width of the river.

Q. You have been across the river many times? A. Yes sir.

Q. In your judgment is it not about a thousand feet wide, average about that? A. I would not think it was that wide, it may be.

Q. About how wide is it, give your best judgment to the jury? A. It may be a thousand feet, I never did think about measuring it, some places it is wider than others I know.

Q. You say the width of the river from bluff to bluff, you think about seven thousand feet? A. I heard it spoken of being seven or eight thousand.

Q. Is it not more than seven or eight times the width of the channel? A. I don't know; if the channel is estimated a thousand feet I don't think it would be much more, it is not as wide there as in other places.

Q. How far is it from the river west of the stock yards east to the bluff? A. You mean from the river?

Q. From the river bank to the bluff east? A. It
351 varies because the river comes around Rex Mills. And Turkey creek makes a bend and kind of makes it wider.

Q. You estimate the width of the river from bluff to bluff about seven or eight thousand feet? A. Yes perhaps a little more.

Q. Now after that river overflowed its banks, it then rose about nine or ten feet, [it] less than 12 hours did it not. A. I would not think it rose that fast.

Q. How much would you say it rose from six o'clock Sunday morning until six o'clock Sunday evening. A. How much did it rise from six o'clock Sunday morning until six o'clock Sunday evening? I would guess about six o'clock; I don't know I was not there Sunday evening; I started down Sunday morning about half way from the bottom, when I started down.

Q. What time did you go there? A. I did not get there I started across and was stopped.

Q. What time in the day was that? A. Between 10:30 and 11 o'clock.

Q. How long did you stay where you could observe the river? A. I went around up to the viaduct comes in from the south side of the yard, I thought I could get in from that way over the chutes, that was a high part of the yard.

Q. Just tell about how long you staid there where you could see it? A. Perhaps about one o'clock.

Q. What was the depth of the water in the river bottom in the vicinity of the stock yards when you went away from there as near as you could estimate it. A. I should think about, I was not over at the yards, I did not go over to the yards, some men were driving out some mules and it was about up to their bellies.

352 Q. At what time was that? A. That was about 11 or 11:30 Sunday morning.

Q. You staid there until about one thirty? A. Yes sir.

Q. About what was the width of the water in the river bottoms at that time at one thirty? A. I do not know; bottoms not very level some places higher than others.

Q. The water rose very rapidly during that time you were in sight of it. A. It seemed to raise fast.

Q. Very rapid current? A. There was in certain places.

Q. Wherever it was not obstructed by buildings or other obstructions the current was very swift? A. Yes sir through the streets it was a swift current.

Q. Before you left there, there was buildings floating down the stream was there not? A. Some little buildings there in the main channel of the river.

Q. And west of the main channel was there not. A. I could not see over there on account of the packing houses there, I could only see the channel there.

Q. How long have you done business in the stock yards? A. 29 years.

Q. You never heard of the stock yards flooded before that time? A. Not to that extent.

Q. You never heard of them flooded did you? A. Yes sir.

Q. What part of them? A. The north part of the yards.

Q. Over by the Missouri Pacific? A. Near the Missouri Pacific.

Q. That was low ground at that time? A. The lowest ground of the stock yards would be by Turkey creek.

Q. Where the old Turkey creek bed used to run
353 through the stock yards? A. Yes sir it is a little lower there than in other places.

Q. At the north end of the yards another low place by the Missouri Pacific tracks. A. That low place by Turkey creek runs down through east of the Missouri Pacific unloading yard.

Q. Did you ever see any water on the stock yards in the 29 years in those low places? A. Yes sir.

Q. And those places had been filled up before 1903, so that they were above any water which you had ever seen in the stock yards, were they not? A. Yes the old Turkey creek bed.

Q. Had been filled up? A. Yes sir.

Q. And the old bed of Turkey creek was almost on a level with the bed of the river was it not, pretty near the same level? A. Yes sir I presume it was.

Q. Whenever there was water, any considerable amount of water in the Kaw river there was water in the bed of Turkey creek at that time? A. It was filled up.

Q. Afterwards that was filled up? A. Yes sir.

Q. That was a great many years ago? A. Yes sir.

Q. Since that you have not seen water in the stock yards until 1903? A. In 1881 we had a flood went down through that low part of the yard and over the streets of North Kansas City?

Q. In North Kansas City? Did the flood of 1881 go into any part of the present site of the stock yards? A. Yes sir.

Q. Which part? A. Through all of that Turkey creek valley.

354 Q. In the Turkey creek valley? A. Yes sir what would be called the Turkey creek valley.

Q. Had that been graded up at that time? A. Yes sir.

Q. To the present level? A. Yes sir.

Q. You say you saw water there? A. Yes sir.

Q. In the stock yards? A. Yes sir, rode through it on horse back.

Q. What part? A. Right north of the exchange.

Q. Where the Turkey creek bed was? A. Yes sir.

Q. How much water was there at that time? A. It was belly deep riding horseback.

Q. In the stock yards? A. In that low place.

Q. How wide a place was that? A. It is not graded abruptly.

Q. How wide a place was that at that time where you saw that water? A. I presume a hundred yards.

Q. You think it was a hundred yards? A. Yes sir.

Q. There was no water at that time in the streets along in front of the stock yards was there? A. No sir.

Q. And there was no water in the streets, anything along the streets south of Central avenue at that time was there. A. South of Central avenue?

[A.] Yes and 9th street? A. Most of those streets north of the railroad tracks were under water.

Q. Did it get as high as the first street south of 9th street and Central avenue at that time? A. It got up high enough in the union depot you could not walk on the boards.

Q. I am asking you about the streets in the west bottoms of Kansas City; did the flood of 1881 extend over any
355 of the streets south of Central avenue? A. I don't know just what street we call Central avenue.

Q. It is what is called 9th street in Missouri and called Central avenue in Kansas City, Kansas goes by Armour's. A. I drove over in a buggy in 1881 and the water came up to the buggy on 9th street.

Q. And the old channel of Turkey creek crossed that street near where the Abernathy furniture factory now is? A. I think so.

Q. That is the only place where the water was over that street at that time? A. No sir, it was over clear on through Armours.

Q. Did that flood extend to the next street south of that? A. I am very sure it was over all of the ground and territory north of the railroad tracks. I am almost positive of that.

Q. When you speak of the railroad tracks now you mean the Missouri Pacific tracks? A. Yes sir.

Q. They are north of the stock yards proper? A. The water ran over the lowest place of those tracks too.

Q. Now just answer the question; those tracks are north of the stock yards proper? A. Yes sir north of the main part, there are yards north.

Q. But the main yards are south of those tracks? A. Yes sir.

Q. And there was very little comparatively, stock yards, as they then existed had water on them, during that flood? A. All of that low part.

Q. And that is the highest flood you have ever known in Kansas City prior to 1903, is it not? A. It is.

Q. There was another flood in 1902 in the Kaw river in Missouri? A. I believe it was in that year we had high water, we have had several years.

356 Q. Now did the water get into the yards any place in that year 1892? A. I am not certain about 1892; there never has been a high raise in the Kaw.

Q. It did not run through that yard, or through the sewer? A. I think 1881 was the highest, perhaps it was in 1892, I do not remember.

Q. Wasn't it a fact in 1892, the next highest flood after 1881, there was no water over any street or any part of the stock yards in that vicinity at no time. A. I am positive it has been over the stock yards two or three times the lower part of the yard.

Q. The part of the yards where these cattle was kept was in the low part of the yards? A. No sir.

Q. Never used the low part of the yard? A. No sir.

Q. The yards are high ground? A. Yes sir.

Q. You never saw water on that part of the yards before 1903? A. No sir.

Q. You know that the Kaw river bottoms through the Kansas City yards, and Kansas City, Missouri, were thickly settled with residences, were they not, and occupied by warehouses and factories and like institutions? A. Not now.

Q. Where the bottoms were not occupied by warehouses, and factories and packing houses, it was thickly built up and occupied as residence property? A. Yes that is true.

Q. The residents living in that part of the district did not go out of their homes until the flood actually came upon them did they? A. I don't think they did.

Q. And the inhabitants of the two cities, Kansas City, Kansas, and Kansas City, Missouri, the police and fire department spent the entire day Sunday and Sunday night and

357 Monday taking the people out in boats, did they not? A. Sunday when I came back from the upper end of the yard, Sunday afternoon, there was some little boats going over the viaduct, bringing people over Sunday afternoon.

Q. Sunday afternoon after the flood came up there, that you know of, nobody went out on account of the flood until the flood was actually upon them? A. No sir.

Q. There were numerous stores in that part of the city covered by that flood, was there not? A. Yes sir.

Q. Do you know any of those stores moved their stocks or any part of them on account of the contemplated or expected flood? A. Not for certain; I think they had some.

Q. You know as a matter of fact that very few, if any of them, did move their stocks? A. I don't know the particulars.

Q. You saw afterwards numerous stock there which had been left [left] in the stores, ruined, didn't you? A. From the street, yes sir.

Q. All the packing houses of Kansas City, Kansas, and Missouri, are in that flooded district, are they not? A. Yes sir.

Q. And not one of them moved their stock or cattle on account of the contemplated flood or expected flood did they? A. Those were at the packing houses I don't know, some moved out of the stock yards over on the viaducts, hogs, sheep and some cattle.

Q. The cattle which were in the stock yards were moved up? A. Yes sir.

Q. That is after the flood came? A. That is Sunday morning.

Q. After the flood was away up, you don't know of any of the packing houses which moved or attempted to move their stocks of meat and other property, do you? A. I could not say as to that.

358 Q. You know the principal implement houses and large warehouses of Kansas City are located in that district do you not? A. Yes sir.

Q. And many of them, their stocks were all caught in the flood and ruined, you know that do you not? A. I do not know as to the extent of all their stocks. The basements, lower part were injured.

Q. None of them saved or moved as far as you know? A. No not to my knowledge.

Q. And nobody moved their stocks or property in anticipation of the flood, did they. A. Not to my knowledge, no sir.

Q. It is a fact since you have been in business at the stock yards, every year or two, there are reports of floods in the Kaw river coming down; are there not very frequent reports? A. Any ordinary flood we paid no attention to them.

Q. During the year 1902, you were warned of floods at least three times, were you not of floods in the Kaw river? A. I do not know about warning three times; the river was very high above and expected high water.

Q. You know that the Santa Fe road was washed out in one or two places on-e or twice during that year, 1902? A. I am not positive.

Q. You understood that? A. Yes sir.

Q. And nobody moved their property on account of that reported flood, did they. A. Not that I know of.

Q. And there was not a report which you heard from up the river in 1903, which indicated in any manner the volume

of water which afterwards did come down upon us? A. Yes sir, we got several days there, every day, we had telephone messages, from somebody up the river, telegraph or some reports.

Q. That there were floods in the river. A. It was
359 very high and five foot raise on top of that.

Q. You knew that would take ten foot raise on top of that to injure anything at the stock yards. A. No sir, not if it was over the banks.

Q. You knew that would take ten foot raise on top of that to injure anything at the stock yards. A. No sir, not if it was over the banks.

Q. Do you know what the danger line at Kansas City is and said to be? A. I do not remember.

Q. You know that every two or three years the river goes above what is called the danger line? A. Yes sir. So reported in the papers.

Q. And nobody except those in the low bottoms paid any attention to that? A. I don't think so.

Q. The business men, doing business in that district did not pay any attention to the reports of that kind, did they? A. I do not know what attention they paid; they paid something, I know of cellars to have been moved out.

Q. You know there are three or four banks across the river from the stock yards in the district known as Armourdale, do you not, were at that time? A. You mean banking houses, I know two; I do not know how many.

Q. And you know those banks did not move their property in anticipation of the flood, do you not? A. No, sir, I do not know what they did.

Q. You understood from the banks which were caught there? A. Yes sir.

By the Court: I think we have pursued this inquiry far enough.

Mr. Angevine: I would like to ask about one other circumstance.

Were you at the union station during that flood or immediately after the flood subsided? A. I was there Sunday morning about 11 o'clock. Then I was there along during, when I could get to it, the next week.

360 Q. You went down in a carriage Sunday morning? A. Yes sir 11 o'clock.

Q. Where were you, at what place? A. Drove in front of the depot.

Q. You drove in front of the depot? A. Yes sir and started to go on west.

Q. Did your carriage fill before you got out? A. No sir.

Q. The water got into your carriage before you got out? A. We drove on up to about the west end of the depot and there is a little low place there, it ran up into the bottom of the carriage.

Q. And at that time the water was raising very rapidly? A. Yes, sir, it seemed to be.

Q. After the flood subsided, did you see two or three passenger trains standing on the tracks in front of the union station which had been caught in the flood and submerged there? A. I think there was some there, I did not pay much attention.

Q. Two or three trains caught there. A. Seemed to be, some were pulled out during the flood; some were pulling out.

Q. After the flood subsided you saw two or three trains standing there which had been there during the flood covered with mud? A. I did not notice—I only went down the street, I saw it was muddy and I did not go over.

Q. Did you see a large hole which was torn out in the Santa Fe yards over east of the stock yards? A. Yes sir there was at the end, I do not know the size, in the railroad tracks, there was a big hole.

Q. There was a hole nearly a quarter of an acre in extent, 30 or 40 feet deep gouged out? A. I do not know how
361 deep it was, it was about a quarter of an acre.

Q. It was deep enough that many pullman palace cars and locomotives went down and out of sight in the water? A. Yes sir.

Q. When the water went down? A. They were not entirely out of sight.

Q. The locomotives were entirely out of sight? A. I think they were.

Q. Did you see the Missouri Pacific bridge during the flood or immediately afterward? A. Yes sir.

Q. You saw as many as 17 locomotives standing on that bridge? A. I did not count them, there was quite a number.

Q. The water had been entirely over those locomotives? A. I could not say entirely; I did not go down there though it went up on them.

Q. I now show you a picture, and ask you if that is correct picture of the portion of the stock yards as they appeared when that flood subsided? A. Yes sir seems to be.

Q. Don't that show the end of one of the overhead viaducts of the stock yards which was broken down by the flood, if there was any? A. I did not go over there; that

seems to be one of the viaducts going north; none of the viaducts in the yard proper, were broken down.

Q. I will ask you if that is a correct picture of that part of the yard shown there? A. I did not examine that debris there, none of the viaducts went down in the yard proper.

Q. How long have you lived in Kansas City? A. Thirty years.

362 Q. You never saw such a flood before? A. No sir, not in this river.

Q. Haven't you lived here longer than thirty years? A. Not continuously, no sir.

Q. You have lived here prior to that time? A. No sir.

Q. Now when you went to the Santa Fe offices with Mr. Steube, was it, you say you went there? A. Yes sir.

Q. Did you and Mr. Steube and Mr. Brown have any talk about these cattle going north over the Missouri Pacific road? A. Mr. Steube, as I stated called on Mr. Brown, and wanted to know what was going to be done with these cattle, he said they were arranging to get them out.

Q. Didn't he say that he had arranged with the Missouri Pacific to take them north? A. I understood him to say the Burlington or any connection of the Missouri Pacific would take part of them, then the Burlington would take part.

Q. Didn't he tell you that he had arranged with the Missouri Pacific to take the cattle north, when you first went to the office, did he not, in speaking about arranging to get them north, was that they had arranged to have the Missouri-Pacific take them north. A. He said he had arranged with the Missouri Pacific to take part of the cattle, we went over there, over to the Missouri Pacific office to know what they were going to do and they said they could take out 19 cars.

Q. They told you they had 19 cars the Missouri Pacific, 20 cars? A. I don't know, they said they could take out 19 cars.

Q. They said 19 or 20 cars had been delivered to them? A. No I don't know they used the word delivered.

363 Q. Didn't they say they had arranged to take out all of that stock? A. The Missouri Pacific, no I do not remember of hearing them say that.

Q. You would not be positive Brown didn't tell you that, that the Santa Fe had arranged with the Missouri Pacific before they brought the stock here to take the stock forward? A. No sir I do not know a thing about it; I did not know as he knew a thing about it until Saturday morning.

Q. While you were in the office there, did the Missouri Pacific stock agent come into that office and tell Mr Brown

that in effect, that you have some cattle in the yards for us and we are arranging to take them out? A. I do not remember of the Missouri Pacific agent coming in there, or being in there at the time; we went over to Mr Brown's office and Mr Kendrick's office and from Mr Kendrick's office to the Missouri Pacific office, Mr. Doughitt. They said they were arranging to take out 19 cars, that was about all I know of it.

Q. I was not asking you about Mr Kendrick's statement; now you say that you talked about the Missouri Pacific taking the cattle out while you were in the Santa Fe offices, you had a talk with Mr Brown? A. Mr Brown said the Missouri Pacific; arranging with the Missouri Pacific to take out 19 or 20 cars, if I am not mistaken 19, and then we went to the Missouri Pacific office to see if they were going to take them.

Q. When you first saw the cattle they were in the stock yards? A. Yes sir.

Q. They were unloaded, and not in the cars? A. No sir, they were not in the cars.

Q. They were in the part of the yards which you say is the receiving and shipping yards? A. Yes sir.

364 Q. It is the yard both for receiving and shipping them? A. It is used for shipping cattle, which are to be shipped out.

Q. Well, it is the portion of the yard used for unloading cattle and for their shipment where brought in by one road and taken out by another, unloaded in that part of the yard and loaded up again, for any cattle to be shipped out.

Q. That is the purpose for which they were used? A. Yes sir.

Q. The Kansas City stock yard is a public yard? A. Yes sir.

Q. And no cattle are taken out of there or can be taken out of there except by the consent of the Kansas City Stock Yard on the request of the consignee of the cattle, is your information? A. That depends on the consignee; if the consignee is there.

Q. If the consignee consents to it? A. Yes sir, other cattle are supposed to go on without any definite order only on the part of the railroad people.

Q. No definite orders required? A. No sir not from the consignee.

Q. Whenever cattle are brought in there and turned into the yard by delivery of the railroad company, then the other railroad without any further definite order takes the cattle loads them out and ships them on? A. Yes sir.

Q. And that is the usual practice in the yard. A. Yes sir, where they are consigned through.

Q. That is the general custom? A. Yes sir.

Q. While you were in there talking, Mr. Steube did not ask to have these cattle taken back on the Santa Fe did he, he was talking about forwarding them north. A. He could not get them out of there some way.

Q. He spoke about forwarding them north? A. He wanted to go on with the cattle.

365 Q. He was talking about forwarding them on north? A. Yes sir.

Q. Where they were destined for and where he wanted to have them sent, on north? A. Yes sir.

Q. And Mr Brown said they were doing their best to get them out? A. He said they were arranging.

Q. As fast as he could to have them forwarded? A. Yes sir.

Q. The Santa Fe has no line running from Kansas City north as far as you know, has it? A. Well they have one, I suppose they call it north, it runs up to Olathe, I think it runs north there.

A. Branch line? A. One runs down east and turns north.

Q. That Olathe line, whenever you have through shipments of cattle you never ship over it? A. It might be used.

Q. You know through shipments of cattle from Kansas City to Council Bluffs go over the Burlington or the Missouri Pacific, do you not? A. I am not positive they all go that way.

Q. They are the only two direct lines or roads? A. Yes sir.

Q. And the only two direct roads? A. I presume you would call them direct roads.

Q. In shipping cattle, that is customary to select the most direct road, is it not? That is the usual practice? A. Yes sir, that is usual.

Q. How deep did the water get to be over the part of the stock yards where these cattle were located, the highest time of the flood? A. That is the highest, about the highest part of the yard, I think about eight feet.

366 Q. About eight feet deep? A. Yes sir.

Q. Mr Allen, the custom of railroads delivering stock at the stock yards is to remove their cars from the tracks from which the cattle were unloaded immediately after unloading the cattle, is it not. A. Sometimes they do, owing to the necessity, I suppose.

Q. Is it not the practice? A. Generally it is the practice.

Q. There is no room for storage of cars there, is there? A. If there was nothing else coming in they could leave them there.

Q. Is it not the practice to remove them at once on unloading the stock? A. I have seen them remain there for several hours, and ship them right away.

Q. You spoke of cars being on those tracks on Sunday; was that the track you spoke of? A. Saturday.

Q. You say you saw cars on some side tracks, were those tracks in the yards, or was it the same tracks you spoke of. A. Hog unloading chute tracks.

Q. You saw cars there Saturday? A. Yes sir.

Q. You did not examine them to see what cars they were, what road? A. Stock cars.

Q. You do not know what company they belonged to? A. I did not pay close attention to them, they were on the different unloading tracks.

Q. How many unloading tracks there? A. About six or seven.

Q. You saw stock cars on the various unloading tracks? A. Yes sir.

Q. But you do not know what company's cars they were. A. I [they] they were cars of the Santa Fe, all tracks, lots of cars in the yard Saturday, they did not ship out very much and just left them there.

367 Q. At that time the Santa Fe railroad did not have any track to the stock yards, did it. A. It had tracks they came in on.

Q. Answer the question definitely, whether the Santa Fe road had any tracks to the stock yards in 1903? A. The brought in stock I think,—as to the ownership of the tracks, I don't know.

Q. Don't you know from your own experience as a shipper that the Frisco road always delivered the Santa Fe trains of cattle from their end of the road into the stock yards, do you not. A. I do not remember of the Frisco delivering them, the Santa Fe engines pulled them in.

Q. The Santa Fe engines pulled them in? A. I do not know whose tracks they are.

Q. The Santa Fe cars come in do they not—don't you know as a matter of fact, that the pass track extending to the stock yards from the Frisco main tracks, over which the Santa Fe cars were brought in was the Frisco tracks and

controlled by the Frisco road? A. I do not know as to the ownership; I know the Santa Fe used them, that is all I know.

Q. You know that the cars from the several different roads came over that track, don't you? A. There are six or eight tracks in all came inside the city; the ownership of the tracks, I do not know.

Q. The Sante Fe cars come in over the same tracks that the Frisco cars came over, didn't they during that year? A. I do not remember as to the exact tracks that the Frisco comes in on; the Santa Fe tracks they used was right to the first shipping division.

Q. The tracks which the Santa Fe used was at the
368 first shipping division? A. Yes sir.

Q. At the extreme west side of the shipping division? A. Yes sir.

Q. Those are the tracks which the Santa Fe uses? A. Yes sir, loading and unloading.

Q. All of those tracks were built there during the year 1904? A. There are some there now still outside, there are some new tracks on the outside now built within the last year.

Q. Don't you know that the only connection of the Santa Fe road to the stock yards was built during the year 1904. A. No sir, I don't know that.

Q. Do you know any other track leaving the stock yards and connecting with the Santa Fe tracks during the year 1903.

Objected to by the plaintiffs, the witness ought to be permitted to finish his answer to the previous question before counsel propounds another.

By the Court: Very well, that will be done.

Q. By Mr. Angevine: Did you finish your answer to the previous question? A. I don't know it came so close together.

Q. Is there any further answer which you care to make to the previous question? A. They were being used by the Santa Fe I don't know whose tracks they were nor the ownership.

Q. With what railroad tracks did that line connect the Santa Fe used during the year 1903. A. How do you mean connect, coming in the yards.

Q. Yes sir. A. These terminal tracks.

Q. Now with what railroad did the other end of that track connect? A. I do not know who is the owner above there, The Santa Fe comes in over the tracks, I suppose it is the owner.

Q. Now answer the question—with what road, rail-
369 road did the other end of that stock yard track connect. A. I do not know the ownership of any lines.

Q. You know where the Frisco road comes into Kansas City? A. Yes sir, by the water works.

Q. You know where the Santa Fe comes in there to the stock yards? A. Yes sir.

Q. Now did the track over which you say the Santa Fe delivered cattle in 1903, connect with the Santa Fe tracks from the south or over the Frisco tracks from the south? A. I could not say as to the connection in there between the Frisco and the Santa Fe.

Q. You have shipped cattle over both roads? A. Yes sir; when shipping out over the Santa Fe I had nothing to do with the Frisco people.

Q. Have you gone out over that route with your cattle? A. I have sent them out that way.

Mr. Botsford: The plaintiffs object to this examination as an unnecessary consumption of time; and as to the ownership of the tracks, is wholly immaterial.

By the Court: I do not see that it cuts any material figure.

By Mr. Angevine: There are two reasons, they say that we might have shipped those cattle out, and I want to show that we have no track and no control over those cars; and another thing they have introduced what they call a rough sketch of the situation there, showing the Santa Fe track running right into the stock yard at that time.

By the Court: It is not contended by the plaintiff that the Santa Fe had any track in there but used the Frisco track.

Q. By Mr. Angevine: Now do you say that this is
370 a correct sketch of that part of the stock yards showing the Santa Fe track in the [the] stock yard? A. I can't say as to the ownership of the Santa Fe tracks, the only tracks they used in and out.

Q. Did the Santa Fe railway at that time have a track running into the stock yard as shown on that map? A. I do not know whose owrership of the tracks were, they used those tracks.

Q. Was there a track at that time coming in there in that direction that track is marked on there? (exhibiting map to the witness.) A. About that idea, those they used, yes they are.

Q. Will you mark on there which is north and south and east and west? A. Yes sir—marks north.

Q. Now do you say that the Santa Fe railroad company at that time, had a track there or near that yard coming in there, similar to the track marked there as the Santa Fe track? A. Something like that.

Q. As a matter of fact it came in from the southeast and not from the southwest, did it not? A. I don't know.

Q. Which connected with the Frisco tracks and not the Santa Fe tracks? A. I don't know as to the ownership.

Q. I will ask you where it connected? A. It connected after leaving the yards, going right on around to their own tracks, as to the exact location, I do not know nor the exact ownership.

Q. Don't you know that the track over which the Santa Fe at that time delivered stock came in off the Frisco tracks and not off the Santa Fe tracks? A. I do not know as to the ownership.

371 Q. You do not know whether this map is correct or not? A. In a way it is.

Q. And in a way it is not correct is it. A. Well it may not be exactly correct, but it is the idea.

Q. What you understand as to the way of using the tracks? A. I do not know as to the ownership of them. They say they use them.

Q. You did not make this map? A. Yes sir I helped to make it last night, they asked how the Santa Fe came in and go out and I said that is about the idea.

Q. During no time of the 30th, no railroad to whom those cattle were consigned, could have taken them out of the stock yards? A. What day would that be, Sunday.

Q. Saturday—but no time during the day on which they arrived could they have been taken out, could they? A. I think so.

Q. The consignee of the cattle could have moved them at any time during that day and up to nine o'clock the next day couldn't they? A. I did not say that.

Objected to by plaintiffs; there was no consignee at Kansas City and the cattle were not destined to come to Kansas City, and they were brought in here by the action of the Santa Fe railroad company and taken out by them.

Objection overruled, plaintiffs then and there duly excepting.

A. They could have moved them out I don't say as to all of the roads, they could have moved them out all day Saturday; the first I knew from the Missouri Pacific people, and about two or three o'clock in the evening of Saturday they could have moved them out on their own line all day Saturday and Saturday night.

Q. The Missouri Pacific could have moved them out at any time up to what time? A. I think about two or three
372 o'clock the Missouri Pacific men told me they could not take the cattle.

Q. For what reason? A. On account of some high water.

Q. Two or three o'clock? A. Yes sir.

Q. And at that time the stock had been in the yards several hours? A. Yes sir.

Q. You say that they moved them out on their own line, who do you mean by their own line? A. The lines running south.

Q. Do you mean the Santa Fe? A. Yes sir or the Frisco.

Q. Where could they have moved them by running south? A. Run them up around the usual way of getting out.

Q. By way of Holiday? A. No sir east.

Q. Do you know whether the cattle were consigned east or not? A. Dakota.

Q. You understood they were consigned north? A. The proper way was to go up the Missouri river, that would have been the best route.

Q. The owners of those cattle could have driven them up on the hill south of the city for all you know? A. Yes sir.

Q. And just as easy as the Santa Fe could have taken them out? A. I don't know about as easy.

Q. It would have been as near on the road for the owners to drive them up on the hill south of Kansas City as for the Santa Fe to haul them off east? A. It would have what?

Q. It would have been as near on the road to South Dakota for the owners to drive them on the hill? A. No sir.

Q. As a matter of fact there is no pasture in the vicinity of Kansas City to which the owners of the stock yards com-
373 pany or the railroad company could have driven those cattle, is there? A. Yes sir plenty of them.

Q. In the vicinity of Kansas City? A. Yes sir.

Q. How close to Kansas City? A. Within six miles.

Q. Plenty of pasture? A. Yes sir, Henry Kopeck had pasture there, he wanted to take cattle out there, of different traders and men who had bunches in the yard.

Q. Who was it? A. Henry Kopeck, towards Independence.

Q. Driving out his own cattle? A. No sir, there were a number of people put out little bunches.

Q. No public stock yards? A. They were in the public stock yards.

Q. Driven out of the public stock yards and sent out to pasture? A. Yes sir.

Q. Pasture for the season? A. No sir, temporarily until the flood went down.

Q. On what day was that you say? A. Saturday, several little bunches were taken out.

Q. There were thousands of heads of hogs sheep and cattle left in the yards over Sunday? A. Yes I understood about 1800 sheep and I forget the number of hogs.

Q. Several thousand? A. Yes sir, but I do not know as to the number, they were put up on some of the viaducts.

Q. Five or ten thousand hogs? A. No sir, I would not think that many.

Q. Quite a number of them? A. Quite a number I don't know just how many they came in Saturday.

Q. It is quite a common thing for these traders, as you call them to buy little bunches of cattle and send them out
374 in the country to pasture a while? A. Yes sir certain times.

Q. And the class of cattle which they buy are called holdovers? A. No sir, they buy anything that comes in.

Q. They do not buy whole bunches as a rule? A. Yes sir, thousands of them every day, fresh cattle.

Q. Now as a rule do they not buy cattle that are not suitable for slaughter, immediate slaughter? A. They do not buy slaughter cattle, they buy stockers and feeders.

Q. As a rule they are small bunches of cattle? A. Some of these traders buy [thrr] or four hundred head and some a less number; all the way from twenty-five to three or four hundred.

Q. Up until two o'clock in the afternoon of the 30th then, the plaintiffs in this case expected the Missouri Pacific to take out their cattle, did they? A. I do not know what they expected. The Missouri Pacific told me they could take out 19 or 20 cars.

Q. They as a matter of fact had turned 19 or 20 cars of cattle into the stock yards for the purpose of being fed, with the intention of taking them out again that day, by the Missouri Pacific. A. I don't know about what the [a] Missouri Pacific,—the Missouri Pacific Agent told me that they were ready to take out the cattle and I went to them a little bit after two and they said they could not take them now on account of the water.

Q. They told that in the morning they were ready to take them out? A. Yes sir.

Q. Told you that in the presence of Mr. Steube and Mr. Frost? A. Yes sir told me in the morning they could take out 19 or 20 cars.

375 Q. You said the cattle were there ready for them? A. Yes sir and we were anxious to have them take them out.

Q. They said they would take them out as soon as they could? A. They were arranging to take them out as soon as they could.

Q. They had their equipment there ready? A. I think that is what they said they were ready to take them out and continued up until two o'clock that day. Then the agent said he did not want to take them out then.

Q. That was on account of water and washouts, somewhere north? A. Yes I think he mentioned that.

Redirect Examination.

Q. By Mr. Botsford: In this shipping division where cattle were not destined ultimately for Kansas City, how would anybody get them from the stock yards after they were unloaded? A. It would be by the order of the bringing in line.

Q. By the order of the bringing in line? A. Yes sir, cattle destined through.

Q. Like these cattle were not destined ultimately for Kansas City, how would they? A. The bringing in company or line give an order to the [the] company for the out going line.

Q. The stock yards company order to the out going line? A. Yes sir and the out going line takes that up with the yard company which gives them credit for the number of cattle and cars.

Q. Under the custom down there would those cattle be delivered by the stock yards company to another carrier without such order? A. No sir would not.

Q. In this case where the cattle were put in the shipping division by unloading from the Santa Fe trains in the
376 shipping division, could the owners of any connecting carrier have obtained those cattle for movement without such order from the Santa Fe? A. No sir, nobody could touch them or have anything to do with them excepting the incoming line which gives the order to the out going line.

Q. Could the Santa Fe railroad company themselves [—] moved them if they desired to? A. They could, yes, sir, I suppose, they held the title, is what is called shipper's title, until they are delivered, that title to some other company.

Mr. Angevine: I move to strike out the answer of the witness as a conclusion and not a statement of fact.

By the Court: Overruled; defendant then and there duly excepting.

Q. So under the custom, if I understand you, nobody but the Santa Fe railroad company or some company with an order from the Santa Fe railroad company could have taken these cattle out of the shipping division?

Objected to by defendant as leading and suggestive.

A. No sir.

Q. Where did the tracks of the Santa Fe company used at that time out of the stock yards connect with the track of the Milwaukee and St. Paul? A. Down the east side of the city, across the city.

Q. Kansas City, Missouri? A. I think the St. Paul and the Santa Fe both used the Belt line tracks, where the connecting part would be perhaps on the east side where they would connect, on the St. Paul road proper.

Q. Where does the St. Paul cross the Missouri river going north? A. On the bridge down east of the city about three miles perhaps below the union depot, I don't
377 know the distance exactly.

Q. At that time what tracks did the Santa Fe and Milwaukee use out of the stock yards.

Objected to by defendant as incompetent, irrelevant and immaterial; objection sustained.

Q. What line did the Santa Fe use out as far as— A. They switched at the south end of the yards then on the Belt line; at the south end south side of Turkey creek came on the Belt line road.

Q. Where did this run to? A. Runs through the southern part of the city out east to Blue river.

Q. Did that line intersect the Chicago, Mil. & St. Paul? A. Yes sir crosses it.

Q. Was the Belt line open on Saturday and Sunday for the movement of trains.

Mr. Angevine: Objected to by defendant as incompetent, irrelevant and immaterial, whether the Belt line was open or not.

By the Court: Objection sustained; plaintiffs then and there duly excepting.

Q. How late on Saturday or Sunday the 30th or 31st could trains cross from the shipping division in the stock yards to where you say these cattle were located, and have gone east over this line, Belt line as far as the Milwaukee road?

By Mr. Angevine: Objected to by defendant as incompetent, irrelevant and immaterial.

By the Court: Objection sustained; plaintiffs then and there duly excepting.

Q. Do you know whether this is the same Chicago, Milwaukee & St. Paul railroad that crosses the Missouri river just east of Kansas City is the same road connects
378 with the defendants tracks for Council Bluffs.

By Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial.

By the Court: Objection sustained—plaintiffs then and there duly excepting.

Q. For ordinary feeding and watering purposes, where cattle in through transit are unloaded for feed and water, about how long a time is necessary to feed and water them, for them to be ready to resume transportation.

By Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial, and it does not appear that it was the duty of the Santa Fe to take them any further.

By the Court: Objection overruled;—defendant then and there duly excepting.

A. That depends on the distance they ran from the last feeding point, if it has been a short distance, why a short time.

Q. Suppose in this case they were fed and watered at Strong City and brought in here on the same day? A. Well a few hours would be sufficient; two or three hours would be sufficient if they only ran from Strong City; some times it depends on where you are going to the next feeding point; many cattle go through without being watered or fed; some run on through in the original cars and the engine of the connecting line take them on without any feed, where they go a short distance from the last feeding point.

Q. Did you see these cattle after they came off of the viaducts? A. Yes sir.

Q. How soon after? A. The same day they came off.

Q. State to the court and the jury fully what their condition was when you saw them after coming off of the
379 viaduct.

By Mr Angevine: Objected to as not proper re-examination.

A. The condition was about as bad as they could be for cattle to be alive, they were weak, and lots of them fell down and trampled one another going down the chutes and off of the viaducts, and also in the pens when we fed them, they

trampled over one another lots of them perished right there, their condition was about as bad as they could be, six or seven days without anything to eat.

By Mr Angevine: The defendant moves to strike out the latter part of the answer as not responsive to the question.

By the Court: Sustained.

Mr Ball: What part is struck out, "about as bad as they could be"?

By the Court: Yes.

Q. By Mr Ball—How long had they been on the viaduct? A. I think next Friday, either Thursday evening or Friday morning, next Friday morning, they had been on the viaduct from Sunday forenoon until Friday without water.

Q. Do you know what the market value of these cattle was if they had gone through in the ordinary way in time, at the time they were shipped the 25th and 26th of May, from Texas and Emporia; what the market value would have been at Evarts, South Dakota.

By the Court: The question is, do you know.

A. Yes sir.

Q. Now then what was that market value if they had gone through in the ordinary way and time at Evarts.

By Mr Angevine: Objected to by defendant as in-
380 competent, irrelevant and immaterial and not the proper measure of damages and not the proper place for fixing the damages as to this defendant.

By the Court: It is the well established law everywhere that the measure of damages would be as heretofore stated, that is the value of the cattle at the point of destination, if they had gone in the ordinary way, and the value after having undergone the experience of this kind.

I am going to permit you to prove the value of these cattle at the point where received and also to permit you to prove the freight paid, if you desire to do so, and the value of the cattle in the condiditon they were when received at Evarts; the value at the place of shipment, and the amount of freight paid and value of the cattle where received, at Evarts.

Q. Question read to witness—if they had gone through in the ordinary way?

By the Court: No, I will sustain the objection to that question.

Q. By Mr Ball: Do you know where Hereford Texas is? A. Yes sir.

Q. And do you know where Bovina, Texas, is? A. Yes sir.

Q. And Kenna, New Mexico? A. Yes sir.

Q. Now the evidence is that these cattle were shippe from those points, partly from each, on the 25th and 26th of May, do you know what their market value at those points were at the time of shipment? A. Yes sir.

By Mr Angevine: Objected to by defendant as incompetent irrelevant and immaterial.

381 By the Court: Objection overruled.
Defendant then and there duly excepting.

A. $22 per head.

Q. Now their value at Evarts South Dakota, to be consigned by shipment from those points to Evarts, South Dakota; do you know what that would be, if they had gone through in the ordinary way?

By Mr Angevine: Objected to by defendant as incompetent, irrelevant and immaterial; objection sustained.

Q. What would be the difference between their value at Evarts and the value at the points of shipment?

Mr Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial; objection sustained.

Q. What would be the amount of freight per head of the shipment from Hereford and from Bovina?

Mr. Angevine: Objected to by defendant as incompetent irrelevant and immaterial.

By the Court: I think you have that freight definite.

Q Mr Ball: I believe you stated that you were present when Mr Mullens [amde] arrange-ent with the live stock office for freight; was the freight on these cattle arranged and agreed upon at that time?

Mr Angevine: Objected to for the reason that the question when asked before was ruled out, for the reason that afterwards there was a contract made and put in writing at the point of shipment.

By the Court: No use allowing this witness to speculate on that.

My ruling is that these cattle would have been worth, if they had gone through in the usual way, or what they are worth there plus the freight.

382 Q. By Mr Ball: How often did you see these cattle after they came off of the viaduct? A. I think

when I came back it was along some time Wednesday—I went out on the stock yards Wednesday in a boat.

Q. You saw them after they came off of the viaduct? A. No sir, I saw them during the day two or three times a day until they got them out of there, there was some delay in getting them out.

Q. Did you see them after they left there? A. No sir not after they were shipped out.

Q. What has been the custom in your experience there at the yards as to the time when cattle were loaded in or unloaded there or loaded out, if going out at the stock yards; I mean the time within the day of the 24 hours, which that was done.

By Mr Angevine: Objected to by defendant as incompetent, irrelevant and immaterial; objection sustained.

Mr Ball: I want to show that loading out all along, that was the ordinary way even when there was no flood there, the method at all times.

By the Court: This was not an ordinary circumstance.

Objection sustained; plaintiffs then and there duly excepting.

Q. By Mr Ball: Was there any stock moved out of the yards on Saturday and Sunday?

By Mr Angevine: Objected to by defendant as incompetent irrelevant and immaterial; objection overruled; defendant then and there duly excepting.

A. Yes sir there was a lot of bunches, considerable, numbers of cattle sheep and mules and horses all day Saturday and Sunday morning 11 and 12 o'clock.

Q. Up to 11 and 12 o'clock Sunday morning? A. Yes sir.

383 Q. Where were the mules moved from? A. The mule stable, Sparks Brothers.

Q. Where are those stables with reference to this pen where these cattle were? A. About a hundred yards east of the shipping division, about the same section.

Q. South of 16th street? A. South of 16th street.

Q. And east from the shipping division? A. Yes sir.

Q. How late were they moving the mules out Sunday morning? A. About 11 o'clock I saw a drove of mules coming out to the bluffs. That is I was on the viaduct they were driving them out then.

A. About 11 o'clock Sunday? A. Yes sir.

Q. Any movement going on there Sunday? A. Yes sir, several bunches sent out during Saturday, all day Saturday I

think some in the night, late in the evening the last bunch when I left looked like forty or fifty head going out Saturday evening.

Q. Which was the last part of the yards to be submerged? A. The shipping division was the highest part of the yards.

Recross-Examination.

Q. Now the custom in shipping cattle through Kansas City, where one carrier brings the cattle into the city for delivery to another carrier, to take them out, the custom is to deliver them to the stock yards and with the cattle to deliver a slip or stub way bill, is it? A. Yes sir.

Q. And from that the stock yards company makes its entries on its book as to delivering carrier and also as to receiving carrier do they? A. I think they keep the stub.

384 Q. Do they notify the receiving carrier of the receipt of the cattle for them? A. Generall- the in-coming people notify the outgoing people.

Q. They generall- notify them prior to the arrival of the cattle that is the custom by wire? A. That is generally so.

Q. One agent notifies the other agent that cattle are coming? A. Yes sir.

Q. And when the cattle arrive at the stock yards; when the cattle are delivered at the stock yards, the company delivering them, just delivers them on a slip shewing what road they are destined for, that is correct? A. Generally one agent notifies the other one there is a train of cattle in for him and give him an order on the yard company for the cattle.

Q. The order on the yard company, it is already in the possession of the yard company when they receive the cattle, is it not, they receive it with the cattle, do they not. A. They receive the cattle through the billing, is different from an order. Their billing shows the destination and generally the road.

Q. Where it is through billing then the stock yards company, as soon as they receive the cattle for the outgoing company, they hold the cattle? A. I suppose they would if it was put on the billing, if it is through billing, that is they are marked.

Q. The stock yards company would receive them and hold them for the outgoing company? A. Yes sir.

Q. It is the custom for the stock yards company, also to notify the outgoing company that they have so many cars of stock for them? A. I don't know, I don't think hardly the stock yard company notify them, I think they already know it.

385 Q. As a matter of fact in actual practice the railroad company brings the stock into the yard and arrange with the out going company before bringing that in as

265

to the shipment of them and notify them as soon as they can of the arrival. A. It is generally marked on the bill.

Q. Noted on the bills? A. Yes sir that is the general way.

Q. For instance in a bill like that Amarillo—Santa Fe via Junction, Atchison to Kansas City, St. Joe & Council Bluffs, shows the routing, does it not? A. I should think so.

Q. Upon the arrival of the cattle under a bill of that kind the practice would be for the stock yards company to take them and they would appear, as for the outgoing carrier would they not. A. Yes sir for stock cattle.

Q. It is the common practice for the stock yards company under circumstances like that to notify the outgoing carrier of the arrival of stock and where they are, is it not? A. I do not know about the practice of the company notifying that particular outgoing company, it kind of speaks for itself, or what has been said between the agent prior to that, the agents of the incoming line notify the agents of the outgoing line that they have so many cars of cattle going out. Kind of a custom of the agents.

Q. And that notice is either given by calling up on the phone or meeting them and saying that they have so many cars of cattle for you? A. Yes sir.

Q. And you have dealt with them for a great many years there and know that that is the custom and know the usual way is either to call up the company on the phone and say we have so many cars of cattle. A. They phone it or send one another word, or send a boy; it has generally been arranged before the cattle arrive.

Q. Usually arranged by telegram from one road to
386 the other? A. Yes sir I have called them up.

Redirect Examination.

Q. That is with a bill when the cattle come in here, for instance when these cattle come in, who would have that bill? A. The Santa Fe people.

Q. How would another road get it. A. By delivering from the Santa Fe company to the yard company and the yard company to the outgoing road.

Q. Has the outgoing road getting these cattle with the order from the Santa Fe to give them to them, or without deliver of the bill. A. They would offer them deliver of the bill or order; no outgoing train would take them out without deliver of through billing or the order, there has to be a written method of doing it.

Nova Z. Douthitt, sworn, testified on behalf of the plaintiffs as follows on

Direct Examination

By Mr. Ball:

Q. Please state your name? A. Nova Z. Doughitt.

Q. Where do you live? A. Kansas City, Mo.

Q. How long have you lived there? A. Since 1874.

Q. What is your business? A. Railroad business.

Q. In what capacity? A. Agent, live stock agent of the Missouri Pacific.

Q. How long have you been so? A. Since April 1, 1892.

387 Q. Where? A. At Kansas City since January 1, 1893.

Q. Where before that? A. Pueblo, Colorado.

Q. You became the general live stock agent at Kansas City, January 1893? A. Yes sir.

Q. 12 years ago? A. Yes sir.

Q. During that time where were your offices? A. Prior to June flood in 1903 they were in, right on the line, partly in Kansas City, Kansas and partly in Kansas City, Missouri, at the live stock exchange.

Q. In the live stock exchange building. A. Yes sir.

Q. After the flood where? A. In the exchange but on the Kansas side, Kansas City, Kas.

Q. In the same building but on the other side of the state line? A. Yes sir.

Q. The state line runs through the building? A. Yes sir.

Q. Your offices prior to the flood were really cut by the line? A. Yes sir.

Q. You were in one state and part in the other? A. Yes sir.

Q. What territory does your jurisdiction as general live stock agent cover, and did it cover during those times. A. It, covered all of the territory we ran with our own rails and in the business pertaining to the traffic of the road.

Q. Do you mean anywhere in the United States? A. Yes sir.

Q. Were you here during the flood? A. Yes sir.

Q. Do you remember of a lot of cattle coming into the Kansas City stock yards Friday 29th in the evening and Saturday morning the 30th, in the morning, over the Santa Fe from the south and destined north, to South Dakota? A. Yes sir.

388 Q. Did you have any correspondence on behalf of the Missouri Pacific railroad company with any official of the Santa Fe railroad company in reference to the handling of those cattle? A. Yes sir.

Q. With whom did you have such correspondence. A. It was with the [traffix] department of the Santa Fe at Topeka.

Q. Who [—] personally there? A. Well I could not say personally, I can't tell what clerk in the Santa Fe office handled the correspondence.

Q. Was the correspondence conducted by wire? A. Principally, I think.

Q. To refresh your recollection was it with Mr. Cook? A. Either during Cook's administration or—let me see I guess it was Mr. Cook.

Q. Who was Cook at that time. A. He was the assistant general freight agent of the Santa Fe.

Q. He was the assisant general freight agent? A. Yes sir.

Q. And where located? A. Topeka.

Q. Have you the correspondence, telegraphic or otherwise which you conducted with him about that matter? A. No sir, we lost all of our records in the flood.

Q. You lost them in the flood? A. Yes sir.

Q. I will hand you telegram dated Topeka, Kansas, May 27th, addressed to you, and signed C. W. Cook, and I will ask you if that is a copy of the wire which you received in reference to this matter? A. I think that is correct.

(Marked exhibit number 11)

Mr. Ball: I offer that in evidence.

And which is in words and figures following to-wit:

389 Topeka, Kansas, May 27-03.

Rush wire.

N. Douthitt, Kansas City.

Account of washout with Burlington, want to deliver Missouri Pac. at Atchison, about three trains of cattle for Evarts, S. D. and routed via Councill Bluffs, care of C. M. & St. P. Presume you will join accepting north of Atchison same division Burlington accept. Rush answer. Q 3:52.

C. W. COOK.

Q. Did you send that telegram in response? (showing paper) A. I think so (marked plaintiffs exhibit 12.)

Mr. Ball: I will offer that in evidence.

The defendant objects to the evidence as irrelevant and incompetent and not the best evidence. Objection overruled. Defendant duly excepting.

151 S M ND.

Kansas City, May 27, 03.

C W COOK, Topeka.

Yours date Q 2:52; will move the three trains cattle Atchison to Omaha accepting division allowed Burlington which I understand is $13 per car; advice when shipment will be delivered our line. N. Douthitt.

5:52 p m.

(Memo: Have now advised J E Hurley that line is in operation again.)

Q. By Mr. Ball: Do you know what "Q" 3:52 means? A. That is the file number.

Q. In Mr. Cooks office? A. Yes sir.

Q. Do you know anything of that memo on there; read that, in pencil? A. No I could not recall that. "memo, have no- advised J. E. Hurley line in operation again."

Q. Is not that meant for Burlington the first word? A. Yes sir that is meant for Burlington.

Q. May 27th was Wednesday, was it not? A. Saturday was the 30th, Sunday the 31st.

390 Q. Now do you recall any other correspondence or arrangement with either at Kansas City, than as indicated by these telegrams, I have shown you? A. I don't recall any other correspondence.

Mr. Angevine: These telegrams were taken off our files; they have them in the record I ask that they be read and copied.

Q. Mr. Ball: Had you or your railroad company made any arrangement with the Santa Fe railroad prior to Friday evening the 29th or the morning of the 30th, about receiving as connecting carrier these four trains of cattle at Kansas City?

By Mr. Angevine: Objected to by the defendant.

By the Court: Let him state what is within his knowledge.

Q. By Mr. Ball: Who would have made arrangement on reception of these four trains of cattle by [tour] railroad here, if such arrangement had been made with the Missouri Pacific to take them at Kansas City.

By Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial and calling for the conclusion of the witness.

By the Court: Objection overruled, defendant then and there duly excepting.

A. Naturally, I would, having charge of the live stock department.

Q. Did you prior to Saturday morning the 30th of May have or make any arrangement with the Santa Fe railroad company to take these four trains of cattle at Kansas City? A. No sir.

Q. What was the first you knew of the four trains of cattle being in here? A. When was the first, the morning of the 30th I think.

391 Q. About what time in the morning? A. About 8:30 o'clock when I came to my office.

Q. You found out they were here? A. I can't just say how, probably their local office, the general live stock office of the Santa Fe I could not testify as to just how I got the information.

Q. You do not recollect who brought it to your attention? A. No sir.

Q. Do you recollect about any Santa Fe officers asking you about taking them out on that day? A. Yes sir.

Q. Who was it and when did they do it? A. During the forenoon Saturday, I can't say who.

Q. During the forenoon on Saturday, but you can't say who? A. No sir.

Q. Was Mr. Titus the general live stock agent of the Santa Fe at that time? A. Yes sir.

Q. Who, if you know, was in his office attended to those matters? A. Well, naturally Mr. Brown, I presume is the chief clerk, attended to it, or I believe Mr. Roberts was there at that time.

Q. Was there a man by the name of Jasper, they called by some nick name or first name; you do not recollect who this gentleman first spoke to you about it was? A. No sir not at this time.

Q. Do you recollect about what time of day they first spoke to you about it? A. About the time I reached the office about 8:30.

Q. Now at that time and prior to that time, had you expected to be asked to take any of these cattle? A. No sir, not at Kansas City.

Q. At Kansas City I mean? A. No sir.

Q. Had you any preparation made on your road
392 to take them at Kansas City, at that time.

By Mr. Angevine: Objected to by the defendant as being a mere guess on the part of the witness, he cannot

know what the general officers of the road had done, unless they came under his observation.

By the Court: Objection sustained.

Q. By Mr. Ball: If these cattle were to be taken out by your road whose business was it to prepare to take them out?

By Mr. Angevine: Objected to by the defendant as heretofore stated.

Objection overruled—defendant then and there duly excepting.

A. It would be the business of the operating department to prepare to take them out.

Q. Under whose orders? A. Well that would depend on circumstances, it would be possible for the Santa Fe to, deliver the Missouri Pacific a train of cattle at Kansas City, for St. Louis or some point east or north without any knowledge even through shipment.

Q. Who directed the operating department in taking these cattle? A. That would come under my observation if necessary to direct them at all I would direct them; but the operating department might a general shipment without my knowledge, the rate and so forth, would be something I would have to personally know of.

Q. But in the ordinary way if these four trains came in here to be taken by the Missouri Pacific, who would see to the matter of giving the orders for the cars to take them out, after the Santa Fe had brought them in here,—is what I am getting at? A. After they were unloaded at Kansas City, they would come under my observation.

393 Q. That would come under your observation? A. Yes sir.

Q. And you would be the one to order the preparation of the cars to take them out? A. Yes sir.

Q. Now you had not and did not make any such arrangement in this matter as I understand it prior to the time they spoke to you about 8:30 o'clock in the morning of Saturday.

By Mr. Angevine: Objected to by the defendant as it is the testimony of the counsel and not the witness, it is leading.

By the Court: Objection sustained.

Q. Had you made any such preparation at 8:30 at the time they spoke to you about it Saturday morning?

By Mr. Angevine: Objected to by the defendant as leading; objection overruled, defendant then and there duly excepting.

A. No sir.

Q. What did you state to them when they asked you to take them.

By Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial.

By the Court: Objection overruled—defendant then and there duly excepting.

A. We told them we did not have the power to handle that many trains of cattle without notice, that the indications were that we could not get them out under any circumstances; we would make an effort if the water was not any higher by noon to load one train that day.

Q. What do you mean by saying you had not the power to take them out? A. I mean we did not have three locomotives available in Kansas City, over and above the other business to take them out, that we could put on this stock to take it out.

Q. What about the remainder of your power outside of this one train, you said you would make an effort on? A. The remainder of the power did not come into consid-
394 eration; we could get one engine that day, if we could get at the chutes to load them, we would not undertake to handle more than that because we had not the power

Q. Was the rest of the power engaged? A. Yes sir.

Q. Now did you make an effort to get together a train for them? A. I made an effort at exactly noon to get to the chutes where we were to load these cattle, in sending the switch engine down there with one of my men in charge, and that switch engine could not get into the chutes, as far as we tried and all we could do, they got into the water where it put the fire out.

Q. Where were the cars at that time in which you expected if your engine could have gotten through to take the 19 or 20 cars which you say you tried to take? A. We had not undertaken to furnish the cars; they were in the yard bottoms, may have been in the cypress yard.

Q. You had not undertaken to furnish any cars? A. We had not undertaken to bring in any cars.

Q. Under your arrangement for this one train where were the cars to be obtained?

By Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial, and calling for the conclusion of the witness.

Objection overruled—defendant duly excepting.

A. There were two sources from which we could obtain them; that would be considered after we found that we could get into the chutes; one would have been to have gotten cars from the Santa Fe and the other we could have gotten them out of our own yards.

Q. Was anything said by them about cars in which they asked you to take the cattle? A. Not that I recall,

395 Q. Look at this sketch marked exhibit number ten, and if the pens indicated there, marked shipping division, is that about the location of the shipping division with reference to the exchange building. A. Is this the exchange building here?

Q. That is supposed to be the exchange building. A. Well it is at least a mile north of the exchange building to where we would have to load these cattle.

Q. Where you would have to load them? A. Yes sir.

Q. At that time, in the shipping division, where would they have to be taken in order to be loaded on your tracks? A. They would have to be directly north of where the Union Pacific and Missouri Pacific bridge cross the Kaw river—directly north of where this bridge cross- the river.

Q. How would they go from the shipping division to where they could be loaded in your yards. A. Through all the stock yards?

Q. Any viaducts over that way? A. Yes sir.

Q. Could they go by the viaduct or through all of the stock yards? A. They could go both ways, there is a tunnel and viaduct also.

Q. Where was it your engine attempted to go and got the fire put out? A. Over here just a mile north.

Q. Where was it going. A. It was going into these Missouri Pacific chutes where we would have to load these cattle, to see if we could load them.

Q. Was a cattle train there to put them in after you got the cattle over there? A. No sir I told you before we may have expected to get cars from the Santa Fe may be or may be have used our own cars which may have been on this side of the river or in the east bottoms.

396 Q. You had to send your engine after them? A. Yes had to send an engine in there.

Q. You do not recollect as I understand you, just what car arrangement was? A. No sir, no [cary] arrangement had been definitely arranged as I recollect it now.

Q. Now was there in fact any cattle delivered to your road —these cattle? A. No sir.

Q. Did you receive from the Santa Fe any order for any of these cattle? A. No sir.

Q. Did you receive from the Santa Fe any way bills? A. No sir.

Q. Accompanying the cattle? A. No sir.

Q. After your correspondence with the company as shown by these telegrams of the 27th, do you know whether your railroad made any arrangement for receiving any of these cattle at Atchison? A. After my correspondence with the company?

Q. Yes, Wednesday the 27th. A. Yes sir.

Q. What was done there? Of your own personal knowledge, of course? A. I can only testify from my correspondence.

Q. You were not up there then? A. No sir.

Q. Did you give any directions emanating from your office in that regard? A. Yes sir.

Q. What?

By Mr. Angevine: Objected to by the defendant as not the best evidence.

By the Court: Objection sustained.

Q. The wires which you sent in that respect, have you those? A. No sir, we have nothing pertaining to the transaction in the way of record. We had absolutely nothing left in our office.

397 Q. So that your communications and orders in that regard made by wire, the memorandum of them is entirely destroyed? A. Yes sir entirely.

By the Court: To whom were they sent? A. To the freight superintendent at Atchison.

Q. Who is he? A. It was either superintendent Rathburn or Russell, I do not know just which, one or the other, the administrations change.

Q. You gave your deposition in this matter I believe, in this matter some time ago? A. Yes sir.

Q. To refresh your recollection then I will show you your answer then. A. I think possibly Mr. Clark was there at that time. I would not undertake to testify, we have had three superintendents there quite recently, it would not be right for me to undertake to say who was there at that particular time. I can't recall it now.

Q. Whatever those orders were, and to whoever sent at Atchison, were those all of the orders which you gave in reference to [to] the time and place of taking these southern cattle? A. They were all the orders I gave and were all the orders given towards that transaction.

Q. Did you make any arrangement any where else other than that? A. No sir.

Cross-Examination.

Q. By Mr. Angevine: What is your official position with the Missouri Pacific road? A. General live stock agent.

Q. Is there a man connected with the Missouri Pacific road by the name of Gould? A. Yes sir.

Q. E. A. Gould? A. Yes sir.

Q. What is he, or what was he in May and June, 1903? A. Genl. Superintendent.

Q. What were his duties? A. Genl. Supt. of the System.

Q. He had authority to make contracts for handling
398 stock of connecting lines over the road? A. No authority to make any contracts pertaining to traffic of the road.

Q. He had no authority? A. No sir.

Q. You say you as live stock agent had authority in regard to traffic of the road superior to Gould? A. Mr. Gould has no authority in connection with the traffic of the Missouri Pacific.

Q. From what source do you get your authority? A. I get it from knowledge of the business and the way it is conducted and from experience.

Q. There is where you get your authority in regard to the matter is it; now do you know from what source Mr. Gould got his authority? A. I do not know anything about Mr. Gould's authority; I know that he is connected with the operating department only; he has nothing to do with the traffic.

Q. Who has general charge of the traffic of the road, of the Missouri Pacific? A. W. C. Stiff of St. Louis.

Q. Who has charge of the furnishing of the motive power and the operation of the trains on the division of the Missouri Pacific road from Kansas City to Atchison? A. Mr. J. Russell at Atchison, Kansas, at this time.

Q. Who had charge of that in May and June, 1903? A. His predecessor.

Q. Do you know his name? A. I stated before I can't tell whether it was Mr. Clark or Mr. Rathburn.

Q. What are his initials, H. G. Clark? A. Yes sir.

Q. Was Mr. H. G. Clark, division superintendent of the Missouri Pacific from Atchison, Kansas, in May and
399 June, 1903? A. Either he or Mr. Rathburn was superintendent, not division superintendent.

Q. Superintendent? A. Yes sir.

Q. Over how much territory did his division extend at that time? A. Everything north and west of Kansas City.

Q. And he had control of the traffic of the road over that department, had he? A. Not the traffic, no sir.

Q. What did he have control of? A. Operation.

Q. That is furnishing cars and motive power. A. Not furnishing cars, no sir.

Q. Who would have control of the furnishing of cars? A. The superintendent of transportation at St. Louis.

Q. At St. Louis? A. Yes sir.

Q. Now I mean in the use of cars over the road, would Mr. Clark have authority to direct the handling of trains over his division? A. Yes sir.

Q. And would have authority to direct the operation of the road over that division would he? A. Yes sir.

Q. If Mr. Clark at that time was superintendent, it was he, who would have authority and charge of the traffic over that division at that time or operation of the road? A. Yes sir.

Q. That is the handling of trains? A. Yes sir.

Q. Supplying the motive power and operation of trains? A. Yes sir.

Q. [Who] office did you say E. A. Gould held? A. General Superintendent.

Q. He was the superintendent over the whole of the Missouri Pacific System? A. Yes sir, Missouri Pacific proper.

Q. Where was his office in June, 1903? A. Kansas City, Missouri.

400 Q. In May and June? A. Yes sir.

Q. And he had charge of the operation of the entire Missouri Pacific System, did he? A. The Missouri Pacific proper, yes sir.

Q. And the line from Kansas City, north to Atchison, and beyond was under his jurisdiction, at that time, was it? A. Yes sir.

Q. And Mr. Clark or whoever was superintendent at Atchison was under Mr. Gould's direction? A. Yes sir.

Q. And in regard to the transportation of cattle from Kansas City, north over that division, the transportation of the cattle would be under their direction would it, the management of trains? A. The transportation would be under their direction.

Q. You had no authority in the transportation department at all had you? A. No authority in the transportation department.

Q. Your authority was general solicitation and the procurement of the shipment of live stock and looking after stock claims and so forth, was it? A. And rates governing it. And also the movement.

Q. Would you have authority to direct the movement of trains of stock different from an order given by Mr. Clark as to the movement of that train. A. I have authority to

say to Mr. Clark we want certain things; we would make certain arrangements and confer with him as to carrying them out, that is pertaining to the transportation only.

Q. And the same with Mr. Gould, you have that authority to Mr. Gould, to direct him as to what he shall do in the transportation of stock, have you? A. Not direct him, no sir, confer with him.

Q. And then he does as he pleases about it afterwards? A. No sir, he does not.

401 Q. You say that you, the stock agent of the Missouri Pacific at Kansas City, have authority to control the general superintendent of your system in regard to the handling of stock over that road. A. I made no such statement.

Q. Is that true? A. No sir, it is not.

Q. Now it is true, is it not, on the morning of the 30th day of May, 1903, at 6:30 in the morning, a train load of this stock in question, was delivered to your tracks in your yards in Kansas City for shipment north, and receipted for by the Missouri Pacific road, is it not? A. I would say not, although I would not swear to it, I have no knowledge of such action.

Q. Do you not know at the time that the train load of cattle in controversy were delivered into your yard and by the Missouri Pacific road afterward turned into the stock yard? A. No sir.

Q. Who is Mr. Isit? A. The local agent.

Q. The local agent of the Missouri Pacific. A. At Kansas City.

Q. He is the agent of the Missouri Pacific for the receiving and handling of shipments of freight, collecting charges for freight, and also passenger traffic, is he? A. He has nothing to do with the passenger traffic, neither has he with the collection of freight on live stock; through freight he collects the charges.

Q. The custom of your road in receiving stock from other roads, is that Mr. Isit receipted for it, is it not? A. It depends on how it is intended to handle the shipment; for those shipments moving through Kansas City, without being unloaded, as I have already stated, it would be handled through the local office, that is the bills; charges would be subject to our direction.

402 Q. Then you do not know, whether a train load of that stock was received by the Missouri Pacific at Kansas City, that night do you? A. I would not swear to that, no sir.

Q. You have no authority to order out an engine from the roundhouse, have you? A. No sir.

Q. You have no authority to order out trains have you? No sir.

Q. You have no authority to order stock cars from the yards to any place, have you? A. Yes sir.

Q. You have authority to order those, simply to bring them out? A. Yes sir.

Q. Who have you authority to order to bring them out? A. Anybody.

Q. You have authority to order a train crew to go and get a lot of stock cars? A. I do not deal with the train crews, no sir.

Q. You deal with the operating department then, do you? A. Yes sir.

Q. Have you any authority to order the operating department in regard to handling trains? A. No sir.

Q. None whatever? A. No sir.

Q. You could not order the handling of cars from the cypress yards to the stock yards and direct your order to any operating employe could you? A. I could order the superintendent of terminals to take 25 cars stock cars, from the cypress yards to the cattle loading chutes, at a certain hour.

Q. You could order that? A. Yes sir.

Q. If Mr. Gould, the general superintendent would order him not to do it, there would be a slight conflict of authority would there not? A. Yes sir.

403 Q. And you would control also? A. That would be demonstrated later.

Q. And you think your authority as superior to the authority of the general superintendent, do you? A. It depends on what the question is, and pertains to.

Q. About 8:30 in the morning of the 30th, you were notified of the arrival of this stock at Kansas City for shipment north over your road? A. That is about the time I learned of it.

Q. How near is your office or was it at that time to the office of the Santa Fe live stock agent in the exchange building? A. 100 feet.

Q. On the same floor? Were you in the Santa Fe live stock agents' office that morning? A. No sir.

Q. Were they in your office? A. I can't recall, I could not say.

Q. Who was it notified you of the arrival of this stock? A. I really could not say.

Q. Were you notified that the stock was in the yards for you? A. I do not understand that I had such notice as that, my recollection is that we were notified that the cattle were in Kansas City and we were asked if we could take

them out. My last transaction in connection with it was we were to get them at Atchison, the record that I left when I left the office the evening before, that was the arrangement.

Q. And the excuse which you made for not receiving and the only one you did make, was that you did not have the motive power to handle all of those cattle, was that it? A. We were not attempting to make any excuse, it was not necessary.

Q. What you told the Santa Fe agent when you were notified of that was that you did not have the motive power, and that was the reason was it, why you did not want
404 to take the stuff? A. We did not have the motive power to move three trains at once.

Q. You had no control over the direction of the power, you say? A. No sir.

Q. Had you been notified by the operating department that you would not take it? A. No sir, I would not tell the Santa Fe man that if I did not confer with the operating department.

Q. Did you confer with him before you told him that. A. That is the only way I could find it out.

Q. How long did it take you to confer that day and find out? A. I don't know how long it did take; I know I could find out in five minutes.

Q. Did you call up the operating department by 'phone? A. That is the only way we could reach them; I would not say positively we called them up; I can't recall a conversation by phone two years ago.

Q. Did you confer with the department about it? A. Yes sir.

Q. Told them there was three train loads of stock for the Missouri Pacific north? A. We went over it, I do not know just what I told him in words.

Q. As a matter of fact was there not three train crews at Kansas City waiting to take this stock north? A. No sir.

Q. Do you say as a matter of fact there was not three Missouri Pacific train crews? A. No I could not say, there might have been 25 engines in Kansas City; I am testifying from my knowledge there was no engines available.

Q. That is the department you had nothing to do
405 with you say? A. I explained my connection with that department.

Q. As a matter of fact did not the operating department at that time when you told them about the stock being there for them say that they were afraid to start with it on account of the water? A. I know we were afraid to start with it, for the reason we went down to try.

Q. For the reason you went down to try? A. Yes sir. To see if we could get to load them.

Q. Was your track in perfect condition out of Kansas City at that time, at the time you have spoken of when you made the effort to get into the stock yards? A. I could not testify as to that.

Q. Was there any reason why you could not have loaded the cattle at the end of the yards where they were kept at the time you attempted to get into the stock yards? A. It was impossible.

Q. Why so? A. Because we could not get in there with the switch engine as I have stated.

Q. At 8:30 in the morning couldn't you get into the stock yards? A. We did not try at 8:30.

Q. What time was it when you did try to get into the yards? A. About noon.

Q. What day? A. Saturday.

Q. At noon on Saturday could you not have run an engine into the south end of the stock yards where the stock was unloaded? A. I do not know where they were unloaded.

Q. You did know at the time where they were, didn't you? A. I knew they were in the Kansas City yards; I did not know where they were located in the Kansas City yards.

Q. Didn't you testify a few minutes ago that the cattle were in the extreme south end, your yards were in
406 the north end? That they would have to be driven clear through? A. No sir, I did not; I did not testify where the cattle was; I testified where they would have to be loaded if we took them.

Q. Didn't you answer to Mr Ball's question was, they would have to be driven from the south end of the yards through the yards, either over the viaducts or through alleys and taken to the north end of the yards where your loading chutes were. A. I did if they were located where he said they were on that diagram; I did not know where they were.

Q. Was there any reason why your motive power could not have been sent to the south end of the yard at noon or at any time during Saturday to load and take out these cattle? A. There are good reasons why we could not.

Q. What was the reason? A. Because we did not have any tracks over there; we did not go out that end.

Q. You have no tracks, but other roads have them, do they not. A. Yes sir, but we did not have access to them, though.

Q. You could have had access by application for it, couldn't you? A. No sir.

Q. Do you say that the roads do not one run over the other upon application, and under arrangement made with the

other road? A. I say they do not in the Kansas City terminals. The only way we could have gotten that stock from the south end of the yards, would have been for it to have been loaded on some other line tracks and they switch it to our connection at the north end, and we pay the switching charge; we could not have gone in with our own power.

Q. That is the only reason why you did not take it at that time? A. It is never done, never has been done.

Q. You could not go in on any other road with your own power? A. No sir.

407 Q. That is the universal rule is it one road can't go in on another road's tracks with its own power? A. Yes sir; it has to make arrangement with the road owning the line.

Q. It has to make arrangement for the road owning the power or the line and have their power used? A. Yes sir.

Q. And that you say is the universal rule? A. Yes sir.

Q. That is the reason why you did not do it at that time? Is it? A. The question of us getting in there was never considered, it is not done under any circumstances.

Q. Was any of your tracks at the north end of the yards submerged at noon on Saturday? A. I could not testify personally from observation.

Q. You were down there by the yards and told where this engine tried to go? A. I was not I sent a representative as I stated.

Q. What you testified to about that is simply what somebody else told you, is it? A. What my man reported, yes sir.

Mr. Angevine: The defendant moves to strike out of the witness's testimony about the water over the tracks at the time they undertook to put an engine in there, as hearsay evidence.

By the Court: Motion overruled; defendant then and there duly excepting.

Q. At 8:30 o'clock you were notified of the cattle being in the yards and you then stated you would make an effort to handle one train of cattle, did you? A. About that time, yes sir.

408 Q. And you told the owners of the cattle that also did you? A. I never saw the owner that I recall.

Q. Are you acquainted with Mr. Allen, a stock yards man? A. Yes sir.

Q. Did he come into your office with Mr. Frost and Mr. Steube and inquire about sending those cattle north? A. Not to me personally that I recollect, he may have.

Q. Do you remember of Mr. Allen being in your office on that day at all? A. No sir.

Q. Had no conversation with him? A. I do not remember any conversation with Mr. Allen.

Redirect Examination.

By Mr. Ball:

Q. Might Mr. Allen and Steube have been there to see you without you now recollecting it? A. Yes sir; I could not undertake to say he was in there; several hundred people in a day; they might have seen me personally, or they might have seen some of the office force.

Q. Do you desire to be understood as saying they were not there? A. No sir, I could not say that.

Q. Please explain a little further, and a little more clearly, I did not undertand myself clearly, the difference between what you call the traffic department and the transportation department? A. The transportation department has charge of the operation of the road; the traffic department have charge of the traffic in the way of rates of division and arrangement for shipments with connecting lines.

We make the previous arrangements with the operating department to be prepared to handle it, but the rate proposition and all pertaining to the traffic comes under the traffic department, the operating department receive their
409 notice from us as to such shipments, they prepare to handle it.

Q. What do you mean by us? A. The traffic department.

Q. Is that the traffic department of which you are the head? A. As far as the live stock is concerned, Mr. Stiff is the head of it.

Q. Now if arrangements were made to take these cattle from the Santa Fe at Kansas City through what department would that be made.

By Mr. Angevine: Objected to by the defendant as not re-examination, and going over the same ground again.

Q. Admitting they were not originally billed to go over the Missouri Pacific, what department of your road would have made arrangement to take them, if any such arrangement was made or to be made?

By Mr. Angevine: Objected to by defendant as calling for a conclusion of the witness.

Objection overruled. Defendant duly excepting.

A. The traffic department; the operating department might have notice in such event they were offered by the operating department of the Santa Fe certain cars of stock, they would ask us if we had any arrangement to handle that business.

Q. That is the operating department would ask your department? A. Yes sir.

Q. Now you stated to Mr. Angevine in the absence of any proper arrangement, any proper notice, I believe you stated, that cattle went through here on through shipment and not unloaded, that the bills would be handled through the local agent? A. Yes sir, the stock yards company would not have anything to do with a shipment of that character.

Q. If not unloaded? A. No sir.

Q. Where they were unloaded, as they were in this
410 instance, how would your road get them?

By Mr. Angevine: Objected to by the defendant as not re-examination, and simply going over the same ground with the same story.

By the Court: Overruled.

Q. The way bills would be delivered by the Santa Fe to my office; we would place an order with the stock yards company to run those cattle at our loading chutes at a certain hour, the stock yards company would load them at that time, into our cars or cars we furnished at that particular point; the way bills then would be forwarded to the terminal office by my office and conductor of the train take them out and take them through.

William M. Kendrick, sworn, testified on behalf of the plaintiffs as follows, on:

Direct Examination.

Q. By Mr. Ball: What is your name? A. Wm. M. Kendrick.

Q. Where do you live? A. Kansas City, Mo.

Q. How long have you lived there? A. 20 years.

Q. What is your business? A. I am the agent for the Burlington at the stock yards.

Q. What sort of an agent? A. Stock agent.

Q. General live stock agent? A. No, sir, simply local live stock agent.

Q. At Kansas City? A. Yes sir.

Q. Is there a general live stock agent at Kansas City, Mo.? A. No sir, we have none.

411 Q. How long have you been in that capacity? A. About 20 years.

Q. During the time you have lived here? A. Yes sir.

Q. What are your duties in that regard? A. Simply to look after the stock interest of the Burlington at the stock yards and solicit business and attend to the loading it out and unloading such as we receive of business handled through the stock yards here.

Q. Is all of the business handled through the stock yards in which your company is concerned, I mean live stock business, of the company, come under your direction? A. Yes sir.

Q. Do you remember the occasion of the flood of 1903? A. Yes sir, very well.

Q. You were there and in this position at that time? A. Yes sir.

Q. Do you remember, Mr. Kendrick, of three or four trains of cattle coming in over the Santa Fe, some of them arriving Friday evening, on the 29th, and some of them on Saturday morning, of the 30th of May? A. Yes sir, I have heard of them.

Q. Did you make any arrangements to take those cattle?

By Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial and calling for the conclusion of the witness; Objection overruled.

A. No sir, I did not make any arrangements. Before the first train which arrived there on Friday reached the yards, our superintendent called me up and told me that there was about 25 cars—

Mr. Angevine: We object to the conversation between him and the superintendent, as hearsay evidence.

By the Court: Objection sustained.

412 Q. Now never mind what the superintendent told you; did you know of the first train being expected in? A. Yes sir, I was there, when it was received.

Q. Now what did you do when those cattle came in?

By Mr. Angevine: Objected to by the defendant—are those the cattle in controversy.

Mr. Ball: No sir; it is the cattle in controversy the first train came in Friday within the issue, I am asking about.

By the Court: Proceed.

Q. What did you do about it? A. Having heard about them I went to see whether we were to handle them or not.

Q. Where did you go? A. To the Santa Fe office.

Q. Whose office now? A. The stock office of the Santa Fe road, there is but one office in the exchange building.

Q. Who is the live stock agent of the Santa Fe or was then? A. I do not remember now, just who he was, their live stock agent at that time, I think Mr. Roberts, same gentleman occupies the position now.

Q. Who is Mr. Titus? A. Live stock agent.

Q. Was it in his office? A. No sir, the adjoining one, they have three or four offices each adjoining on the other; I went into the local office, the local agent's office, and I asked him if he could tell me anything about that train of stock, I heard they were routed our way, and if they were I wanted to know something about them, and he called up Argentine.

Q. Who was Roberts? A. Not Roberts, a clerk there.

Q. Who was the clerk there? A. I never did know his name, his nick name was Jasper, he worked there quite a long time for the Santa Fe, I never knew the gentleman's name.

Q. What kind of work did he do? A. He was a
413 clerk in the Santa Fe office, he seemed to revise and handled all of the bills.

Q. Did he do that right along while you were there and dealt with him? A. Yes sir, that was his business there.

Q. What did he do?

By Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial, and for the further reason that it is not shown that the man Jasper, was authorized to bind the defendant company.

By the Court: You say that he revised and handled all of the bills, what do you mean by that. A. The bills coming in there with stock, for instance anything sent through the care of a connecting line, he would be the party to go around to the other agent and get us those bills or notify us of the shipments.

Q. What kind of bills do you mean? A. Bills for live stock.

Q. Way bills? A. Yes sir.

Q. How long a time had he been doing that prior to this? A. It has always been the custom—

Q. I mean this particular individual. Was there any body else in the office when you went in there to see about this? A. I do not remember who may have been in there, I think possibly there were others, but I do not remember who they were.

Q. Was he the man you customarily did this same business with? A. Yes sir.

Q. Now what did he do?

Objected to by the defendant as incompetent, irrelevant and immaterial; Objection overruled, defendant then and there duly excepting.

414 A. He called up the Argentine office over the phone.

Q. Who did he call at Argentine? A. I think he said it was the chief clerk, of course, it was their local office.

Q. The Santa Fe local office? A. Yes sir.

Q. What did he say then?

By Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial, and hear say evidence, and not being shown that this man Jasper had any authority to bind the defendant in any statement he could [made.]

By the Court: Objection overruled, defendant then and there duly excepting.

Q. What did he say? A. He asked them how that train of stock was routed through the telephone, he hold him they were routed—

By Mr. Angevine: Objected to by the defendant.

By the Court: Did you hear what the other fellow said at the other end of the line? A. I talked to him myself later on, I wanted to know.

Q. First let us get at what Roberts said—I mean Jasper? What did he say to you after he telephoned to this party?

By Mr. Angevine: Objected to by defendant as incompetent irrelevant and immaterial.

Objection overruled; defendant then and there duly excepting.

A. That they were routed care of the Missouri Pacific railroad.

Q. Then what did you say? A. I said I would like to speak to the gentleman myself please through the telephone.

Q. Did you? A. I did.

Q. And what did he say? A. The same thing.

Q. And then what did you say? A. I quit.

Q. Did you say anything? A. Yes sir.

415 Q. What was it? A. It was a sad thing. I was out of it of course, routed by the Missouri Pacific.

Q. I asked you if anything else was said? A. No sir, I think that was possibly about all.

Q. What time was that? A. I can't recall the hour, I think possibly between two and three o'clock possibly.

Q. What day? A. Friday.

Q. In the afternoon? A. It might have been a little bit later than that, my impression is about three o'clock.

Q. Some time afternoon Friday? A. Yes sir.

Q. Was that before or after the cattle arrived, the first train? A. Before.

Q. Now then where did you go after you left—did you leave at that time? A. Yes sir I went back to my office.

Q. Now where were the loading chutes of the Burlington system at the stock yards with reference— A. South end of the yards, south of the exchange building.

Q. Where were they with reference to the shipping pens? A. Just opposite.

Q. Which way? A. The shipping division is west.

Q. West? A. West of our loading chutes.

Q. Was it so in May 1903? A. Yes sir.

Q. Now what is the relative altitude of that portion of the yard as compared with the other parts of it? A. As high as any part of it I think. Yes I would think the yards are as high as any other point.

Q. What equipment and power did you have at command at that time and on Saturday for the handling of live stock out there?

By Mr Angevine: Objected to by defendant as incompetent irrelevant and immaterial; Objection overruled. Defendant duly excepting.

Mr. Angevine: And it does not show that they were
416 to be sent over their road from there.

By the Court: Objection overruled. Defendant duly excepting.

A. Without knowing positively, I could not say; we are very rarely short of power.

Mr Angevine: We object to the testimony because it is not shown that the witness has anything to do with the operating department, and he does not know anything about the movement of trains and he ought not to be asked to guess about it.

By the Court: State what equipment the Burlington did have there in the way of engines and cars available for taking cattle out Friday evening and Saturday?—first state if you know? A. Well I really know but very little about it, I know we were equal to emergencies.

By Mr Angevine: The defendant objects to that statement and moves to strike it out.

By the Court: Objection sustained; only state what you know.

Q. Did you have plenty of cars? A. Yes sir.

Q. Did you have any engines? A. Yes sir but I don't know how many.

Q. Did you have enough to move three trains.

By Mr Angevine: Objected to by defendant.
By the Court: Objection sustained.

Q. Do you know how many engines? A. I think I had two or three trains that evening as we had every day, without looking at the time record—

Mr Angevine: Defendant objects to and moves to strike out the statement of the witness, as incompetent, irrelevant and immaterial.

417 By the Court: Objection sustained.

Q. Whenever any cattle came in for further transportation over your line, who arranged to receive them and send them out of Kansas City. A. When they came to the stock yards, I did.

Q. That is what I mean? A. Yes sir.

Q. These cattle Saturday night and Friday [noght], or Saturday morning came to the stock yards and were unloaded? A. Yes sir.

Q. If they had been routed by your line, did you have at your command sufficient facilities, engines, and cars to take them out?

By Mr Angevine: Objected to by defendant the witness stated that he knew little about it.
By the Court: Objection sustained; plaintiffs then and there duly excepting.

Q. I ask him, do you know whether cars and engines were there sufficient to take out these three trains. A. We had ordinary stock cars.

By the Court: The question is, do you know. A. I say we had plenty of stock cars.

By the Court: That is not the question; the question is whether you know you had plenty of equipment to take these cattle out? A. I don't know.

Q. By Mr Ball: You do not know whether you had? A. no sir.

Q. At the time you were talking with this man in the Santa Fe office, did you say anything to him about handling these cattle.

By Mr Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial.

By the Court: I can't see it is material.

418 By Mr Ball: I want to show whether they were billed to them or not, they could send them out over this line if they wanted to.

By Mr Angevine. It is not shown that Jasper had anything to do with the operation of the road or this man had or knew anything about it.

By the Court: The objection is sustained.

Q. By Mr Ball: Is there any other conversation which occurred between you and the man in the Santa Fe office except what you have related.

By Mr Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial.

By the Court: Objection overruled? Defendant duly excepted.

A. I do not remember that there is.

Q. Did you send any cattle trains out by the Burlington Saturday?

By Mr Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial.

By the Court: Objection sustained; plaintiffs then and there duly excepting.

Q. Do you know of any trains going out in the part of the yards where these cattle were and clearing the flood on Saturday?

By Mr Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial.

By the Court: Overruled; defendant duly excepting.

A. I do not know just where those cattle were yarded, we loaded out cattle there on Saturday evening.

By Mr Angevine: Defendant objects to the answer as not responsive to the question; sustained.

Q. If they were yarded in what is known as the shipping division?

By Mr Angevine: Objected to by the defendant; the witness says he don't know.

By the Court: Overruled. Defendant duly excepting.

419 A. We loaded out I think it was two trains if I remember correctly, I think 35 cars Saturday evening.

Q. What time did they go out?

Mr. Angevine: The defendant objects to the testimony and moves to strike out the witness's answer, as incompetent, irrelevant and immaterial.

By the Court: Objection overruled; defendant duly excepting.

A. I do not know exactly, I think between five and six o'clock.

Q. Where were they destined?

By Mr. Angevine: Objected to by defendant as incompetent, irrelevant and immaterial.

By the Court: Objection sustained; plaintiffs then and there duly excepting.

Q. Did they clear the flood?

By Mr. Angevine: Objected to by defendant as incompetent, irrelevant and immaterial.

By the Court: Objection sustained; plaintiffs then and there duly excepting.

Q. What road did they go on? A. The Burlington.

Q. Which direction?

By Mr. Angevine: Objected to by defendant as incompetent, irrelevant and immaterial.

By the Court: Objection overruled; defendant then and there duly excepting.

A. East.

Q. When were they loaded? A. Saturday evening.

Q. What time? A. Possibly I think they left the yard between five and six o'clock.

420 Q. What time were they loaded? A. About that time, pulled them out as soon as they were loaded.

Cross-Examination.

Q. By Mr. Angevine: Your line which you have spoken of goes to Chicago and St. Louis and points in the east? A. I think leaving the yards they cross the river at Harlem.

Mr. Botsford: I will read the deposition of Wm. A. Dyal, which is as follows:

421 Direct Examination

By J. S. Botsford:

Q. Where do you live? A. 124 Quincy Street, Topeka, Kansas.

Q. How long have you lived in this State? A. About eleven years the last time.

Q. Were you in Topeka, Kansas, in May and June, 1903? A. Yes, sir.

Q. Do you remember the flood of the Kaw river at that time? A. Yes.

Q. What business were you in at that time? A. Scrap iron and metal business.

Q. Whereabouts was your place of business? A. 214 and 216 North Kansas Avenue.

Q. Where as relates to the Kaw river is that? A. Three or four hundred feet of the river—five hundred feet I guess.

Q. Which side of the river? A. On this side; south side.

Q. Were you there at your place of business in May, 1903? A. No, I could not get there on the 30th.

Q. Do you remember of the rainfall along the Kaw river and at Topeka and in Kansas during the month of May, 1903? A. Yes, I know the rainfall was very heavy. I don't know what it was.

Q. When did it begin to be heavy? A. Along about the fifteenth, I should judge.

Q. How did it continue from the 15th of May on? A. Why, I should say heavy; the river kept rising.

Q. During what portion of the day or night from the 15th on did it rain? A. I could not say as to that.

Q. How heavy were the rains after the fifteenth? A. They must have been pretty heavy up the Kaw judging from the way the river came up.

Q. When did the Kaw river begin to rise at this point? A. My judgment would be along about the 15th, possibly as late as the 20th.

422 Q. How much did it rise a day? A. I could not say.

Q. How many feet do you say from the river your place of business was? A. I should judge about five hundred feet.

Q. How high above the river at low water mark was your place of business? A. I should say the grade floor of our building was high, but judge in the neighborhood of eighteen or twenty feet.

Q. How soon after May 15 was it before the water reached your grade floor as you call it? A. I reached our grade floor the night of the 29th of May.

Q. What was the height of the water on the 20th of May, if you remember? A. I could not say, only it was high.

Q. How was it on the 23rd? A. If I remember right it did not fall much after it commenced rising. We were preparing to get away and the river kept up so I stayed at home on account of it.

Q. When do you say it commenced? A. I should think between the 15th and the 20th.

Q. How much higher than your grade floor did the flood get? A. Four feet.

Q. When did it reach that height? A. I suppose about the 30th. We could not get down there after I left there the night of the 29th about ten or eleven o'clock, and it was just commencing to come in on our floor then. The morning of the 30th I could not get there.

Q. Did you keep any memorandum or data of the rise of the river, or anything of that sort? A. No, sir.

Witness excused.

WILLIAM A. DYAL.

423 C. T. McLellan sworn testified on behalf of the plaintiffs as follows on

Direct Examination

Q. What is your name? A. C. T. McLellan.

Q. Where do you live? A. Topeka, Kansas.

Q. How long have you lived there? A. Since 1887.

Q. Continuously since that time? A. Yes sir.

Q. What position do you hold there [ir] business do you follow? A. I am division superintendent of the Atchison Topeka & Santa Fe Railway Company.

Q. How long have you been division superintendent of that road? A. Since September 1890.

Q. What portion of the road is included within your division of which you are division superintendent? A. From Argentine to Emporia by way of Topeka and from Holliday to Emporia, and by way of Topeka to Atchison and St. Joseph and Wilder to Hawthorne, by way of Leavenworth and Alma branch, Burlingame to Alma.

Q. Was that your division in 1903? A. Yes sir it was.

Q. Do you remember the flood of 1903? A. I do.

Q. Do you remember the rains in the month of May 1903? A. I remember we had frequent rains and some of them heavy.

Q. Did you get any kind of rains in the way of washouts in the Kaw river during that month? A. About the 27th and 28th of May, I got some reports from the Rock Island office by phone, that the river west of Topeka—

Q. That is the Rock Island office in your city? A. Yes sir, Topeka.

Q. What did you say you learned in that way? A. The question was asked as to what the stage of water was above what we could expect and they advised by phone what

424 it was in the vicinity of Manhattan.

Q. They had information from Manhattan, is that a fact? A. They were given the information as being from Manhattan.

Q. When on the 27th did you commence to get that information? A. At that time I was at Lake View, the information was gotten through my office by phone and then telegraphed to me as I remember it.

Q. That is you were at Lake View some point between Lawrence and Topeka is it not. A. It is, I was between Lake View and Lawrence.

Q. On the 27th? A. Yes sir.

Q. And this communication which came to your office in Topeka by phone from Lake View as to Manhattan was telegraphed to you at Lake View from Topeka at your office? A. Wired me by my chief clerk.

Q. What were you doing at Lake View. A. I was protecting the right of way between Lake View and Lawrence where the river is high.

Q. How near is that to the Kaw River? A. Lake View proper is about a mile.

Q. What was the condition of the water there on your track at Lake View between Topeka and Lawrence on the 27th? A. The water was not on the track at Lake View; at a point about three miles west of Lawrence it was over the track, and we were holding the bank with riprap and sand bags.

Q. When was the last time before that day when your track at that point had been flooded? A. In June 1902.

Q. When was the last time the trains passed over that road between Topeka and Lawrence in the summer of 1903. A. A work train on the morning of May 29th about 4:30 and 5:30 in the morning, passed over the track between
425 Lake View and Lawrence.

Q. You say that was the last one during this flood period? A. That was the last wheel moved.

Q. What hour did you say? A. Between 4:30 and 5:30 in the morning.

Q. Was there any train in the morning, passenger or freight, passed over that line between Topeka and Lawrence until the subsidence of the flood some time in June after that train. A. Nothing at all, as late as the 8th of June I got up I think as far as Lake View, with a work train from Lawrence.

Q. Suppose then that a train of live stock leaving Strong City and coming to Kansas City over that line, could not have come over that route by way of Topeka after that Friday morning, could it? A. Not after five o'clock Friday morning May 29th.

Q. You were giving pretty close attention to the flood conditions on the different points on your road on and in your

division. A. I was attending to the work personally between Topeka and Kansas City, and I was getting reports from every point on the division where we were threatened.

Q. When did the rise in the Kaw river at Topeka begin? A. I think the river commenced to rise early in May, but the rise was very gradual and slow.

Q. What time in May did it begin? A. I think by the 14th or 15th middle of the month, it was raising slowly.

Q. Did it continue from that time on until the climax of the flood? A. There was not a steady raise, there were times when it was at a stand-still and fell slightly.

426 Q. Were the rains continuous during that period? A. They were very nearly continuous.

Q. How many feet above the low water mark, is considered the danger point in the Kaw river at Topeka? A. I could not say we have no gauge.

Q. You kept fully informed from time to time of the state of the water at Topeka did you?

By Mr. Angevine: Objected to by the defendant, as calling for a conclusion, let him state what information he had. Objection overruled, defendant duly excepting.

A. I tried to.

Q. Was the line of your road between Emporia and Topeka flooded during that week? at any time? A. The track between Lang and Emporia was flooded on the 30th and a portion of the 31st of May.

Q. How long after that time did it continue in that condition? A. The water subsided on the 31st and we replaced the track which was washed away on the roadbed and resumed train service on the tracks the 31st I remember.

Q. Which one of those days, if any of the-, did trains discontinue running between Topeka and Emporia? A. The morning of May 30th.

Q. Did they run on that day?? A. I went out with an engine on that day as far as I could go within about three miles of Emporia, there was no trains went into Emporia by that route.

Q. This station Lang is it on the main line between Emporia and Topeka or on the cut-off. A. It is on the main line about eight miles from Emporia east.

Q. Now up to what time did trains continue to run from Strong City and Emporia and Topeka up to Atchison? A. We discontinued train service to Atchison on the morning of [of] the 29th.

427 Q. What time that morning? A. The last train went through was a freight left Topeka about three

o'clock in the morning and as near as I can remember it reached Atchison about eight o'clock.

Q. The same morning? A. Yes sir.

Q. Now in consequence of the floods at what point on the road were these trains discontinued after that? A. They were discontinued between Topeka and Atchison, Topeka and Leavenworth and Topeka and Kansas City.

Q. They were discontinued at all of those points? A. Yes sir the morning of the 29th.

Q. You say Leavenworth that is the road goes from Wilder, is it not? A. They were discontinued on that also, there is a road betwen Topeka and Leavenworth, between the two lines, there is a road from Topeka to Atchison and Topeka and Kansas City and then a branch line from Martin junction to Leavenworth; this Martin junction is ten miles east of Topeka.

Q. All of the lines of the Santa Fe system in Kansas City north of the Kaw river were discontinued if I understand you on the morning of the 29th? A. They were as far as it relates to Topeka, we were still open and operating trains between Holliday and Kansas City.

Q. Between Holliday and this city? A. Yes sir. We were still operating trains on the 29th between Holliday and Kansas City by way of the cut-off.

Q. But did you operate any trains between Holliday or Wilder and Leavenworth or Atchison north after the morning of the 29th? A. That is my recollection we ran trains over that portion of the road on the 29th but discontinued the service that evening.

428 Q. The evening of the 29th? A. Yes sir.

Q. Now going back again to the line from Topeka to Atchison, I believe you stated there was a flood at Valley Falls. A. The Deleware river overflowed the main line—

Q. The Deleware river is one of the tributaries of the Kaw? A. Yes sir.

Q. Empties into the Kaw river where? A. Opposite Lecompton.

Q. Between Lawrence and Topeka? A. Lecompton is 16 miles east of Topeka, between Lawrence and Topeka.

Q. That stream the Deleware at Valley Falls became a flood near the first? A. It made trouble for us on the forenoon of May 29th it went over the track, while it did not wash the road bed away it made it unsafe for trains.

Q. How was the flood in the Kaw river at Topeka on the morning of the 29th? A. I could not say from my personal knowledge, I did not reach Topeka until noon of the 29th.

Q. How was it then? A. It was over the track and the track was impassable.

Q. Was there a break across the Kaw river on your road. A. In the direction of Atchison it was impassable then.

Q. At noon of the 29th? A. Yes sir.

Q. How long had it been impassable did you learn from any officers agents or employes of the road how long it had been impassable at that time. A. I was informed by the office force that they had not been able to put anything over there after train 122 that morning.

429 Q. What time was that six o'clock? A. One left three o'clock in the morning.

Q. What was the condition of the road at Holliday? A. The water was over the main track at Holliday.

Q. When? A. On the 29th.

Q. What time? A. All day; there is a sag in the track at that point, the road bed is low and the bank of the river is low.

Q. When did the last train go over your road at Holliday? A. A stock train about 10:15 or 10:30 that night, May 29th east bound.

Q. Did they go by the way of the cut-off? A. It came by way of the cut-off.

Q. After the morning of the 29th, there was no trains came east by way of Holliday except by the cut-off, if I understand you? A. That is right.

Cross-Examination.

Q. By Mr. Angevine: It is true is it not that you ran trains from Lawrence down to Kansas City over the main line all day on the 29th passenger trains left Lawrence about four o'clock in the afternoon and came down to Kansas City, is it not? A. I believe I did run a local passenger 114 which should have,—I think we ran that train by way of Osage City and Quenemo over Lawrence branch to Holliday.

Q. And from Holliday into Kansas City? A. Yes sir that was the only service we had by that route.

Q. That was the last train over that? A. That was the last train.

Q. You say at Holliday at that station the tracks are low in a sag there? A. Yes sir.

Q. You frequently have water over your tracks there? A. We have had water over the track there a number of times.

430 Q. There is a creek comes down there from the south and crosses your track near Holliday is there not? A. Creek called Mill creek runs from Olathe.

Q. And on both sides of that creek the ground is low and at the station at Holliday it is low is it not. A. It is.

Q. And the track would be flooded there nearly half a mile on either side would be water on your track? A. That has been our experience.

Q. Now in regard to the washouts or disabling of your road and your tracks from Topkea to Atchison, you had one washout at a creek called White clay creek did you not? near Atchison? A. We have trouble there; bridge number five about a mile and a quarter west of Atchison.

Q. That disabled your road did it? A. That disabled the road at that point, yes sir.

Q. At Lake View your track crosses the old bed of the Kaw river does it not? A. Yes sir.

Q. And that place was low and has caused you trouble frequently? A. It gave trouble in 1902 in June 1902.

Q. In June 1902, the Kaw valleys were flooded two or three times were they not, the Kaw valley. A. We had no water over the track in June 1902 except at Lakeview and between Lakeview and Lawrence and in the Holliday yard.

Q. And that time you had no water in your terminals at Kansas City, had you? A. None that I know of.

Q. Or none at the stock yards as far as you know. A. None that I ever heard of.

Q. And had never had water in your terminals at Kansas City prior to the flood of May 31st, and June 1st, 1903?
431 A. Not to my knowledge.

Redirect Examination.

Q. By Mr. Botsford: I suppose it is true, that the business of the Atchison, Topeka & Santa Fe Railway Co. is and during its entire existence, has been, that of a common carrier engaged in carrying passengers, and freight for hire? That is true? A. That is my understanding.

Q. Mr. McLellan, the office of J. E. Hurley, the general superintendent, and Mr. Austin, trainmaster, and yourself, as division superintendent and C. W. Cook, as assistant general freight agent, and W. J. Healy freight auditor, both now, and in the year, 1903, are, were and had been at Topeka, were they not? A. Mr. Cook is not there now. Hs was there in 1903.

Q. All of these gentlemen in May 1903 and June had their offices in the Atchison Topeka & Santa Fe building opposite the capitol in Topeka, Kansas? A. They did; my office is at the freight yards, the others in the general offices.

Adjourned to January 20th, 1905, 10 a. m.
January 20th, 1905, 10 a. m. resumed.

Mr. W. H. Frost recalled testified on behalf of the plaintiffs as follows on:

Direct Examination.

Q. By Mr. Botsford: State to the court and jury what was the amount of the freight which was paid by you for the transportation from Texas to South Dakota of your cattle. A. The rate from Hereford to Evarts, South Dakota was $100 per car.

Q. I belive there was 21 cars? A. Yes sir.

Q. Did you pay that at the destination? A. Yes sir.

Q. That was for the freight on the entire shipment of 791 head of cattle? A. Yes sir.

By the Court: Does this witness know the freight trade on the Minnesota & Dakota company cattle?

Mr. Botsford: No sir.

Q. By Mr. Botsford: I suppose you do not know what was paid by the Minnesota & Dakota Cattle company, except as you know it from their statements? A. No sir, I do not.

Cross-Examination.

By Mr. Angevine: I would like to cross-examine the witness a little further. While you were at Strong City with your cattle the water came into the stock yards where the cattle were kept, did it not the flood of the Cottonwood river and the creek which came down by the stock yards. A. My recollection is the Cottonwood partially overflowed and ran to near the corner of the yards the morning which we loaded out.

Q. And the water was raising when the cattle were loaded? A. Yes sir I think so.

Q. You got up on the fence and called to the men to hurry up and get the cattle out of there on account of the water, did you not? A. No sir.

Q. Did anybody with you in charge of your cattle or assisting you do so? A. I don't think so.

Q. You do not know? A. I have no such recollection.

Q. The pens where the cattle were kept were located at some distance away from the station, were they not?

A. Yes sir.

Q. In the creek bottoms of the creek coming into the Cottonwood river from the north? A. I do not know what creek it was, I suppose it was the Cottonwood.

Q. And the water was raising rapidly in the Cottonwood river when the cattle was loaded. A. I noticed the water was in the yards, one corner of the pen.

Q. It was raising at that time? A. I think so.

Q. And the pens were located on level ground, comparatively level ground were they not. A. There was high and low ground in those yards, reasonably level.

Q. Now what time was it when the last train load of your cattle arrived at Strong City, did you say? A. 11:30 the 26th, I think it was about that.

[A.] About 11:30 the 26th? A. Yes sir.

Q. And is it not a fact that that train load of cattle did not stop at Strong City when they first arrived there, but came on east towards Atchison and were stopped at Saffordsville, a station between Strong City and Emporia and there they were backed up to Strong City, on account of the report of a washout on the Burlington or for some other reason? A. If such was the fact I have no knowledge of it, I had no knowledge of it at that time.

Q. It was in the night time? A. Yes sir it was in the night time?

Q. You were in the way car were you? A. Yes sir.

Q. And don't you know whether that was a fact or not? A. I don't think it is.

Q. Would you say it is not a fact? A. No sir, I would not say it was not.

Q. Is it not a fact that that train backed for several
434 miles in going into Strong City at the time you have spoken of when it came there? A. No sir, I don't think so.

Q. You do not think so? A. No sir.

Q. You were awake and looking out of the car? A. Yes sir.

Q. Is it not a fact that that train passed Strong City going east about 12 o'clock or 12:01 midnight and went on to Saffordsville and returned reaching Strong City about two o'clock in the morning? A. No sir it was not.

Q. The train you were with was the last one of the trains there at Strong City was it? A. No sir.

Q. Was there another train of cattle came in afterward? A. Yes sir.

Q. What time afterwards? A. I could not say, I don't know, I saw the shipper the next day some time.

Q. Came in some time the next day was it? A. I don't know.

Q. You do not know of any other train coming in that night than your own, do you? A. No sir, I do not.

Q. Now is it not a fact there was a train load of cattle in the yards when your train came in? A. Yes sir.

Q. And is it not a fact that your train could not be unloaded or could not be loaded up until the other train was loaded up and taken out of the way? A. They could only load one train at a time.

Q. So that in the morning or next day when they undertook to load them out they could not put but one train on the track at a time to load? A. Yes sir.

Thereupon the plaintiffs read in evidence the deposition of Pat. Connor, as follows to-wit:

EXHIBIT "A"

Nov. 30/04

D. D. Denham, Notary.

435 U. S. Department of Agriculture, Weather Bureau.

River Stages at Kansas City, Mo., May 12th to June 10th, 1903. Observations taken at 6:42 a. m., local time. Height of danger line 21.0 feet.

Date	Reading of river g-age	Change in 24 hours	Rainfall in 24 hours.
May 12	9.5ft	plus 0.3ft	0.95in.
13	10.4	plus 0.9	0.89
14	12.9	plus 2.5	0.02
15	13.8	plus 0.9	0.0
16	14.7	plus 0.9	0.0
17	14.8	plus 0.1	0.03
18	13.8	-1.0	0.0
19	13.2	-0.6	0.06
20	12.9	-0.3	0.0
21	13.2	plus 0.3	0.70
22	13.3	plus 0.1	0.34
23	14.4	plus 1.1	0.74
24	16.2	plus 1.8	0.27
25	16.8	plus 0.6	0.07
26	18.0	plus 1.2	0.16
27	18.7	plus 0.7	0.76
28	21.7	plus 3.0	0.0
29	23.3	plus 1.6	0.22
30	25.0	plus 1.7	0.64
31	27.5	plus 2.5	0.62

June 1	35.0	plus 7.5	0.95
2	35.0	0.0	0.12
3	34.4	-0.6	Trace
4	32.9	-1.5	0.03
5	31.0	-1.9	0.04
6	28.9	-2.1	0.22
7	27.4	-1.5	0.0
8	25.7	-1.7	Trace
9	23.7	-2.0	0.05
10	21.7	-2.0	0.0

P. CONNOR,
L. F. O., Weather Bureau.

R. L. A.

436 EXHIBIT "B".

Nov. 30/04 D. D. Denham, Notary.

Copies of River Forecasts and Warnings Issued at Kansas City, Mo., May 26th, 1903.

Owing to the frequent heavy rains in the Kaw and middle Missouri valley, the rivers will continue rising at Kansas City. Should the rains keep up a few days longer the danger line will be reached at Kansas City.

May 27th, 1903.

The rivers will continue rising at Kansas City.

May 28th, 1903.

The great volume of water resulting from recent storms between Kansas City and Sioux City, and in the Kaw valley, has raised the Missouri beyond the danger line at Kansas City, the reading at 7 a. m. being 21.7 feet.

While Sioux City and Omaha report falling stages, reports of very high water in the Kaw river, added to a prospect of more rain in this section in the next 24 hours, suggest that interests affected by high water should be closely guarded.

The foregoing, in addition to being printed on all maps, was prepared on special cards and mailed to the 20 places between Leavenworth, Kansas, and Boonville, Mo.

May 29th, 1903.

The Missouri river stage 23.3 feet at Kansas City this morning, 2.3 feet above danger line.

Excessive rains in past 24 hours in Kaw valley and light to moderate rains throughout the Missouri basin.

Both Missouri and Kaw rivers will continue rising. The flood in the Kaw may become very serious without the addition of rains liable to fall to-day and to-night. It may go 2 or 3 feet higher in next 36 hours.

The following warning was prepared on postal cards and mailed to all points between St. Joseph and Boonville, Mo.

Ordinary river stages are shown in the Missouri from Plattsmouth northward, while below St. Joseph the river is above the danger line, being quite serious at Kansas City. This flood is entirely due to frequent and excessive rains. The uncertainty of the rain outlook places the river changes beyond accurate calculation, and it would be well for all interested to be prepared for emergencies.

May 30th, 1903.

State of Missouri at 7 a. m. at Kansas City, 25 feet and still rising. This is more serious than the flood of 1892 and only about one foot below the stage of 1881.

Heavy rains in Missouri and eastern Kansas last night renders the situation more alarming for points below Kansas City.

(The foregoing warning prepared on postal cards and mailed to all points below Kansas City.

It was amended for local use by every spark of intelligence which reached this office. Being a legal holiday no weather reports received, and only vague reports from Kaw points telegraphic communication very, very poor.

May 31st (Sunday).

No reports of any kind received. Cut off from telegraphic or telephonic communication, excepting to eastward, nothing could be said except what was actually happening in this vicinity. And still the rain kept falling.

437 June 1st, 1903.

Stage of river at Kansas City at 7 a. m. 35 feet, a rise of 7.5 feet in 24 hours. At Plattsmouth 11.2 feet, rise of 0.2 feet; at Omaha 14.4 rise 1.3 feet; at Sioux City 11.3 fall of 0.7 feet. No reports received from Kaw points.

Light to moderate rains have fallen in the Kaw and middle and lower Missouri valleys in past 48 hours, and rain is falling this morning over the greater portion of Kansas, Nebraska, Iowa and Missouri.

The weather will remain cloudy and threatening with occasional rain to-day and Tuesday, and continue cool.

There will probably be little change in the river condition at Kansas City during the next 24 hours. Slight fluctuations mean but little in the way of relief so long as weather conditions remain unsettled. The following special bulletin was issued at 11:30 a. m.:

The crest of the flood has probably been reached at Kansas City. It is now fluctuating a little below the 35-foot mark, the threatening and showery conditions at present

prevailing over the Kaw and middle Missouri watersheds may not be able to maintain the present high stage, so that a slight fall may be shown within 24 hours.

This encouragement should be taken sparingly owing to unsettled weather conditions.

June 2nd, 1903.

River ga-ge reading at Kansas City at 7 a. m. 35.0 the same as yesterday morning, with slight fluctuations during the day. The Kaw appears to be falling slowly, but the decline is counterbalanced by a rise in the Missouri. These conditions will likely continue during the next 12 hours, after which the fall of the Kaw will begin to show on the Missouri ga-ge. The Kaw will continue falling Wednesday, and the Missouri will begin to show a fall.

The ga-ge readings at 7 a. m. at stations north were Sioux City 10.7, a fall of 0.7 foot; Omaha 13.8, fall 0.6; Plattsmouth 10.7, fall 0.5; St. Joseph 15.0, rise 1.0 foot.

Light to moderate rains have fallen during past 24 hours in the West, and the threatening conditions still keep up, but with the probability that the rains, if any, will be light.

(Copies of maps containing the foregoing river information, mailed in envelopes to points below this city, instead of the warning cards as heretofore).

June 3rd, 1903.

The river ga-ge reading at Kansas City at 7 a. m. was 34.4 feet, a fall in the flood level of 0.6 in the past 12 hours.

Both Missouri and Kaw rivers will continue falling today and Thursday. The flood level will be from one to two feet lower Thursday morning.

June 4th, 1903.

Stage of river at Kansas City at 7 a. m. 32.9 feet, a fall of 1.5 feet in last 24 hours, and a fall of 2.1 feet from the highest stage. Stations north of Kansas City report a general fall, the greatest being 0.9 foot at St. Joseph.

The rivers will continue falling to-day and Friday below St. Joseph; the fall in next 24 hours at Kansas City will be in the neighborhood of two feet.

It is not believed that the reported rise in some of the western tributaries of the Kaw river, unaided by further rains, will check the general downward tendency of the rivers in this locality.

In addition to the foregoing, supplementary information correlating the latest intelligence from up-river points with the local situation was freely given to all persons communicating with this office by telephone.

438 Direct Examination

By J. S. Botsford:

Q. Please give your name, residence and the office that you hold? A. Patrick Connor, 2642 East Seventh Street, Kansas City, Missouri, and I have charge of the United States Weather Bureau office, in Kansas City, Missouri.

Q. Just state the title of your office,—superintendent, or manager of chief? A. Official in chargé.

Q. Did you have charge of the United States Weather Bureau in Kansas City, Missouri, during the whole of 1903 and also in 1904? A. Yes sir.

Q. Do you remember the flood at Kansas City and in the Kaw river in the latter part of the month of May and the month of June, 1903? A. Yes sir.

Q. What did you do in your official capacity respecting that flood during its rise and fall? A. We took measurements of it as shown on a guage on the Hannibal Bridge crossing the Missouri river.

Q. At Kansas City, Missouri? A. At Kansas City, Missouri.

Q. State whether, during the rainfalls of May, 1903, you took any accounts of such rainfalls? A. Yes sir, we took account of the rainfall locally, and by the reports or through the reports of some sub-stations distributed outside of here.

Q. Over what territory were those sub-stations located from which you received those reports? A. The sub-stations were located in Kansas and western Missouri. And in addition to those we received reports from the regular bureau stations in every state and territory west of the Alleghany mountains.

Q. Did you receive reports from the territory tributary to the Kaw river during the month of May, 1903? A.

439 Yes sir.

Q. What streams are tributary to the Kaw river,—state briefly? A. The Big Blue river is the first you meet going west, then there is the Republican, then there is the Solomon, Saline and—what river did you speak of?

Q. The Kaw river. A. The Kaw is the union of the Republican and Smoky Hill rivers.

Q. Where is the junction of those rivers? A. At Junction City, Kansas.

Q. That is where the Kaw river begins and the Republican and Solomon rivers end? A. Yes sir, they unite at about that place and form the Kaw.

Q. Through what country do the Republican and Solomon rivers run? [Q.] The Solomon river runs through the northwestern counties of Kansas, and it drains chiefly the

northwestern part of Kansas. The Republican river starts, I believe, in the Foothills of Colorado and runs through Nebraska for a long distance, thence into Kansas.

Q. About how far from Kansas City is Junction City, Kansas—just about? A. Probably 150 miles.

Q. Whereabouts into the Kaw river does the Big Blue empty? A. The Big Blue empties in at Manhattan.

Q. That is this side of Junction City? A. Yes sir.—I have made a mistake about those rivers,—did you understand from me that the Republican and Solomon unite to form the Kaw?

Q. Yes sir? A. That is not right. The Solomon drains the northwestern part of Kansas. The Republican starts in Colorado and flows across southern Nebraska and comes a little north of Concordia, then turns south into Kansas. The Smoky Hill river is a very important river and originates in Colorado and flows eastward, and the Solomon empties into the Smoky Hill at Solomonville, or Solomon City, and further east the Republican unites with the Smoky Hill to form the Kaw.

440

Q. Now, what country does the Big Blue drain? A. That originates up in Nebraska and flows south almost directly.

Q. Do these several rivers, namely, the Republican, Smoky Hill, Saline, Solomon, Big Blue and the Kaw, drain the whole of the north portion of the state of Kansas? A. They drain practically the north half of Kansas, and also the southern part, probably two tiers of counties, of Nebraska, and a small portion of Colorado.

Q. When did the rains or the rainfall which in the aggregate brought the flood of 1903 of the Kaw river and at Kansas City, Missouri, commence to fall? A. Well, I presume the earlier rains you could say started in April. Any rains that saturated the ground would tend to diminish the capacity of the ground to hold moisture, but the chief rains which brought on the flood fell in the month of May.

Q. What time did they begin to fall—that is the rains that brought the flood? A. The rains that brought the flood fell in the month of May.

Q. What was the extent of the rainfall over the country that you have described that was drained by these several rivers that run into the Kaw, and by the Kaw itself, during the first half of the month of May, 1903? A. It was quite heavy.

Q. Did you have occasion to make a record of the extent of that rainfall during those fifteen days? A. Yes sir, we tabulated the reports daily and bulletins were issued from the office.

441

Q. Was that work done in the line of your official duty? A. Yes sir.

Q. Are you able to state now the extent of that rainfall during those fifteen days?

By Mr. Angevine. Objected to by defendant as incompetent, irrelevant and immaterial; it is simply an estimate of the witness and not given from his personal knowledge. He says he had no personal knowledge of the matter.

By the Court: Objection overruled, defendant then and there duly excepting.

A. Well, I am not supplied with the data to give exact information on it.

Q. Do you remember the extent of that rainfall, as you made a record of it during the first fifteen days of May, 1903, as compared with the rainfall of the same period of other years?

By Mr. Angevine: Objected to by defendant as incompetent, irrelevant and immaterial; it is simply an estimate of the witness and not given from his personal knowledge. He says he had no personal knowledge of the matter.

By the Court: Objection overruled, defendant then and there duly excepting.

A. It was heavier than the average.

Q. How much heavier? A. Well, I can't say exactly, during the first fifteen days, how much heavier. I have a little better idea how the rain was distributed during the month over the basin than I have of the first fifteen days.

442 Q. How was the rainfall, then, during the month of May, 1903, over the Kaw river basin and that of its tributaries, that you have named? It was unusually heavy.

Q. When you say "unusually heavy" how much unusually? A. I suppose it averaged from 2 1/2 to 3 inches in the western part to eight to ten inches in the eastern part, in excess of the normal amount.

Q. During that period? A. During that period.

Q. That is in excess? A. Yes sir, in excess of the normal amount.

Q. During what days in the month of May, 1903 were those rains? A. They were quite general throughout the month.

Q. Every day? A. Pretty nearly. There may have been a cessation about the 15th to the 18th, or somewhere about that time there was a slight cessation; they were not quite

as heavy as both before and after, and the reports of rain were less frequent—just a short middle interval.

Q. What other interval, if any, of that sort took place that month? A. I don't like to state something now from my recollection that might be at variance with what I have put in my reports.

Q. If you now recollect of any other period during that month, I would be glad to have you state it, if there was such a cessation? A. I hardly think there was much diminution of the rain, except the first few days, probably two or three, or three or four days, then a slight cessation around the middle of the month; otherwise it was rather continuous, to the best of my recollection.

Q. State how the rainfall was at nights? A. Well, days and nights the same. I don't make any distinction between day and night. When I say day I mean a proper period of twenty-four hours.

443 Q. Did you keep a record of the rainfall at Kansas City, Missouri during that period? A. Yes sir.

Q. Is this paper which I hand to you a record of that rainfall? A. Yes sir.

Q. Is that a correct statement of the rainfall during the period that it covers? A. Yes sir.

Q. That is a true copy of your records, is it? A. Yes sir. This shows correctly the amount of rainfall each day.

Q. At Kansas City, Missouri? A. Yes sir, at Kansas City, Missouri.

Q. Does this paper also show any other facts in connection with the flood of May, 1903? A. It shows the stages of the water each morning.

Q. In what stream? A. In the Missouri river at the Hannibal bridge.

Q. When you say the Hannibal bridge you mean the bridge used by the Chicago, Burlington & Quincy Railroad in the Missouri river just below the mouth of the Kaw river? A. Yes sir. Each morning from May 12th to June 10th, inclusive, and, also, the paper shows the change that took place each twenty-four hours. I may remark that the measurements were made according to this paper between six and seven o'clock A. M. of each day.

Q. Are all the matters that are contained on that paper, copies of records of your office? A. Yes sir.

The plaintiffs here tender said paper to the Notary and ask him to file said paper herein, marked Exhibit A in connection with the testimony of the witness.

Said paper is accordingly marked "Exhibit A", filed herewith and made a part hereof.

444 By Mr. Angevine: Defendant objects to the testimony being Exhibit A, as incompetent, irrelevant and immaterial and as hearsay evidence and for the further reason it is not properly identified and made a part of the deposition.

By the Court: The only question in my mind is whether it is any part of the plaintiffs' case; it really appears to the Court more proof of the defense, but the plaintiff offered it; it will be received. Defendant then and there duly excepting.

Q. I ask you if you made a report of this flood to the Department at Washington? A. Yes sir, I did.

Q. Does this book which I hold in my hand contain the substance of your report? A. Yes sir.

Q. I wish to direct your attention to page 54 of this volume, and will ask you to state the extent of the rainfall during the last eleven days in May, 1903? A. During the last eleven days of the month the enormous quantity of nearly seven inches of rain fell in the central and eastern thirds, not scattered down-pours, but general rains during that period.

Q. Now state in what portion of Kansas were those rains? A. In the central and eastern thirds.

Q. I will ask you to state whether during the month of May, 1903, your office issued warnings of the rise of the flood? A. Yes sir, we issued warnings.

Q. Do you remember what time in the month of May those warnings began? A. They began on May 26th.

Q. Do you remember the day of the week that was on? A. Tuesday.

Q. To what extent did you issue those warnings? A. We included in the warnings such advice as we felt justified

445 in making in view of the fact that we had no river gauges in the Kaw valley, and the warnings were largely based upon our knowledge of the quantity of rain that fell over that territory.

Q. To whom were these warnings given? A. Those warnings were entered on between four and five hundred maps that were sent out daily about ten o'clock each morning, or between ten and eleven o'clock each morning, except Sunday, and those maps are furnished to large business institutions, schools and where there are large interests to be served. A number of them, probably a hundred and thirty-five or forty of them were mailed within the limits of Kansas City, Missouri and Kansas City, Kansas. The remainder

were sent to the outside—western Missouri and over the state of Kansas pretty generally.

Q. Now, to what class of business people or corporations or transportation companies were these maps and warnings sent as you have described them? A. Nearly all the business institutions of any consequence have been on our map list for years. It is not that they are supplied at a certain time, taken up and dropped at intervals, but it is a standing thing all the time.

Q. What, at that time and since that time and before that time, was and had been and is your official duty and habit in reference to furnishing maps of this kind? A. It is part of the official duty of the office to receive reports and prepare those charts for such information as we may deem accurate and of [advantaje] to the public, and to issue them to large interests and others that may not be very large, but generally to the commercial companies.

446 Q. State whether the railroad companies coming into Kansas City were included in the persons that received these reports? A. Yes sir, some of them.

Q. Which ones? A. I can't name all of them.

Q. Do you remember whether the Atchison, Topeka & Santa Fe Railroad Company was one of them? A. That matter I looked up on our list immediately following the flood and I could not find the address of an officer of the Santa Fe Railroad among our addresses.

Q. How about the Kansas City Stock Yards company?

By Mr. Angevine: Objected to by defendant as incompetent, irelevant and immaterial. Objection sustained; plaintiffs then and there duly excepting.

A. The Kansas City Stock Yards Company received a map,—I believe they have been receiving a map or more than one map, for several years.

Q. Did they receive a map during that period from the 26th of May, 1903 on to June 10th, 1903?

By Mr. Angevine: Objected to by defendant as incompetent, irrelevant and immaterial. Objection sustained; plaintiffs then and there duly excepting.

A. Yes sir.

Q. Now what point or fact in connection with the rainfall or flood of 1903 did you embrace in the information thus given to the public by those maps?

Br. Mr. Angevine: Objected to by defendant as incompetent, irrelevant and immaterial and not the best evidence.

Objection overruled, defendant then and there duly excepting.

A. We wished to convey just exactly to the public
447 the cause or the causes leading up to the flood, and the augmentation or diminution each day, and the consequences are always referred to the character of the weather that had obtained over that territory, whenever mentioning the flood question; stated whether or not rains had occurred; whether or not they were light or heavy. Some people may have a mistaken idea of a flood as coming from a very remote source, from the mountains—for instance.

Q. What do you say about this rainfall that you have described, over the Kaw basin and the basin of its tributaries during that month, in these reports? A. In substance I stated that owing to the [tremenfous] quantity of water that had fallen that it would necessarily raise, or cause a flood at Kansas City.

Q. I ask you if you kept in your office a resume of these reports that you publish each day? A. The originals of the reports,—the original copies are all there.

Q. State what this paper that I now exhibit to you is? A. That is a resume of the conditions that were printed on those daily maps that were issued during the period covered by the flood.

Q. And during the days that are described in that paper? A. Yes sir.

Q. Is that a true, correct and full copy of your record of those reports that you made? A. It is full so far as it relates to the flood. There are other data entered on the maps, such as barometric conditions and thermal conditions, and cloudiness all over the United States, which, of course, could not be entered on a paper such as this.

Q. Were these rpeorts published in any other way than distributed in the form you describe? A. The informa-
448 tion, such as we had, and such advice as we had to offer, was given freely and with good grace to the public by telephone to any person who would choose to call us, and any information we had was also given to the newspapers.

Plaintiffs now offer this paper to the Notary Public and ask the Notary to mark the same as Exhibit "B" and to file the same as an exhibit with the deposition of this witness.

Said paper is accordingly marked "Exhibit B", filed herewith, and made a part hereof.

Mr. Botsford: We offer "Exhibit B" in evidence.

Mr. Angevine: Objected to by defendant as incompetent, irrelevant and immaterial, and for the reasons as offered to "Exhibit A".

Objection overruled, defendant then and there duly excepting.

Q. Are you able to state, Mr. Connor, how long it took water at a certain height in the Kaw river at Topeka to attain the same height at Kansas City, Missouri? A. It would not take very long. The crest of the flood moved at the rate of two miles and six-tenths an hour in the Kaw.

Q. Two miles and a fraction in an hour? A. Yes sir, two miles and a fraction (6/10) of a mile an hour.

Q. At that rate, then, how long would it take the flood to rise to the same height at Kansas City that it had been at Topeka? A. Well, different physical conditions might not enable us to make a comparison as to whether or not the same height would be shown at Kansas City as compared to Topeka. It might have vastly greater territory to spread over at Kansas City and not make the showing that it would at Topeka. Topeka might have a confined channel.

Q. Assuming that the valley of the Kaw is very much the same all along to Kansas City, what would you say as to the time it would take for the river to attain the same height here that it had at Topeka? A. I should not think it would
449 take more than about thirty hours,—that is, in case of a great flood.

Q. When did these rains that you have described actually end? A. They practically ended in Kansas about the close of May.

Q. About what day in the close of May? A. About the last day, or the day before,—probably the 30th or 31st of May. In Missouri they kept up a little longer.

Q. When did the the flood reach the climax in the Kaw river at Kansas City? A. The morning of June 1st, 1903.

Q. That is Monday, is it not? A. Yes sir, Monday, June 1st, 1903.

Q. Do you remember whether any of those reports of yours from the 26th to the 31st of May were sent to Topeka and points west of there? A. Yes sir, as long as the train service kept up reports were mailed. We mailed a number of maps daily to the Observer at Topeka.

Q. To what other points in the state of Kansas, along the line of the Kaw river, did you mail those reports? A. To pretty nearly all the prominent towns, but the package we mailed to Topeka is for local distribution and we don't know the local addresses.

Q. State whether those reports were also mailed to Emporia, Strong City, and Wellington?

Mr. Angevine: Defendant objects to the question as leading.

Objection overruled, defendant then and there duly excepting.

A. I would not like to mention the towns. My memory might be treacherous and I might state that they had gone to points where they had not been received. I have in the office a list of most of them.

450 Q. What other points in central Kansas, aside from Topeka, did you send those reports to, that you now recollect? A. I think we sent some of the maps to pretty nearly all of the prominent towns in the Kaw valley.

Q. Did you send any away from the Kaw valley in central Kansas, either north or south? A. Yes sir.

Q. What places do you now remember of? A. I would not like to mention the places, but it [—] pretty certain that we sent them throughout the northern part quite generally.

Q. How did this flood of 1903 compare with the flood of 1881? A. Very much greater.

Q. What was the difference between the volume of water in the Kaw river at Kansas City in the flood of 1881 and the flood of 1903? A. The flood of 1881 attained a stage of 26.2 feet; the flood of 1903 attained a stage of 35 feet above zero.

Q. That is, about nine feet higher than the flood of 1881? A. Very nearly nine feet.

Q. Between eight and nine feet? A. Yes sir.

Q. How much above low water mark was the flood of 1881? A. 26.2 feet.

Q. That is with reference to low water mark, the figures you have given? A. Yes sir, that is it refers to our zero, and our zero is, of course, low water.

Q. That is what the people generally mean when they say low water mark? A. Yes sir.

Q. Do you remember how long prior to the climax to the flood of 1881 the rains had continued that made that flood? A. No sir, we have no reliable record.

451 Q. You were not connected with the department at that time? A. I was connected with it in a different section of the United States, but the Weather Bureau had no office at Kansas City then.

Q. At that time? A. No sir, nor for many years afterwards.

Q. Mr. Connor, what was the extent of the flood of 1903 above the city of Atchison? A. Above the city of Atchison, in—

Q. (Interrupting) In Kansas, yes sir? A. They had I believe, the flood conditions existed north of Atchison a little.

Q. How far? A. I think they had a moderate flood at St. Joe,—as far up as St. Joe.

Q. I call your attention to page 56 of this United States Department of Agriculture Weather Bureau Bulletin of the floods of 1903 for the purpose of refreshing your memory as to the other floods in the Missouri river above Atchison and St. Joe. Give in your own conversation the substance of the facts, as you remember them, having refreshed your memory by that report? A. This confirms my previous impression that a very moderate overflow or flood occurred at St. Joe and some of the lower bottoms south of St. Joe were inundated.

Q. Between St. Joe and Atchison? A. There was not very much damage from flood between St. Joe and Atchison.

Q. Do you have any record, or do you remember of any flood north of St. Joe? A. There was no flood condition north of St. Joe,—practically none.

Q. And only a mild form of flood, you say, between Atchison and St. Joseph? A. The lower bottoms were
452 liable to inundation during the flood conditions, but practically very little damage, as compared to what occurred below. From Leavenworth south was more severe.

Q. How long have the flood conditions of which you have spoken, between St. Joe and Atchison continued, during how many days? A. That was not so prolonged as the flood at Kansas City.

Cross Examination

By Mr Angevine:

Q. Mr. Conner how long have you been stationed at Kansas City in your present official capacity? A. Fifteen years.

Q. Have you had charge of the weather station at Kansas City since its first establishment? A. Not quite, but very nearly. It was established the first of July, 1888.

Q. What weather stations are located in Kansas that make reports to your office? A. Concordia, Wichita, Dodge City are regular bureau stations. We receive reports regularly from Concordia, Dodge City and Wichita, which are regular bureau stations, then from the sub-stations at Manhattan, Baker, Dresden, McPherson, Ft. Scott, Osage City, Toronto, Sedan, Macksville and Hayes City. I think those are about all.

Q. Were the stations that you have named, in operation during and prior to the flood of 1903? A. Yes sir, except that of Dresden.

Q. Manhattan, Dresden, Concordia and Hayes City are the only stations that you have named that are in the Kaw valley watershed, are they not? A. I might say that is all I have a recollection of.

Q. During the month of May, 1903, you were not out of Kansas City, were you? A. I don't think so. I might
453 have been to Independence.

Q. Independence, Missouri? A. Yes sir, but I don't know that I was.

Q. You did not visit any of the Kansas weather stations during the month of May, 1903, did you? A. No sir.

Q. All you know about the weather conditions in Kansas is what was reported to you by others, is it not? A. Yes sir.

Q. And also what you saw in the newspapers,—you read the newspapers during that time, didn't you? A. Yes sir.

Q. And got some of your information from the papers? A. I make big allowances for what I see in the papers.

Q. During the year 1892 the Kaw valley was flooded three or more times, was it not? A. In 1892 there was a flood in this vicinity, which takes in a portion of the Kaw valley.

Q. During that year the Kaw valley from Manhattan to Kansas City was flooded three times, was it not? A. I can only speak of one general flood.

Q. The Kaw river bottoms were overflowed from Manhattan to Kansas City at the time you speak of, were they not, in 1892? A. Our reports were very limited in that year. We had no reporting stations that I remember of in the Kaw valley, except Concordia, that year.

Q. The stations at Hayes City and Manhattan were established by reason of the flood of 1892, were they not, for the purpose of giving better facilities? A. No sir. They
454 were established as a part of a general system for giving information to the crop growers, and to be maintained during the crop growing season. The system was originated in 1896 and covers all the corn and wheat states, practically, in the United States.

Q. During and prior to the flood of 1892 that you have spoken of, you issued warnings of a flood in the Kaw the same as you did during 1903, did you not? A. I don't recollect.

Q. Do you remember whether you did or not? A. I think to the best of my knowledge I have never neglected a duty in that line, and I think I realize it was my duty to say something in regard to an anticipated flood, whether great or small I can't just say now. But I think that my judgment was based upon the indications indexed in the Missouri river, and also my knowledge of the rain conditions over the West.

Q. You did send out warnings of a flood that you anticipated would occur in the Kaw valley? A. In the Kaw valley?

Q. Yes sir, during 1892, did you not? A. Only for Kansas City and below.

Q. That flood did not flood the West bottoms of Kansas City during that year did it? A. I remember having been over there and I saw some people floating around on floating sidewalks.

Q. The only places in Kansas City that were overflowed by that flood were the low places in the bottoms, is that not correct? A. Largely so, though I could not speak for Argentine and Armourdale sections, because I think it was in Argentine where I went over on purpose to see the flood conditions and got off the cable car and on a mule car and they pulled us through water two feet deep, and they let
455 us off at the other end and [proplе's] houses were flooded a couple of feet, and sidewalks were floating around, and people seated on some of them.

Q. What is considered the danger line at Kansas City? A. Twenty-one feet.

Q. That is in the Missouri river, is it? A. Yes sir.

Q. And whenever the river approaches within a few feet of twenty-one feet, then you send out warnings, do you, of an apprehended flood? A. Well, I have to anticipate something that would raise the stage considerably beyond twenty-one feet before I would make warnings of a flood. Of course, there is always some one to be benefitted by a warning of a stage even as high as twenty-one feet.

Q. At twenty-one feet it commences to overflow some of the lower bottom lands, does it? A. Yes sir, that is what we recognize as the danger point. Just the initial point, so to speak, of the danger.

Q. Now, that river gauge has never shown much above twenty-one feet since you have been at the weather station in Kansas City, until 1903, has it? A. In 1892 it went to 24.9 feet.

Q. Nearly four feet above the danger line? A. Yes sir.

Q. During that year the flood was largely,—the flood in the lower Kaw river was largely back water from the Missouri river, wasn't it? A. It was helped, yes sir, it was. Whatever flood was in the Kaw that year was aided by the condition of the Missouri.

Q. Was there any flood in the Kaw river at Kansas City after 1892 and before 1902? A. Nothing of any consequence, —Particular consequence.

456 Q. Was there a flood in the Kaw river valley during the year 1902 which overflowed the river bottoms? A. I don't think there was. I could readily verify that by consulting my records, which I have not here.

Q. Were there not three floods during the year 1902, in which the Kaw valley was overflowed between Topeka and Kansas City? A. I would like to appeal to my records for an answer to that question.

Q. I will ask you to examine the records kept by you and then state how many times the Kaw valley between Topeka and Kansas City was overflowed during the year 1902. Will you make such examination and come here and state to the Notary Public the result of your examination? A. Yes sir.

Q. Mr. Connor, did you investigate the question of the floods during the year 1902, since the adjournment of the taking of these depositions? A. Yes sir.

Q. You may state whether or not, there were floods in the Kaw river during the summer of that year? A. Well, I can't say whether there was a flood in the Kaw river or not, but I can say that on the same guage on which were measured the flood of 1903, and the guage in constant use by our office, that shows a reading of 23.1 feet as the highest of the flood of 1902.

Q. What was the date of that? A. That was July 14th and 15th, 1902,—23.1 feet.

Q. Were there any other floods during that year in this vicinity? A. No sir, that was the only flood that we had that we regard as a flood. That was 2.1 feet above what we consider the danger line.

457 Q. Do you know whether or not there was a flood or high water in the Kaw river one or more times during the summer of 1902? A. No sir, I could not say whether or not there was a flood in the Kaw river during that year.

Q. Do you remember whether or not you sent out flood warnings for the Kaw valley during the year 1902? A. For the local situation here, yes sir.

Q. Only for the local situation? A. Yes sir, and of course below on the Missouri river.

Q. None for any place above Kansas City on the Kaw river? A. No sir, not that I know of, except such deductions as might be made from the conditions sent out.

Q. Where is Manhattan, one of your sub-stations? A. Manhattan is at the junction of the Blue and Kansas rivers. It is about 119 miles, by rail, west of Kansas City.

Q. Where is Hayes? A. Hayes is located in the western part of Kansas on the branch of the Smoky Hill river, I believe.

Q. Just give the distance from Kansas City? A. According to railroad schedule it is about 289 miles west of Kansas City.

Q. Where is Concordia? A. Concordia is in the north central portion of Kansas. Supposed to be on the Republican river—close to the Republican river.

Q. Just give the distance? A. About 210 miles, by way of Junction City, northwest of Kansas City.

Q. Where is Dresden? A. Dresden is in the northwestern part of Kansas.

Q. About how far from Kansas City? A. About 365 miles by rail west of Kansas City.

458 Q. Dresden is not on any river or stream, is it? A. I am not quite sure.

Q. Can you give the rainfall by days at Manhattan from May 15th to May 31st, 1903, inclusive? A. I can. May 15th, 1903, at Manhattan, trace,—

Q. (By Judge Botsford) What do you mean by "trace"? A. An immeasurable amount too small to measure,—less [then] the one-hundredth part of an inch. May 16th, 1903, no rain:

May 17,	no rain
May 18,	no rain
May 19,	.54 inch
May 20,	no rain
May 21,	.44 of an inch
May 22,	.19 of an inch.
May 23,	1.03 inch
May 24,	no rain
May 25,	.12 of an inch
May 26,	.75 of an inch
May 27,	.83 of an inch
May 28,	no rain
May 29,	2.38 inches
May 30,	.42 of an inch
May 31,	.57 of an inch.

Q. Can you give the rainfall at Concordia by days, from May 15th to May 31st, 1903, inclusive? A. Yes sir.

Q. You may give it? A. May 15th, 1903, at Concordia the rainfall was .04 of an inch.

May 16,	no rain
May 17,	no rain
May 18,	no rain
May 19,	.82 of an inch
May 20,	no rain
May 21,	.18 of an inch
May 22,	1.10 inch
May 23,	.94 of an inch
May 24,	no rain
May 25.	.16 of an inch
May 26,	16 of an inch

May 27, .80 of an inch
May 28, .02 of an inch
May 29, 3.78 inches.
May 30, no rain
May 31, no rain.

459 Q. Can you give the rainfall in inches, by days, at Hayes City or Hayes, from May 15th to May 31st, 1903, inclusive? A. Yes sir.

Q. You may give it. A. May 15th, 1903 at Hayes the rainfall was trace,

May 16, no rain
May 17, no rain
May 18, no rain
May 19, no rain
May 20, no rain
May 21, no rain
May 22, .62 of an inch
May 23, .14 of an inch
May 24, no rain
May 25, no rain
May 26, no rain
May 27, 2.26 inches
May 28, .85 of an inch
May 29, 2.21 inches
May 30, .42 of an inch
May 31, no rain.

Q. Can you give the rainfall, by days, at Dresden, from May 15th to May 31st, 1903, inclusive? A. Yes sir.

Q. You may give it. A. May 15th, 1903 at Dresden there was no rain,

May 16, no rain
May 17, No rain
May 18, no rain
May 19, no rain
May 20, no rain
May 21, no rain
May 22, .67 of an inch
May 23, No rain
May 24, no rain
May 25, trace
May 26, .06 of an inch
May 27, no rain
May 28, no rain
May 29, .36 of an inch
May 30, .57 of an inch
May 31, no rain.

Q. At the sub-stations you have mentioned the man in charge, or the person in charge keeps a record of the rain fall

from day to day and makes a record of it, does he? A. Yes sir, he is expected to do that.

460 Q. That is his duty, is it? A. Yes sir, that is his duty.

Q. Personally, you know nothing about whether he does keep that right or not, do you? A. No sir.

Q. When he makes a record of that rainfall he then telegraphs you the results from his records, does he not? A. Yes sir.

Q. And when you receive that result by wire you make a record of it in your office, do you? A. Yes sir.

Q. And it is a copy of that record that you have produced here and from which you have testified, is it? A. His daily record or measurement of the precipitation is telegraphed to my office every morning, except on Sunday morning, and the report for Sunday is combined with that for Monday, and our record is made from that telegraphic report originally. Then at the end of each month we get a monthly report from him by mail.

Q. And what do you do with that monthly report? A. Send that to headquarters at Washington, after straightening it out, if such is necessary.

Q. Do you make a record of that monthly report in your office? A. No sir, I do not.

Q. So that you have no record in your office of the monthly report sent from the sub-stations? A. No sir, it is not necessary for our work to keep a copy of the monthly report. The details that go to make up the monthly reports are in the office, however.

Q. That is, the telegrams are sent in and you copy those telegrams on your records? A. Yes sir.

Q. And from those records you obtained the data which you have given here in your testimony? A. Yes sir.

Q. You do not preserve the telegrams themselves, do
461 you? A. The telegrams are sent to Washington to take part in the settlement of the telegraphic account between the Western Union Telegraph Company and the Weather Bureau.

Q. Your records in your office are copies of those telegrams, are they? A. They are the records of the weather data expressed in the telegrams, not a copy of the telegrams, but the data as expressed by the telegrams.

Q. They are your conclusions from the telegrams, are they? A. They are the translations, so, to speak, of the telegrams.

Q. (By Botsford) Sort of a resume of what is in the telegrams, I suppose? A. Yes sir.

Q. That is, you give the substance of the telegrams as you understand them? A. Yes sir.

Q. Making a record of the substance of those telegrams, and from that record you have given your testimony here? A. Yes sir.

Q. Personally you do not claim to know anything about the rainfall in Kansas, except as you get it from that record? A. That is right.

Q. What is the normal rainfall at Kansas City for the year? A. It is a trifle under thirty-seven inches.

Q. (By Botsford) That is for the entire year? A. Yes sir.

Q. The heaviest rainfall of the year at Kansas City and vicinity is usually in May and June, is it not? A. Well, that depends on the character of the season. One season the rain comes in excessive rains a little early, and another season may come in a little later.

Q. The heaviest rains, though, are during the summer season,—the greatest rainfall? A. Yes sir, the heaviest
462 rains usually begin in the latter part of April and may extend to September.

Q. What is the normal rainfall at Kansas City for the month of May? A. I don't know the exact figures, but I think it is a little more than four and a half inches.

Redirect Examination

By Mr. Botsford:

Q. You have described in this deposition the floods of 1902 and 1903,—please state whether there was also a flood in 1904, the present year? A. Yes sir, there was a flood.

Q. In what month did the flood of 1904 occur? A. In July.

Q. How much above what you call the danger point did the flood of 1904 rise? A. It rose 4.2 feet in 1904.

Q. What was the exact height of the flood of 1904? A. Twenty-five and two-tenths feet.

Q. How much below the height of the flood of 1903 was the flood of 1904? A. Pretty nearly ten feet.

Q. How long did the rainfall which produced the flood of 1904 continue prior to the climax of that flood? A. Well, there were rain conditions, or conditions favorable for heavy rains over this section of the west during the latter part of April, I think, and all of May and June and a portion of July, but occasional cessation of the rains enabled the rivers to carry off the volume of the water. A cessation for two or three days might enable them to carry off the volume of water without causing a flood, and if I remember right that occurred several times in our streams, that there was a cessation of the

rain just after it had rained about enough to fill up bank full,
et let that go out, until the climax, when a little too much
463 came, and that brought the overflow, but it was a very
wet season throughout this section of the West.

Q. Was the flood of 1904 over the same basin of the Kaw that the flood of 1903 covered? A. Yes sir, practically so, but the peculiarity of the 1904 season was that the very excessive rains occurred just south of the Kaw valley divide.

Q. Did you send out during the rise of the flood of 1904 warnings in the same manner in which you testified you sent them out in 1903?

Mr. Angevine: Objected to by defendant as incompetent, irrelevant and immaterial. Objection sustained; plaintiffs then and there duly excepting.

A. Yes sir, I believe so. I think they were sent out more definitely than they were in 1903, because I received indirectly a river report from Manhattan and Topeka, Kansas, for several mornings, which I could not have had under the 1903 flood.

Q. Did the flood of 1902 and 1904 extend up the river Kaw and its tributaries which you have named, to the source of its streams?

Mr. Angevine: Objected to by defendant as incompetent, irrelevant and immaterial.

Mr. Botsford: We withdraw the question. All the testimony in regard to the flood of 1904 is omitted.

A. I dont' remember the flood of 1902 as extending up the Kaw valley to any extent.

Q. How about the flood of 1904, did that extend up the Kaw river and its tributaries to their sources? A. Not to their sources, but a long way.

464 Q. Did it extend up to the region of Concordia, Dresden, and Hayes City? A. It extended some little distance west of Topeka, only, where the flood conditions began, although at about the time that we had those flood conditions here, there were, on account of local downpours in the neighborhood of Salina, Kansas, in the central west, in the Kaw valley, there was some damage done by overflow. That overflow, however, did not affect the river in our locality. By the time it came down, our flood had passed out.

Q. Are these flood conditions, such as you have described in 1902, 1903 and 1904, of annual occurrence here at the entrance of the Kaw river into the Missouri river?

By Mr. Angevine: Objected to by defendant as incompetent, irrelevant and immaterial. Objection sustained, plaintiffs then and there duly excepting.

A. No sir, flood conditions are not of annual occurrence. It is ordinary, very ordinary, condition to find the river go up here to twenty-one feet, what we call our danger line, and perhaps may go up to twenty-two feet, but we dont' regard that as a flood condition really.

Q. But the water in 1902, 1903 and 1904 did rise above the danger point each year, did they? A. Yes sir.

Q. Well, how high do the waters usually rise at what may be termed the flood in the other years,—the average years? A. Twenty, nineteen feet, or around there, on our gauge in the Missouri river.

Q. And that generally occurs each year along in
465 the month of June, does it not? A. It is liable to occur in May or June or the first half of July.

Q. As a part of that condition what is called popularly the "June rise" of the Missouri river contributes does it not, Mr. Connor? A. It is popularly understood as the June rise.

Q. Of the Missouri river? A. Yes sir, but it is something on the order of the storms of autumn coming in about the equinox and being called the "equinoctial storms." It is not particularly the rise due to the head waters in June but is rather more of a coincidence with the rain conditions.

Q. These annual flood conditions are made by both the rains in the Kaw basin and the rise of the Missouri river? A. Yes sir, and if it were not for the rains we would never have a flood.

Q. You have given in your cross-examination the rainfall at Manhattan, Concordia, Hayes and Dresden from May 15th to May 31st, 1903, I will ask you to take the same memorandum and give the rainfall from May 1st to May 14th, 1903, commencing first at Manhattan?

A. May 1st 1903, at Manhattan, no precipitation,
May 2, .02 of an inch,
May 3, no precipitation,
May 4, 1903, no rain,
May 5, .65 of an inch,
May 6, no rain,
May 7, .05
May 8, trace,
May 9, no rain,
May 10, no rain,
May 11, trace,
May 12, 1.23 inches,
May 13, .23 of an inch,
May 14, .15 of an inch.

Q. Now the next. Concordia?

466 A. On the same dates in the same year, at Concordia, on

May 1, no rain,
May 2, no rain,
May 3, no rain,
May 4, no rain,
May 5, .58 of an inch,
May 6, no rain,
May 7, .08 of an inch,
May 8, no rain,
May 9, no rain,
May 10, no rain,
May 11, .50 of an inch,
May 12 .80 of an inch,
May 13 .50 of an inch,
May 14, no rain,

And the same dates in the same year, at Hayes on

May 1, no rain,
May 2, no rain,
May 3, no rain,
May 4, no rain,
May 5, .11 of an inch,
May 6, 1.05 inches,
May 7, .61 of an inch,
May 8, .31 of an inch,
May 9, no rain,
May 10, no rain,
May 11, 1.39 inches,
May 12, trace,
May 13, .11 of an inch,
May 14, no rain,

And on the same dates, in the same year, at Dresden, on

May 1, 1903, no rain,
May 2, .26 of an inch,
May 3, trace,
May 4, no rain,
May 5, no rain,
May 6, .75 of an inch,
May 7, .77 of an inch,
May 8, trace,
May 9, no rain,
May 10, .04 of an inch,
May 11, 1.11 inches,
May 12, no rain,
May 13, .16 of an inch,
May 14, no rain.

Re-Cross Examination

By Mr. Angevine:

Q. Mr. Connor, it is a fact, is it not, that in the territory included in the Kaw valley basin the rainfall is frequently heavy at one point and very light at another point a few miles distant, is it not? A. Yes, sir, that is true during the summer months.

P. CONNOR.

467 R. E. Ball sworn [teestified] on behalf of the plaintiffs as follows

Direct Examination.

Q. By Mr. Botsford: Give your name? A. R. E. Ball.

Q. Residence and profession? A. Reside in Kansas City, Mo. Attorney.

Q. You are the attorney for the Minnesota & Dakota Cattle company in this case? A. Yes sir.

Q. And you became the attorney of that company in connection with this matter when? A. It was in June, 1903.

Q. How early in June? A. In the early part, very early, about the time the cattle were caught here in the flood.

Q. That would be the first week in June? A. Yes sir.

Q. You have been the attorney of that company in respect to this matter ever since have you? A. Yes sir.

Q. State whether either of these papers which I now hand you were served by you upon anybody; first this paper? A. Yes sir.

Q. You may state upon whom, as representative of the defendant, you served that and where? A. I served a paper of which this is an exact copy on Mr. Coombs, the assistant agent of live stock.

Q. W. A. Coombs. A. W. A. Coombs, assistant live stock agent of the Santa Fe road at the office of that railroad and of Mr. Coombs in Kansas City, on 9th street, I forget the number of the street.

Q. 9th and Main? A. Yes sir.

Q. That is the Santa Fe office near the corner of 9th and Main? A. Yes sir and the notation at the bottom, this copy is in my handwriting and was made at the time.

468 Mr. Botsford: We offer this in evidence.

Mr. Angevine: You do not offer the notice at the bottom of it.

Witness: That was a memorandum made at the time.

Mr. Angevine: The defendant objects to the offier—exhibit number 12 —now offered in evidence, for the reason that

the same is incompetent, irrelevant and immaterial. I want to make a separate objection to the notation at the bottom.

Q. Mr. Botsford: I notice below that it sets forth that notation was made by me on the day of service?

Witness: Yes sir, at the time of the service; I think I made the notation immediately on my return to the office of Mr. Angevine which is near by.

By the Court: You say you made the notation? A. Yes sir, immediately after giving the original to Mr. Coombs.

Mr. Angevine: It is simply a recital of what he had done.

By the Court: The notation will not be received; the objection will be overruled as to the other.

Defendant then and there duly excepting.

Mr. Angevine: In order to make the record complete, I now object to the reading of the notation made by Mr. Ball at the bottom of the notice.

By the Court: Objection sustained.

Mr. Botsford reads:

"Kansas City, Mo. June 10, 1903.

To the Atchison Topeka & Santa Fe R. R. Co.

Referring to the shipments of three trains of cattle by the Minnesota & Dakota Cattle Company, two trains from Kenna New Mexico, of forty (42) cars and one thousand six hundred and thirty-five (1635) head, and one train from Bovina, Texas, of seventeen cars and six hundred and fifty-nine (659) head, the remnant of which cattle are now
469 in the stock yards at Kansas City, Missouri, and referring to the suggestion that these cattle ought to be temporarily pastured before being sent on to their destination at Evarts, South, Dakota, "we hereby notify you that this company consents to this course as a proper method of minimizing the loss; but your company will distinctly understand that this company will not accept the custody of the cattle at this point, nor that they be handled at its risk or expense," and does not by this consent waive any of its rights under its shipping contracts, or any of its rights to damages for the losses of these shipments.

MINNESOTA & DAKOTA CATTLE CO.
M. Mullen, Prest.

Q. Mr. Ball, I will ask you, in connection with this notice whether Mr. Combs or any other officer of the defendant company a request was made about that time that these plaintiffs in this case, two cases, take the remnants of these herds from the defendants at the stock yards as those remnants

were at that time, whether such an offer or request as that was made by the Santa Fe Company.

By Mr. Angevine: Objected to by the defendant company as incompetent, irrelevant and immaterial.

By the Court: Made to whom?

By Mr. Botsford: To Mr. Ball and myself as representing the plaintiffs.

By Mr. Angevine: That could not affect the liability nor the damages.

By the Court: I think not—objection sustained.

Plaintiffs then and there duly excepting.

By Mr. Botsford: What is this paper which I now exhibit to you? A. That is the itemized account, a copy of the itemized account which was made out and which I gave
470 to the witness Mr. Denham and instructing him to serve it for the company.

Q. Is that the paper which he identified yesterday? A. Yes sir exactly the same thing, the one he identified yesterday was made, copied from Mr. Hurd's original; it is the same except the other one he identified at filing marks of the Santa Fe railroad on it and this has not.

Q. How many times during that month of June and July, 1903, did you as representative of your company, and I in the other cases meet with Mr. Coombs in connection with this matter.

By Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial.

By the Court: Objection sustained; plaintiffs then and there duly excepting.

The plaintiffs thereupon read in evidence the depositions of witnesses, Rufus Cleveland, Jas W. Nichols, and Philip Du Franz, which as read in evidence are in words and figures as follows to-wit:

471 In the District Court of Chase County, Kansas.

The Empire State Cattle Company, et al., Plaintiffs,

vs.

Atchison, Topeka & Santa Fe Railway Company, Defendant.

The Minnesota & Dakota Cattle Company, Plaintiffs,

vs.

Atchison, Topeka & Santa Fe Railway Company, Defendant.

Stipulation.

It is agreed by and between the plaintiffs and defendant in the above entitled causes that instead of taking two sets

of depositions at Evarts, S. D., on October 24th, 1903, of the same witnesses in said causes, one set of depositions may be taken for use in both of said causes subject to the right at the trial of said causes, or either of them, of any party to the suit on trial to object to said deposition, or any part thereof, or any part of the deposition of any witnesses on the ground that the part so objected to is irrelevant, incompetent or immaterial, or on the ground of any other like objection.

BOTSFORD, DEATHERAGE & YOUNG,
F. P. COCHRAN,
Attys. for Empire State Cattle Co. et al.

Dated, Oct./ 1903.

F. P. COCHRAN & R. E. BALL,
Attys. for Minn. & Dakota Cattle Co.
A. A. HURD,
Attys. for A. T. & S F. Ry. Co.

472 In the Circuit Court of the United States. First Division.

The Empire State Cattle Company, et al., Plaintiffs,
vs.
Atchison, Topeka & Santa Fe Railway Company, Defendant.

The Minnesota & Dakota Cattle Company, Plaintiffs,
vs.
Atchison, Topeka & Santa Fe Railway Company, Defendant.

Stipulation.

It is agreed by and between the parties, plaintiffs and defendant, in the above entitled cause that the depositions taken on behalf of the plaintiffs in said causes while their suits against said defendant were pending in the District Court of Chase County, Kansas, which depositions were taken in South Dakota, may be withdrawn from the files in said causes in said District Court of Chase County and filed in said causes now pending in this Court, and that said depositions upon being so filed in this Court in said causes shall have full force and effect as if said depositions were taken in these causes, and that said depositions may be read at the trials of these causes in this Court subject only to such objections as might be made by either party to such depositions, or portions thereof, on the ground that the same are irrelevant, incompetent or immaterial to the issues in these causes.

All objections to said depositions, or any part thereof, on the ground that the questions are leading, or otherwise improper, are waived.

BOTSFORD, DEATHERAGE & YOUNG,
Attorneys for Empire State Cattle Co. et al.
R. E. BALL,
Attorneys for Minn. & Dakota Cattle Co.
A. A. HURD,
Attorneys for A. T. & S. F. R. R. Co.
Dated January 7th, 1904.

473 Q. State your full name, your age and occupation? A. Rufus Cleveland, age twenty-three, laboring man.

Q. Where do you reside, Mr. Cleveland? A. On the Seventy-three ranch, South Dakota.

Q. What class of labor are you engaged in? A. I have been building fence and making hay.

Q. State for what company or person you performed these services, and how long in their employ? A. Since the 25 day of May with the Minnesota & Dakota Cattle Company.

Q. What was your first employment with the company? A. Bringing a train load of cattle from Kenna, New Mexico to Evarts, South Dakota.

Q. You may state whether or not you accompanied a train-load of cattle belonging to this company from Kenna, New Mexico to Evarts, South Dakota? A. Yes sir.

Q. When did you start from Kenna with these cattle? A. About six o'clock the 26th day of May, 1903.

Q. State, if you know, how many train-loads of cattle this company shipped from this point? A. Two.

Q. With which one of these trains did you ship? A. The second one.

Q. Were you present at Kenna, New Mexico at the time this company shipped its first load of cattle? A. I was.

Q. State, if you know, when the first train-load of cattle left Kenna and who was in charge of the same? A. I judge about between five and six o'clock on the 25th of May, 1903, and William Welch was in charge.

Q. You may state what time you arrived at Kansas City on the train on which you shipped. A. About five
474 o'clock in the evening of the 29th of May, 1903.

Q. Was the stock on the train on which you shipped unloaded en route to Kansas City for feed or water and if so, where? A. Yes sir, they were unloaded and fed and watered at Wellington, Kansas.

Q. What day of the month did you reach Wellington, Kansas and about what time of the day? A. About half past five the 27th of May.

Q. You may state, if you know, what quantity of feed was furnished and vive to the stock on your train at Wellington?

By Mr. Angevine: Objected to by defendant as incompetent, irrelevant and immaterial.

By the Court: It is contended that the cattle were not properly fed at Wellington.

By Mr. Ball: I suppose it would be competent as part of the res gestae.

By the Court: I will admit it.

Defendant then and there duly excepting.

A. The evening we got there they were fed three bales of hay to the car. The next morning they were fed about eight o'clock, two bales to the car. There was that much if not more, two or three. I ordered them fed prairie hay in the morning of the 28th. They only had twenty bales of prairie hay and finished the feed with alfalfa.

Defendant moves to strike out from the above answer all that portion commencing with "I ordered them fed with prairie hay in the morning" for the reason that it is not responsive to the question and merely a voluntary statement on the part of the witness.

By the Court: Motion overruled; defendant then and there duly excepting.

475 Q. Mr. Cleveland, when did you next see the first train which left Kenna, the one that preceded yours? A. If I remember, they were loaded out of Wellington as we came in.

Q. And where did you see them next after Wellington? A. Kansas City.

Q. State when you saw them first at Kansas City. A. About nine o'clock the morning of the 30th of May, 1903.

Q. Where did you see them? A. In the stock yards at Kansas City.

Q. State, if you know, when these cattle on train before yours arrived at Kansas City. A. Sometime between eight and ten o'clock the 30th of May.

Q. Do you know whether or not on or about this time the Minesota & Dakota Cattle Company shipped any other cattle than the two trains which you have mentioned which were shipped from Kenna? A. Yes sir, there was one train loaded at Bovine, Texas.

Q. State when you first saw that trainload of cattle and where. A. I saw them standing on the side track at Bovine on the evening of the 26th.

Q. The train load then from Bovine was behind your train, was it? A. Yes sir.

Q. When did you next see this third train load of cattle? A. Wellington, Kansas.

Q. And where after that, if at all? A. Kansas City.

Q. At what time did you first see this train load of cattle at Kansas City, and when they arrived? A. They arrived sometime in the forenoon of the 30th day of May.

476 Q. In reference to the arrival of the train of which Mr. Welch had charge; state whether or not the train, the third, arrived before or after? A. I can't say, about the same time, though.

Q. You may state, if you know, Mr. Cleveland, which train load of cattle were unloaded first, the one in charge of Mr. Welch or the third train load of cattle shipped by this company? A. I think the third train was.

Q. State, if you know, who had charge of the third train of cattle from Bovine? A. Stebe.

Q. Mr. Cleveland, are you acquainted with any of the officers or managers of The Empire State Cattle Company? A. Yes sir.

Q. Where did you first meet any of the members of the Empire State Cattle Company? A. Kansas City.

Q. State who the representative of that company was and when? A. Mr. Frost; met him on the 30th day of May, 1903.

Q. You may state if you know whether or not this company was shipping any cattle at the time? A. Yes sir.

Q. State who was in charge of their shipment. A. Mr. Frost.

Q. State when Mr. Frost and his shipment arrived at Kansas City, if you know? A. Between eight and ten o'clock on the morning of the 30th of May.

Q. State if you know if any other shipment arrived at the same time? A. The first train of the Minnesota & Dakota Cattle Company arrived at the same time, all on the same train.

Q. Mr. Cleveland, what was the condition of the Kansas City stock yards at the time you arrived on the 29th of May? A. Good.

477 Q. How long did they remain in that condition? A. 'Till Sunday morning the 31st day of May.

Q. Did you frequently see the three shipments of cattle shipped by the Minnesota & Dakota Cattle Company and the train load of cattle in charge of Mr. Frost during their stay in the Kansas City stock yards? A. Yes sir.

Q. What were your duties and in what were you engaged during this time? A. To see that the cattle were fed and watered.

Q. By the cattle you mean the cattle of the Minnesota & Dakota Cattle Company? A. Yes sir.

Q. Did you have anything to do in looking after or caring for the stock that was there in charge of Mr. Frost? A. No sir.

Q. Did you assist in any way during the time Mr. Frost's cattle were in the yard in caring for or looking after his stock? A. Yes sir, I helped feed them three days.

Q. You may state, if you know, whether or not the stock of these two companies was kept in separate yards and apart during its stay in the Kansas City stock yards or not? A. No sir, they were not; they were all mixed up after the morning of the 31st of May.

Q. You may state, if you know, what the occasion was and how it came about this stock was mixed up? A. They were mixed while putting them on the viaducts on Sunday morning the 31st of May, 1903.

Q. State, if you know, how long this stock remained on the viaduct? A. About a week.

Q. State, if you know, how frequently during the time this stock was on the viaduct, the same was fed or watered? A. They were neither watered or fed until Tuesday. A part of them got fed every day after that.

478 Q. State, if you know, whether or not this stock had any water during the time it was confined and kept on the viaduct? A. There were none watered until Wednesday evening, when about a hundred head were watered.

Q. State when they were again watered, if you know, when they were kept there? A. They were part of them watered every day after Wednesday when part of them were watered, until the last day they were on the viaduct.

Q. About what portion of this stock on the viaduct was fed on Tuesday? A. About one-tenth.

Q. You may state, if you know, what arrangements were made and what portion of the stock was fed from that time on until it was removed from the viaduct? A. They had to carry the feed to them in boats, and I should judge they got from three to five hundred a day until they were all fed. Some of them never got any feed until about the sixth or seventh day.

Q. Do you know, Mr. Cleveland, how many head of stock there were in the shipments of these two companies that were huddled together on the viaduct? A. About three thousand and ninety-two head.

Q. You may state, if you know, where this stock was removed from the viaduct and when? A. They were removed back to the yards about the eighth day.

Q. You may state, if you know, the condition of the yards at the time the cattle were removed back to the yards? A. They were very muddy.

Q. You may state, Mr. Cleveland, if you know, the condition and appearance of this stock at the time it was removed from the viaducts to the yards. A. They were very
479 poor; many dead and others dying.

Defendant moves to strike out the answer for the reason that it is not responsive to the question; and is merely a conclusion and opinion of the witness.

Motion overruled; defendant then and there duly excepting.

Q. State, if you know, who removed the cattle that died during this time from the stock yards or from the viaduct?

By Mr. Angevine: Objected to as immaterial. Objection overruled, defendant then and there duly excepting.

A. Men who were in the employment of the stock yards company.

Q. Did you see them removing the dead stock? A. Yes sir.

Q. Can you state how long they were engaged in removing and cleaning out the dead cattle from this bunch of cattle that had died on the viaduct or in the yard at the time they were removed back to the yard?

By Mr. Angevine: Objected to by defendant as incompetent, irrelevant and immaterial.

Objection sustained, plaintiffs then and there duly excepting.

A. Three or four days in removing the dead after the cattle were taken off the viaduct.

Q. You may state, if you know, whether or not these cattle belonging to these two companies were shipped out of the yards, and when, if you know? A. About the 14th and 15th they were shipped out to Emporia, Kansas, in the month of June.

480 Q. You may state, if you know, whether or not from the time this stock was removed from the viaduct to the yards, there was any more deaths among the cattle up to the time they were shipped out of the yards? A. Yes, sir, there was several deaths.

Q. You may state whether or not you accompanied these cattle at the time they were shipped from the yard to Emporia, Kansas? A. Yes sir, accompanied the second train.

Q. And were all these several train loads of cattle shipped to the same place at Emporia, Kansas? A. Yes sir.

Q. State, if you know, whether or not the cattle belonging to these two different companies had been separated prior to their shipment to Emporia, Kansas? A. No sir.

Q. State, if you know, what was done with this stock at Emporia, Kansas and for what purpose it was shipped there? A. They were shipped there to be put on pasture and were put on pasture

Q. You may state, if you know, why this stock was sent out there and put on pasture?

Defendant objects for the reason that it calls for the conclusion and opinion of the witness, and not a statement of the facts.

Objection sustained; plaintiffs then and there duly excepting.

A. Because they were too weak to ship on to Dakota.

Defendant moves to strike out the answer for the reason that it is nothing but an opinion and conclusion of the witness.

Q. You may state, if you know, whether or not there were any more deaths of cattle from this bunch after the shipment from the yards to the pasture? A. Yes sir, there was several.

421 Q. State how long, if you know, this stock remained on pasture at Emporia, Kansas? A. About twenty-five days.

Q. What was done with the stock then, if you know? A. They were shipped to Evarts, South Dakota.

Q. You may state whether or not you accompanied this shipment or what portion of it you did, to Evarts, [Souty] Dakota? A. Yes sir, I accompanied the first train.

Q. You may state, if you know, when this stock was shipped from Emporia, Kansas, and what time it arrived at Evarts, South Dakota?

Defendant objects for it is not the best evidence, calls for secondary evidence.

Objection overruled; defendant then and there duly excepting.

A. Shipped from Emporia about the 10th of July, 1903 and arrived here on the 13th.

Q. You may state, if you know, when the cattle belonging to these two companies were separated? A. The 13th and 14th days of July, at Evarts, South Dakota.

Q. You may state, if you know, how many train loads of cattle were shipped in at the time the cattle were shipped to South Dakota? A. Three train loads.

Q. You may state if you were at Evarts and present at the time these cattle were unloaded? A. Yes sir.

Q. You may state, if you know, whether or not there were any cattle lost in shipping from Emporia, Kansas to South Dakota? A. Yes sir, there were.

Q. You may state, if you know, about how many? A. About ten head.

Q. Mr. Cleveland, where were you employed and what was your business previous to the time that you engaged in service of the Minnesota & Dakota Cattle Company?

482 A. I was employed by the L. F. D. Cattle Company and was handling cattle.

Q. Where was this? A. In the eastern part of New Mexico.

Q. How long had you been employed by this company? A. About two months.

Q. Mr. Cleveland, do you know what brands of cattle were purchased and shipped in these three train loads of cattle by the Minnesota & Dakota Cattle Company? A. Yes sir.

Q. You may state, if you can, what brands were purchased and shipped, if you know? A. L.F.D.'s, H.U.T., A.K.L's, T-tracks, D-Domants, L.F's, Single L's, M.X's, K.M.K's. All these brands were on the right side; some on both.

Q. You may state, if you know, what company owned these different brands of cattle? A. Little-Field Land and Cattle Company.

Q. You may state, Mr. Cleveland, if you know, the condition and appearance of this stock at the time if was loaded first in Texas and New Mexico? A. They were in fairly good condition.

Defendant moves to strike out the answer as not responsive to the question and as being merely the conclusion of the witness.

Objection overruled; defendant then and there duly excepting.

Q. You may state, Mr. Cleveland, if you know, the condition and appearance of this stock when it was unloaded at Evarts and put across the river on the range? A. Poor condition.

Defendant moves to strike out the answer for the reason that it is not responsive to the question and as being merely the conclusion and opinion of the witness.

483 Objection overruled; defendant then and there duly excepting.

Q. You may state, Mr. Cleveland, whether or not you saw the cattle in the charge of Mr. Frost that belongs to the Empire State Cattle Company after they were separated from the other shipment at Evarts, South Dakota? A. Yes sir.

Q. You may state, if you know, the condition and the appearance of the cattle belonging to the Empire State Cattle Company at that time?

Defendant objects to the question as calling for the opinion and conclusion of the witness, and that no sufficient foundation has been laid for such testimony.

Objection overruled; defendant then and there duly excepting.

A. They were poor and appeared to be very weak.

Defendant moves to strike out the answer for the reason that it is not responsive to the question and merely the expression of conclusion and opinion of the witness.

Cross-Examination

By O. J. Wood:

Q. Previous to the 25th day of May, 1903 you were employed in New Mexico? A. Yes sir.

Q. For what length of time and for whom were you employed in New Mexico? A. I had been working for the L. F. D.'s about two months.

Q. Was that for the Little-Field Cattle Company you mentioned in your direct examination? A. Yes sir.

Q. Did you ever have anything to do with or taking care of these cattle that were loaded at Kenna, New Mexico, before they were loaded? A. Yes sir.

484 Q. With all of them? A. All of them that were loaded at Kenna, yes sir.

Q. Did you ever have anything to do or taking care of the cattle that were loaded at Bovina? A. Not since they were calves, no sir.

Q. Did you have anything to do with branding any of these cattle in New Mexico? A. No sir, not in New Mexico.

Q. From what source, then, did you get your information concerning the different brands? A. Well, I had worked on the range three years previous for the company—three years ago this summer.

Q. When you were giving your testimony on the direct examination and particularly when referring to the different brands, you were consulting some book or memorandum and

testifying from [ot]; when did you make a record of these doings? A. Right down here at the yards when I was calling them over at the yards.

Q. You have no distinct recollection, independent of the book or memorandum that you had in your hand when you testified to the various brands? A. Yes, I could have called them over without the book, but I wanted to call them in rotation.

Q. Your first employment with the Minnesota & Dakota Cattle Company was at Kenna, New Mexico, on the 25th of May, 1903? A. On the 26th.

Q. Did you assist in loading the first train load on the 26th of May? A. Yes sir.

Q. And on the following day did you assist in loading that train load you accompanied? A. Yes sir.

485 Q. Who brought these cattle into Kenna from the ranch? A. The L. F. D. outfit.

Q. They delivered them at the stock pens in Kenna, did they? A. Yes sir.

Q. How many car loads, if you recollect, was in the first train that Mr. Welch accompanied? A. Twenty car loads.

Q. And how many car loads in the one that you accompanied? A. At first, twenty-two cars, but they could not carry them, so they dropped off three, which left nineteen cars.

Q. You accompanied this train load that was loaded the 26th through to Kansas City on a live stock contract pass, did you? A. Yes sir.

Q. That train load of cattle was also shipped under a live stock contract? A. Yes sir, as far as I know.

Q. What became of the live stock contract that you had? A. I gave it to Mr. Steube here at the yards when we were branding up the cattle.

Q. He is a member of the Minnesota & Dakota Cattle Company, is he? A. Yes sir.

Q. Did you have anything to do in assisting in the loading of the third train load which was loaded at Bovina? A. No sir.

Q. Who came, if you know, with that train load? A. Mr. Stuebe was in charge of it.

Q. Is the station of Bovina between Kenna and Amarilla? A. Yes sir.

Q. On the Pecos Valley Line? A. Yes sir.

Q. Did you come through Bovina before that train
486 was loaded at Bovina? A. It was standing on the side track loaded when we come through.

Q. What are the age of these that were shipped on your train? A. Two year olds, with the exception of forty-four yearlings.

Q. They were New Mexico cattle, were they? A. Yes sir.

Q. In what part of New Mexico were they raised? A. Eastern part.

Q. And all of them were range cattle, were they? A. Yes sir.

Q. Were they small for their age? A. Not for the country—were good sized cattle for the country.

Q. As a usual thing, New Mexico cattle are small as compared to other cattle, are they not? A. They are as compared to cattle of this country, but not as compared to cattle of the southern country.

Q. You started with this train load about six o'clock on the evening of the 26th of May, 1903? A. Yes sir.

Q. And your first stop to rest, water and feed them was at Wellington, Kansas? A. Yes sir.

Q. How long were you there? A. About twenty-four hours.

Q. Were these cattle in your train rested, fed and watered at Wellington? A. Yes sir.

Q. Did you overtake the first train of cattle at Wellington? A. Yes sir, they were loading out as we came in, if I remember well.

Q. Did they leave Wellington before you did? A. Yes sir.

Q. If you overtook them again before you reached Kansas City, at what point did you overtake them? A. I don't know; we passed them in the night sometime; I knew when we passed them, but I did not know what station it was.

Q. When and where did you next see them? A. Kansas City Stock Yards.

Q. About what time of the day was it when you saw
487 them? A. Between eight and ten in the forenoon of Saturday the 30th of May, 1903.

Q. Did you see that train when it came in? A. I saw the cattle before they got located in the yard.

Q. Did the third train, being the one that was loaded at Bovina, overtake you anywhere on the road? A. It overtook us at Wellington, Kansas.

Q. Were they rested, watered and fed there? A. Yes sir.

Q. And you went out ahead of them? A. Yes sir.

Q. When and where did you next see that train load? A. At Kansas City Stock Yards Saturday morning between eight and ten o'clock in the morning of the 30th of May.

Q. Then you saw the first and third trains at Kansas City about the same time? A. Yes sir.

Q. Did your train stop anywhere between Wellington and Kansas City for resting, water or feeding purposes? A. No sir.

Q. You left Wellington the evening of the 28th and reached Kansas City the evening of the 29th of May, 1903? A. Yes sir.

Q. What was done with your cattle when you reached Kansas City? A. They were fed and then watered.

Q. Were the cattle in trains one and three unloaded at Kansas City and watered and fed? A. Yes sir.

Q. Did you have any acquaintance with Mr. Frost of the Empire State Cattle Company before you met him in Kansas City on the 30th day of May, 1903? A. No sir.

Q. Did you know where his train load of cattle came from? A. Yes sir.

Q. Did you get that information from him? A. Yes sir, and from others. It was wired down to Kenna when
488 they were loading.

Q. They were Texas cattle, were they? A. Yes sir.

Q. What was the condition of the weather during this trip from Kenna to Kansas City? A. It was fair until the night of the 28th, when it rained all night.

Q. That was the night you left Wellington? A. Yes sir.

Q. It had been raining almost constantly almost all that spring, had it not? A. Not where I had been.

Q. Do you know how it was in that respect through Kansas? A. I was told it had been raining all spring.

Q. The road-bed, through Kansas and into Kansas City was soft, was it not? A. Yes sir.

Q. And during your trip through Kansas wherever you came in contact with streams the water was high, was it not? A. Not until I left Wellington; after that it was.

Q. Do you remember whether you went over the cut-off from Emporia to Ottowa, or around through Topeka? A. I went over the cut-off.

Q. Now, after reaching Holliday and going down the Kaw valley through Argentine into the stock yards at Kansas City on the afternoon of the 29th of May, the water was up to the tracks, was it not? A. At Holliday I think it was, the water was over the track, but at Argentine there was no water, or the station before I got to Argentine, I don't know which.

Q. How was the condition of the stock yards at Kansas City? A. As far as the yard was concerned it was in good shape.

Q. Was there any water in them? A. Not in the yards.

Q. Was there any water over the tracks leading to
489 the yards at that time? A. There was water over the nearest track to the river—don't know the number—that is at the unloading shutes.

Q. And on Sunday morning May 31st the stock yards were submerged with water? A. Not 'till eight o'clock in the morning.

Q. And when that occurred, the cattle were driven on the viaduct? A. Yes sir.

Q. And they remained there how long? A. Remained there about a week.

Q. And during that time they were fed and watered on the viaduct? A. They didn't have anything to eat until Tuesday morning, and after that part of them were fed.

Q. After they were driven onto the viaduct, when they were fed they were fed on the viaduct? A. Yes sir.

Q. Did you take care of them, feed or water them, or assist in doing so while they were on the viaduct? A. Yes sir.

Q. Did any body else help you? A. Yes sir, eight of the stock yards boys at work at it. Then [ont] there were more.

Q. And on account of the water being so high about the stock yards and pens, you and those assisting you were obliged to take the feed as well as the water, to the cattle on boats? A. We carried the feed to them and let them down the incline to water.

Q. And that arrangement to feed and water them continued for a week at least? A. Yes sir.

Q. Now, these cattle got mixed at the time they were put on the viaduct? A. Yes sir.

Q. And they were not separated until they reached Evarts, were they? A. No sir.

Q. They were removed from the viaduct back into
490 the yards you say about the eighth day? A. Yes sir.

Q. On account of the high water and flooded condition of the yards and pens and the surroundings, they could not be removed before that time? A. No sir.

Q. When they were removed and driven back into the pens, they were afterwards loaded and taken to Emporia and there pastured for about a period of twenty-five days before they were re-loaded and shipped to Evarts? A. Yes sir.

Q. How many trains were used in transporting these cattle from Emporia to Evarts? A. Three.

Q. How many cars were in each train? A. There were twenty-seven cars in the train I was coming in, and for the other two trains I could not say.

Q. Can you state about how many cars in all were used in shipping these cattle from Emporia to Evarts? A. About eighty-five cars.

Q. Did they all leave Emporia at about the same time? A. Yes, they all left within a period of twelve hours.

Q. What route did you take to come to Evarts? A. Well, I came on the Santa Fe to Atchison, Kansas; and came on the Burlington from Atchison, Kansas to Council Bluffs, Iowa; and on the Milwaukee from Council Bluffs to Evarts.

Q. What time did you leave Emporia and what time did you arrive at Atchison? A. I left Emporia about eleven o'clock in the night and arrived in Atchison the next morning about sun-up.

Q. And the balance of the time your train was transported by the Burlington and the Chicago, Milwaukee & St. Paul? A. Yes sir.

491 Q. You are now in the employ of the Minnesota & Dakota Cattle Company, one of the plaintiffs in this action? A. Yes sir.

Q. On its ranch known as bar—seventy-three bar? A. Yes sir, better known as seventy-three ranch.

Q. And you have been in its employ ever since the afternoon of the 26th day of May, 1903? A. Yes sir.

Q. Are you now or have you ever been in the employ of the Empire State Cattle Company? A. No sir.

RUFUS CLEVELAND.

492 Q. Mr. Nichols, state your full name, age and occupation. A. James W. Nichols, thirty-two years old, Evarts, South Dakota, brand inspector of the Western South Dakota Growers Association.

Q. How long have you occupied that position, Mr. Nichols? A. I have been permanently three years, and held the position for three winters before that.

Q. What was your business and occupation, Mr. Nichols, prior to the time you was appointed brand inspector? A. I guess you would call it cow puncher.

Q. Mr. Nichols, were you acquainted and familiar with the cattle market at Evarts, South Dakota, on or about the 13th day of July last? A. Yes sir.

Q. You may state, Mr. Nichols, whether or not on or about that time you inspected any cattle for the Minnesota & Dakota Cattle Company and the Empire State Cattle Company here at Evarts? A. Yes sir, I did.

Q. You may state as near as you can, what cattle you so inspected, and about how many? A. I don't remember.

Q. Do you recall the fact, Mr. Nichols, that on or about that time these two cattle companies had a shipment of cattle which were unloaded here at Evarts, South Dakota? A. Yes sir.

Q. You may state whether or not you inspected the cattle of these companies that were shipped at that time? A. Yes sir, I did.

Q. You may state, Mr. Nichols, if you know, what the market value of such cattle were at the time they were unloaded here at Evarts, South Dakota?

Defendant objects to the question for the reason
493 that no sufficient foundation has been laid or qualification shown for such testimony, and indefinite as to time or place or market. And the further objection that the market value at Evarts would not be testimony tending to prove the proper measure of damages in this case, and not be fixing the damages or value of the cattle at the right place.

Objection overruled; defendant then and there duly excepting.

A. Of course, there was no such cattle unloaded here, so I couldn't say the market value.

Q. You may explain, Mr. Nichols, what the difference was in this stock and other stock that was being sold on the markets here at Evarts, South Dakota, if you know.

Defendant objects for the reason that it assumes facts not shown, leading and suggestive, and no sufficient foundation laid or qualification shown for such question or such testimony.

Objection overruled; defendant then and there duly excepting.

A. They were much poorer in flesh and very weak.

Q. You may state, Mr. Nichols, what in your opinion would have been a fair market value of these cattle at the time they were unloaded in July last at Evarts, South Dakota?

Defendant objects for the reason that it calls for the conclusion and opinion of the witness, and no foundation has been laid, or qualification shown for such a question or such testimony, and the witness has already stated that he could not say what the market value of any was.

Objection overruled; defendant then and there duly excepting.

Cross-Examination

By O. J. Wood.

Q. Mr. Nichols, you don't have a very distinct recol-
494 lection of this particular shipment of cattle, do you?
A. Well, as to number I do not.

Q. Neither do you have a very distinct recollection as to the number of cars in the shipment? A. No sir.

Q. Or the time the cattle reached Evarts, South Dakota or the number you inspected? A. I remember the time they reached here.

Q. What was the time they reached here? A. About the 15th of July.

Q. You do not know, however, as to the extent of your inspection of them or as to how many you inspected? A. I don't remember the number.

Q. Do you remember about what age these cattle were? A. Two year olds.

Q. Did any of them exceed that? A. I don't think so.

Q. How did you come to make an inspection of them? Was it at the request of the representatives of the Minnesota & Dakota and the Empire State Cattle Companies or by reason of your official duties? A. I inspect all cattle that come to Evarts.

JAS. W. NICHOLS.

495 Q. Frank, state your full name, your age, and your place of residence? A. Phillip DuFran; age is forty-seven; residence is at Evarts, South Dakota.

Q. How long have you resided here, Mr. DuFran? A. Two years and a half about, I have been here three summers, seasons.

Q. What is your business or occupation? A. I am a solicitor for Rosenbaum Brothers & Company of Chicago, in the Live Stock Commission business.

Q. How long have you been engaged in that business? A. About two years and a half.

Q. Were you in Evarts, South Dakota, during the 13th and 14th days of July last? A. I was.

Q. Are you acquainted with the representatives and officers of the Minnesota & Dakota Cattle Company and of the Empire State Cattle Company? A. I am.

Q. You may state whether or not you know of their making a shipment of stock to Evarts, South Dakota, which arrived here and was unloaded about this time? A. I do, yes.

Q. State whether or not you saw the cattle that were shipped in by these two companies at the time they arrived here and were unloaded in July last? A. I helped to unload the cattle and put them across the Missouri river at Evarts, South Dakota.

Q. You may state, if you know, what the cattle market was and the value of cattle at Evarts, South Dakota on or about the 14th day of July last?

Defendant objects for the reason that no foundation has been laid or qualification shown, and is indefinite and uncertain as to what grade, kind or quality of cattle.

496 Objection overruled; defendant then and there duly excepting.

A. Yes sir, I know what the cattle market was.

Q. You may state what such cattle were worth at Evarts, South Dakota on the 14th day of July last, as the cattle were that were shipiped in by these two companies?

Defendant objects for the reason that no foundation has been laid or qualification shown for such testimony; that it is not the proper manner of proving or attempting to prove damages or market value as indicated by the question.

Objection overruled; defendant then and there duly excepting.

A. They were worth about twelve dollars and a half.

Q. You may state the condition and the appearance of this stock at the time it was unloaded here? A. The cattle were in very poor condition.

Defendant moves to strike out the answer for the reason that it is not responsive to the question and merely the opinion and conclusion of the witness.

Motion overruled; defendant then and there duly excepting.

Q. You may state whether or not you were present in the yards here at Evarts on or about the 14th of July last during the time this stock was being unloaded?

Defendant objects to the question for the reason that it is assuming a fact not shown and is leading and suggestive.

Objection overruled; defendant then and there duly excepting.

A. I was.

Q. You may state the condition this stock was in during the time the same was being branded, and as to whether or not it was necessary to assist or help any of the stock in order to get them in position to be branded, or on their feet for the purpose of getting them into the branding shute?

497 Defendant objects as leading and suggestive, calling for the opinion and conclusion of the witness, and not pertinent to the issues in this case.

Objection overruled; defendant then and there duly excepting.

A. Certainly we had to assist them to get them through the branding shute, and there was several of them we could not get through at all.

Q. State why it was necessary to assist them?

Defendant objects as calling for his conclusion and opinion and not a statement of the facts.

Objection sustained; plaintiffs then and there duly excepting.

A. The cattle were so weak that they had to have assistance.

Cross-Examination

By O. J. Wood:

Q. When were these cattle branded? A. They were branded the next day after they were unloaded here, I don't just remember what day that was.

Q. And you assisted in branding them? A. I did.

Q. Were all those who came on those three or four trains branded at that time? A. I think they were.

Q. Were they branded on the next day after they were taken from the cars and before they were driven over the river on the ranch seventy-three? A. They was.

Q. Are you certain that they were branded the next day after they got here or the same day they reached here and were soon after taken from the trains? A. The most of them was branded the first day—the day they were unloaded, and the balance of them the next day; were part of two days branding them.

498 Q. Do you know how many days the cattle had been on the train from Emporia, Kansas to Evarts, South Dakota?

Plaintiff objects to the above question for the reason that it is not proper examination.

Objection overruled; plaintiffs then and there duly excepting.

A. I don't remember, I don't know just how long they were.

Q. Have you ever had any experience in shipping cattle to markets? A. I have.

Q. It is a fact, isn't it, that when cattle are on the cars for a number of days in transit they are naturally somewhat worn out and weak by reason of and as incident to the transportation?

Plaintiff objects to the above question for the reason that it is not proper cross-examination.

A. It is natural that the cattle are weaker.

Q. You are the solicitor and have been for some time for Rosenbaum Brothers & Company, who are Commission men of Chicago, are you not? A. I am.

Q. They are engaged in the business of selling stock cattle on the market in Chicago, are they not? A. Yes sir.

Q. And in buying and shipping cattle to them, you have been buying only such cattle that were in condition for the market and to be slaughtered, have you not? A. I have never bought any cattle for Rosenbaum Brothers & Company of Chicago.

Q. In what way, then have you been a solicitor for them? A. Soliciting people to consign their stock to Rosenbaum Brothers & Company.

Q. Do they handle feeders or only cattle ready to be slaughtered? A. They handle feeders on commission.

499 Q. I will ask you to state if it isn't a fact that Rosenbaum Brothers of Chicago handle almost exclusively beef cattle? A. They handle all classes of cattle.

Q. Do they handle any one kind more than another? A. Why, they handle more beef cattle than anything else.

PHILIP DUFRAN.

500 W. C. Sparks, sworn, testified on behalf of the plaintiff as follows on

Direct Examination.

Q. By Mr. Ball: What is your name? A. W. C. Sparks.

Q. What is your business? A. I am in the mule business.

Q. How long? A. Since 1873.

Q. Where? A. Missouri about 17 years, in Kansas City.

Q. Where were you in business in May and June, 1903? A. Kansas City.

Q. Where was your office and yards? A. 17th and Gennessee.

Q. 17th and Gennessee streets? A. Yes sir.

Q. Where is that with reference to the shipping division; what is known as the shipping division of the cattle yards? A. It is right near, it is within a block where they ship and load.

Q. In which direction from the shipping department? A. They unload right west of us about a block, from one to three blocks west of us.

Q. You remember the flood of 1903? A. Yes sir.

Q. What is your company there? A. Sparks Brothers.

Q. At that time had you any live stock in your barns? A. Yes sir.

Q. How many? A. Between six and seven hundred head of mules.

Q. In the barns? A. Yes sir, the two barns.

Q. At 17th and Gennessee? A. Yes sir and Wyoming street a block east, two barns occupied.

Q. When was the crest of the flood reached there in the yards? A. The first water at our [bran] about eight o'clock between 7 and 8 o'clock in the morning.

Q. What day? A. Sunday morning.

Q. That would be the 31st of May, if that was the
501 last day of May? A. I think so. I think that was about the date.

Q. Now did you move any live stock out of there after that hour? A. Yes sir.

Q. What did you move? A. I moved my mules, all of them after that hour, after eight o'clock.

Q. How many? A. Between six and seven hundred.

Q. To where did you take them? A. I took them to the country about six miles south of Kansas City.

Q. How long did it take you, to take six or seven hundred head of mules from that place out of the valley? A. I was from eight o'clock until 11 o'clock; eight until say half after ten before we got out of the bottoms with our mules.

Q. About two hours and a half? to three hours? A. Yes sir two and a half to three hours.

Cross-Examination.

By Mr. Angevine: You had your mules lariatted and tied up in the barn before you started to take them out? A. No sir I did not have any of them lariatted.

Q. Out in the pens? A. Yes sir.

Q. The pens in which they were located faced on Gennessee street did they? A. Yes sir.

Q. By opening the gates you could let them out into Gennessee street? A. Yes sir fronts Genessee street.

Q. They could be brought out directly? A. Yes sir.

Q. The shipping pens are further west than the mule pens are they not? A. Yes sir.

Q. And they would have to be taken from the shipping pens out south toward Kansas Avenue would they not? A. Out south.

Q. Yes? A. I went north—took my mules north.

502 Q. Taking them from the shipping pens, that would take them out south, would it not? A. They would take them east or south of Gennessee, there is a gate there we take our mules and receive[s] all of these horses into the yards, that is on the east side of the yards.

Q. But the cattle are further west than your mules, were they not? A. Yes sir west and north.

Q. It would be more difficult to get cattle from where they were out into Gennessee street than it would your mules; they were further away from Gennessee street? A. Yes sir.

Q. And cattle from Texas and New Mexico are a little harder to handle than mules in going in and out and driving in the streets? A. I never had any experience with cattle, not any scarcely.

C. T. McLellan, recalled on behalf of the defendant.

Q. By Mr. Angevine: While you were on the witness stand yesterday about the notice which you received of the flood from Topeka, I believe you stated you received your notice from the Rock Island at Topeka? A. My office did and transmitted them to me.

Q. And you were at Lakeview or between Lakeview and Lawrence? A. Yes sir between Lakeview and Lawrence.

Q. You may state whether or not there [—] anything in the notice that you received which would indicate the extent of the raise by at least ten feet.

Objected to by the plaintiffs as calling for a conclusion of the witness and not stating the facts.

503 Objection overruled.

A. There was nothing which indicated any such a raise as that.

Q. You may state how much the water did raise above what you anticipated, from the reports which you received. A. At any particular point?

Q. Yes, the general raise in the river. A. At Lakeview, it rose six feet higher than I had any idea.

Q. At Lakeview, the valley spreads out and is very wide, is it not? A. Yes sir it is wide at Lakeview.

Q. And you say there it was six feet higher than any reports indicated you would have. A. It ran to a height of six feet more than I anticipated at all.

Q. In that vicinity? A. Yes sir.

The plaintiffs move to strike out as a mere expression of opinion of the witness, what he anticipated.

Motion overruled.

Q. Now the Kaw valley in the vicinity of Lakeview is very wide as compared with what it is near Kansas City, is it not? A. I should say it was, I never was on the north side of the river, at Lakeview, and it is a mile from the river to our station.

Q. Looking across the river from the south side where you were the bluffs are a long ways back from the river on the north side, are they not? A. They look to be about a mile from the river on the north side.

Q. And the wide condition of the river continues down past Lawrence, does it not. A. It does.

Q. And even three or four miles below Lawrence the valley spreads out still wider, does it not? A. Three or four miles east of Lawrence the valley spreads to about nine miles wide.

504 Q. And during that flood that entire distance, it was flooded, was it not? A. It was.

Q. Was there anything in the reports which you received while you were in the vicinity of Lawrence or Lakeview to indicate that the water would be high enough to flood your tracks at Argentine and Kansas City

Objected to by the plaintiffs, as calling for the conclusion of the witness and not stating the facts.

Objection overruled.

A. There was nothing in the reports to indicate that we would have any serious trouble.

Q. From the reports which you did receive, you believed that your tracks in Kansas City would not be flooded.

Plaintiffs object to the question as calling for a conclusion of the witness and not stating the facts.

Objection overruled; plaintiffs then and there duly excepting.

A. I had reason to think so.

Q. You did think so? A. Yes sir, I did think so.

Re-Direct Examination.

Q. I do not remember whether I asked you yesterday the distance west of Lawrence of Lakeview? A. Five miles.

The Plaintiffs then offered in evidence the deposition of William Welch, and which as so read in evidence is in words and figures as follows towit:—

505 Q. Mr. Welch, state you name, age and occupation? A. Name is William Welch, I am a laboring man I guess, and am thirty-eight years old.

Q. What business or occupation are you engaged in at the present time? A. I am foreman of the Minnesota & Dakota Cattle Company.

Q. How long have you been engaged in the present position? A. Eight months.

Q. How long have you followed that line of business? A. About twenty years.

Q. What are your duties and what has been the nature of your business during these last twenty years? A. I have yorked as a common hand and run an outfit for the past twenty years.

Q. In caring, looking after cattle on the range? A. Yes sir.

Q. You may state, Mr. Welch, where you were employed and what business you were looking after for this company along about the 1st of May in 1903? A. I was down in Texas and New Mexico and loaded out a train of cattle the 25th day of May, I think. I looked after them cattle 'till I got to Kansas City, I don't just know how long it was.

Q. You may state, if you know, Mr. Welch, how many train loads of cattle were loaded at that time and place by The Minnesota & Dakota Cattle Company? A. The 25th there was one train loaded at Kenna, New Mexico; and the 26th there was a train loaded there and one at Rovina, the same day, in Texas.

Q. You may state, if you know, how many cars and what number of cattle were, loaded and shipped by each of these three trains? A. There were twenty-two hundred and fifty cattle and twenty-two hundred and ninety-four
506 with the yearlings.

Q. Then as I understand you, Mr. Welch, there were twenty-two hundred and ninety-four head of cattle shipped in these three train loads? A. Yes sir.

Q. Were these cattle branded and if so state, if you know, what brand they were branded with? A. They were branded A.F.D. on the right side, and there were some branded A.X.L. on the right side and some branded H.U.T. on the right side. Some branded "T track", and some branded J.O.S.

Q. You may state, Mr. Welch, which one of these trains you had charge of? A. The one loaded the 25th, the first train out.

Q. You may state, Mr. Welch, what time was consumed on your trip from your shipping point North. A. Well, the first place they unloaded was at Wellington, Kansas. The next evening between ten and eleven o'clock. Was first stop. I ordered to be loaded out next morning at five; they loaded me and unloaded me right there. Then they loaded me that evening about seven o'clock. That night they run me the first station beyond Strong City, Kansas. Then they run me back to Strong City and unloaded me about daylight the next morning. They kept me all day and the next night and loaded me the next morning, and I could not get feed while I was there, except I got one bale of hay for each car while I was there. The next time I was unloaded was at Kansas City. We left Strong City at noon and the next day between nine and eleven o'clock in the morning I got into Kansas City.

Q. How many cars of cattle and how many cattle to the car did you have in the train that you had charge of? A. There were loaded thirty-nine and forty and there
507 were twenty cars in my train.

Q. State the time of your arrival in Kansas City of this stock? A. It was on Saturday the 30th of May, 1903, between eight and ten o'clock in the forenoon.

Q. State, Mr. Welch, whether or not you made any demand on the railroad company for feed for this stock from the time you started with this shipment until your arrival in Kansas City and if so, what feed was furnished you? A. I got all the feed I needed at Wellington, but I could only get one bale to the car at Strong City.

Q. Mr. Welch, are you acquainted with any of the officers or managers of the Empire State Cattle Company? A. Yes sir.

Q. You may state whether you met with or s-w any shipments of cattle made by that company and if so, where and when? A. I met Mr. Frost, had a train of cattle at Strong City when I went there.

Q. Was Mr. Frost in the yards at Strong City when you arrived there? A. His cattle was.

Q. State how long his cattle remained there, if you know, and how many cars of cattle were there belonging to the Empire Cattle Company? A. He was there when I came and went away when I did.

Q. Was there any other than this one train load of cattle in the charge of Mr. Frost belonging to the Empire State Cattle Company at Strong City while you was there? A. Not while I was there; he had a train right ahead of mine and I saw them on the track and he said they were his. They were loaded out.

Q. During you stay at Strong City this one train load of cattle in the charge of Mr. Frost remained while you were there, did they? A. Yes sir.

508 Q. And from there, where was this train load shipped of Mr. Frost's? A. Kansas City.

Q. Do you know when they arrived at Kansas City? A. Between eight and ten o'clock on the 30th of May.

Q. You may state, if you know, what time in the day the cattle Mr. Frost had charge of were loaded up at Strong City, and how often they were loaded and unloaded during their stay there? A. They were loaded and unloaded twice to my certain knowledge.

Q. You may state, if you know, what feed was furnished for the cattle in Mr. Frost's charge during their stay at Strong City? A. I think they had the same feed as the train I had there. That was one bale to the car.

Q. You may state, Mr. Welch, just what happened in the handling and shipment of this stock after you arrived at Kansas City? A. We ordered to load out of Kansas City that same night—Saturday night, and they wouldn't load us.

By Mr. Angevine: I move to strike out the answer to that question as indefinite; the answer not indicating upon whom the request or order was made.

By the Court: Objection and motion sustained; plaintiffs then and there duly excepting.

Q. You may state, if you know, for what reason they would not load you out?

Objection by defendant for the reason that it assumes facts not shown and calls for the conclusion and opinion of the witness and not the statement of the fact, and that no foundation has been laid for such testimony.

And for the further reason that it is indefinite.

Objection sustained; plaintiffs then and there duly excepting.

509 A. I can't tell you why they didn't.

Q. You may state, Mr. Welch, whether or not any requests were made by you while at Strong City to have the stock in your charge loaded and shipped? A. Yes, several times.

Q. To whom did you make these requests? A. To the agent of the railroad company who had them in charge.

Q. State, if you know, whether or not Mr. Frost at one or more times during your stay at Strong City made such a request of the railroad company's agent? A. He did, several.

Q. Were you present at the time Mr. Frost made these requests? A. I was.

Q. You may state, if you can, Mr. Welch, the conversations that took place between Mr. Frost and the agent of the company while you were present?

Defendant objects as calling for hearsay testimony and that no sufficient foundation has been laid for the character of the testimony elicited.

Objection overruled; defendant then and there duly excepting.

A. He would go to him several times a day and ask him when he could get out and keep urging him to get out of the yard.

Q. By "him" you mean the agent of the railroad company at Strong City? A. Yes sir.

Q. You may state, Mr. Welch, what the conditions of the yards were in at Strong City while you were there and the stay of Mr. Frost? A. They were pretty muddy. Water in them—some parts of the yard had good deal of water in them.

Q. Was there sufficient flooring or dry ground in the
510 yards at Strong City to keep your stock and the stock in charge of Mr. Frost out of the mud and water?

Defendant objects for the reason that it calls for the conclusion and opinion of the witness and that no foundation has been paid for such testimony or qualifications shown.

Objection overruled; defendant then and there duly excepting.

A. There wasn't sufficient dry places in the yard for the cattle was there.

Defendant moves to strike out the answer for the reasons stated in the objection.

Motion overruled; defendant then and there duly excepting.

Q. Which train load of cattle was loaded first at the time you loaded and shipped to Kansas City from Strong City? A. Mr. Frost's.

Q. How long was Mr. Frost's train load of cattle loaded before they were started for Kansas City? A. We commenced to load them in the morning and they left Strong City at noon.

Q. About what time in the morning did Mr. Frost begin to load his train and about what time were they loaded? A. We commenced to load them between five and six in the morning and we had them loaded about between eight and nine.

Q. Where was Frost's train after they were loaded and between that and noon—the time they were started for Kansas City? A. They were up on the side track some place.

Q. State if you know, whether or not the train load of cattle in your charge and the one in the charge of Mr. Frost were taken as one train or as separate trains to Kansas City?

A. They were taken as one train.

511 Q. State at what time and place you met with or saw any of the other trains of cattle spoken of that were shipped by the Minnesota & Dakota Cattle Company? A. I caught up with a train at Emporia, Kansas that loaded the day after I loaded.

Q. State where you met, if at all, the other or third train load of cattle shipped by the Minnesota & Dakota Cattle Company? A. At Kansas City Stock Yards.

Q. State what was done with the stock in your charge and in the other trains shipped [ny] the Minnesota & Dakota

Cattle Company and also the stock in the charge of Mr. Frost after you arrived at the stock yards in Kansas City? A. I ordered the train I had fed three hundred pounds of hay to the car. We unloaded first.

The defendant moves to strike out the following "I ordered the train I had fed three hundred pounds of hay to the car" from the above answer for the reason that it is not responsive to the question.

Motion sustained; plaintiffs then and there duly excepting.

Q. You may state, if you know, Mr. Welch, how long these four train loads of cattle remained in the yards at Kansas City? A. Got in there on May 30th. I left there June the 10th.

Q. Were the cattle still in the yards at the time you left there? A. Yes sir.

Q. You may state, Mr. Welch, what the conditions of the yards were and the facilities for feeding and furnishing feed for the stock during the time you remained at the Kansas City yards? A. The first feed we gave them, the facilities were all right for feeding—May 30th. After that it was almost impossible to feed them.

512 Q. State when the first feed was furnished the stock? A. About noon on May 30th.

Q. State how frequently and in what quantities feed was furnished for this stock after May the 30th up to and including June 10th—the time you left, if you know? A. Well, there wasn't any feed furnished to amount to anything 'till about June the 9th or about then.

Q. Where was this stock kept during the nine or ten days you were with the stock in Kansas City? A. They were kept on the viaducts, running from one to the other.

Q. Was the stock in the charge of Mr. Frost in the same condition and kept in the same place during the time you stayed in Kansas City with the stock? A. Yes sir.

Q. State whether or not the cattle belonging to the Empire State Cattle Company and the Minnesota & Dakota Cattle Company were kept separate and apart during their stay in Kansas City? A. They were all together.

Q. When was this stock first placed on the viaducts? A. Sunday about between eight and ten o'clock.

Q. That was the Sunday following May the 30th—the day of your arrival? A. Yes sir.

Q. How long was the stock kept on the viaducts? A. They were kept there about one week, to my knowledge.

Q. What attention, if any, was given this stock during the time it was on the viaduct, by the railroad company?

Defendant objects to the question for the reason that no foundation is laid for it and no qualifications shown to answer it, and calling for a conclusion and opinion of the witness.

513 Objection overruled; defendant then and there duly excepting.

A. I don't think the railroad company bothered with them at all.

Defendant moves to strike out the answer for the reason stated in the objection.

Motion overruled; defendant then and there duly excepting.

Q. State, if you know, what feed was furnished this stock by either the railroad company or the stock yards company during the time it was on the viaduct? A. There was hay furnished them.

Q. About how often and in what quantities? A. Well, some of them would get a fair feed and some of them wouldn't get any for two or three days.

Defendant moves to strike out the answer for the reason that it is not responsive to the question.

Motion overruled; defendant then and there duly excepting.

Q. State, if you know, about how long it was after this stock was placed on the viaduct before it was furnished with hay and water? A. It was the next Wednesday, I think, following the Saturday I landed there.

Q. How frequently were these cattle fed hay and by whom during the time they remained on the viaduct after the 3rd of June? A. There were some men working for the stock yards company and they could not feed only about half of them in a day or a quarter of them as there were not enough men there to get around to do the work.

Defendant moves to strike out the following "There wasn't men enough to do the work" from the above answer for the reason it is not responsive to the question and merely a voluntary statement on the part of the witness.

Motion sustained; plaintiffs then and there duly excepting.

514 Q. You may state, Mr. Welch, what the condition of this stock was when it was taken off the viaduct and placed in the yards and also the condition of the yards in which it was placed? A. The yards were bad, conditions were poor.

Defendant moves to strike out the answer for the reason that it is not responsive to the question and merely the conclusion and opinion of the witness.

Motion overruled; defendant then and there duly excepting.

Q. You may describe, Mr. Welch, the condition and appearance of this stock when it was removed from the viaducts to the yards? A. They were in awful bad shape. They were poor and lots of them were going blind and starving and looked as bad as I ever saw cattle look in my life.

Defendant moves to strike out the answer for the reason that it is not responsive to the question and as being merely the opinion and conclusion of the witness.

Motion overruled; defendant then and there duly excepting.

Q. You may state, Mr. Welch, whether or not up to the time of the removal of this stock from the viaduct back to the yards, any of the stock had died? A. Yes sir.

Q. You may state, Mr. Welch, whether or not you continued to find dead stock belonging to this bunch of stock after the time of its removal and up to the time you left there the 10th of June?

Defendant objects as leading and suggestive and indefinite.

Objection overruled; defendant then and there duly excepting.

A. We found dead stock there at the yards that died out of this bunch of cattle.

Q. Can you state, Mr. Welch, about how many head of cattle out of this bunch of cattle died up to the time you left?

A. About four hundred.

515 Defendant moves to strike out the answer as not responsive to the question.

Motion overruled; defendant then and there duly excepting.

Q. Mr. Welch, when did you next see these cattle after the 10th of June? A. Out here on the range where they were put in seventy-three pasture.

Q. About what time was it, Mr. Welch, that you saw this stock at the seventy-three pasture? A. It was the 23rd or 25th of July, I think.

Q. You may state, Mr. Welch, what the appearance of this stock was at the time you saw it at the pasture? A. It was very bad.

Defendant moves to strike out the answer as not being responsive to the question.

Motion overruled; defendant then and there duly excepting.

Q. Mr. Welch, were you acquainted with the market value of cattle here in South Dakota at the time you saw these cattle? A. Yes sir.

Q. You may state, Mr. Welch, what the value of such cattle was per head in the condition in which they were in at the time you saw them at the seventy-three pasture in July last?

Defendant objects to the question for the reason that it is not the proper way or manner of proving the value of the cattle or damages thereto nor the proper place upon which to base the market value or any other value, and that no sufficient foundation of the question or such testimony.

Objection overruled; defendant then and there duly excepting.

A. They were worth about ten dollars a head.

516 Cross-Examination,

By O. J. Wood:

Q. Mr. Welch, I understand you are the foreman of the Minnesota & Dakota Cattle Company at the present time? A. Yes sir.

Q. And you have been acting in that capacity and employment for about eight months last past? A. Yes sir.

Q. Where is the headquarters of the Minnesota & Dakota Cattle Company? A. New Ulm, Minnesota.

Q. Have you now or have you ever had any connection of any kind with the Empire State Cattle Company? A. No sir.

Q. With which one of these cattle companies is Mr. Frost connected? A. The Empire State Cattle Company.

Q. If you know, state where the headquarters of that company is located? A. At Fort Pierre, South Dakota, I believe.

Q. How long have you been engaged in the business of handling cattle? A. About twenty years.

Q. At what place? A. The last fifteen years I have been in South Dakota.

Q. Did you go from South Dakota to Kenna, New Mexico for these cattle you have been describing? A. Yes sir.

Q. Were you sent there by the Minnesota & Dakota Cattle Company for that purpose? A. Yes sir.

Q. In what portion of New Mexico is Kenna? A. It is in the eastern part, I think.

Q. On what line of railroad is it? A. I think we loaded the cattle on the Pecos Valley.

Q. How far and in what direction from Amarillo, Texas, is it? A. South and west I think.

Q. What time did you first go down there? A. It was along about the middle of May, 1903.

517 Q. Your business for the last fifteen or twenty years has been in caring for and looking after stock on the range? A. Yes sir.

Q. Were these cattle that you loaded at Kenna, New Mexico or Texas cattle? A. Those that we loaded at Kenna were New Mexico cattle.

Q. Were they taken off the range in New Mexico? A. Yes sir.

Q. Were they large or small cattle? A. They were good sized two year old cattle.

Q. Were they what you would call feeders? A. Some people feed two year old cattle, but I would call them range cattle.

Q. They were not fit for, or as a matter of fact they were not being sent to the market, were they? A. No sir.

Q. Were they being shipped to South Dakota? A. Yes sir.

Q. For what purpose? A. Range them on the range.

Q. Were they all two years old? A. Twenty-two fifty of two year olds and forty-four yearlings.

Q. Was more than one train load of these cattle you have described loaded at Kenna? A. Two trains.

Q. And the other train was loaded where? A. Bovina, Texas.

Q. Did you have anything to do in loading the train loaded at Bovina, Texas? A. No sir.

Q. So of your own knowledge, you don't know when these were loaded or how many? A. I know how many, yes.

Q. Did you arrive at that fact from the records?
518 A. I saw the cattle at Kansas City when they were unloaded.

Q. Did you assist in the loading of the two trains at Kenna? A. No sir, the first train.

Q. And the first train was loaded on the 25th of May, 1903? A. Yes sir.

Q. How many cars were in that train? A. Twenty.

Q. Do you know of your own knowledge when the second train was loaded at Kenna? A. The next day.

Q. When the first train was loaded, did you leave with it that day? A. Yes sir.

Q. And you were not in Kenna when the second train was loaded? A. No, I was not in Kenna.

Q. About what time on the 25th of May did you leave Kenna—your train? A. It was between four and six o'clock in the evening.

Q. And you reached Wellington about what time on the 26th of May? A. Well, it was between ten and twelve in the night.

Q. And there they were unloaded, rested and fed? A. Yes sir.

Q. I believe you stated on the direct examination that they had a plenty to eat at Wellington? A. Yes sir.

Q. Were these three train loads of cattle belonging to the Minnesota & Dakota Cattle Company shipped under a live stock contract? A. Yes sir.

Q. Was there a contract for each train, or did one contract cover them all? A. A contract for each train.

Q. Was there any other representative of the Minnesota & Dakota Cattle Company accompanying the first train except you? A. No sir.

Q. Was there any other representative of the Minnesota & Dakota Cattle Company at Kenna and Bovina except you? A. Yes sir.

Q. If more than one person, who were they? A.
519 Mr. Mullen and Mr. Steube.

Q. Was each of these contracts for the shipment of the three train loads of cattle belonging to the Minnesota & Dakota Cattle Company executed on behalf of the shipper by the same person or by different persons?

Plaintiff objects to the above question for the reason that it is not proper cross-examination, referring to no part of the direct examination herein.

Objection overruled; plaintiffs then and there duly excepting.

A. Each man that had a train signed his contracts.

Q. As the shipper in charge of the stock? A. Yes sir, as the shipper in charge of the stock.

Q. That is, the Minnesota & Dakota Cattle Company were the shippers and you were in charge of the stock? A. Yes sir.

Q. And you signed it for the company? A. I did for my train.

Q. Who was in charge of the second train, if you know, from Kenna? A. Mr. Cook.

Q. Who was in charge of the train from Bovina, if you know? A. Mr. Stuebe.

Q. And the parties in charge of the stock were each of them transported on the contracts they signed, weren't they? A. Yes sir.

Q. Now, did the train of stock that you were in charge of get into Wellington before the other two did? A. Yes sir.

Q. Did all three of the trains take the same route to Kansas City? A. Well, I don't know.

Q. Did they all pass through Wellington? A. Yes.

Q. Did all three go through Strong City and Emporia? A. Yes.

Q. Did either of the other two trains reach Wel-
520 lington before you left? A. No.

Q. Did either of the other two trains (and I mean those belonging to the Minnesota & Dakota Cattle Company) reach Strong City or Emporia before you left with your cattle? A. There was one train in Emporia with cattle when I got there. I don't know where it got by me.

Q. Was that one of the trains that was loaded at Kenna and Bovina? A. That was the train that was loaded at Bovina.

Q. Did you get into Kansas City before that train did? A. No sir.

Q. What was the day and hour of the day you left Wellington? A. I left there in the evening of the 27th.

Q. What time did you reach Strong City? A. Well, I went through Strong City to the next station and they run me back to Strong City and it was about daylight when I got there.

Q. That must have been the morning of the 28th of May? A. Yes sir.

Q. Do you know whether they run you to Emporia and then back to Strong City, and did you know the cause of it? A. I don't know what station it was. I only know what they told me.

Q. Is Strong City the first station you met the train of cars belonging to the Empire State Cattle Company with Mr. Frost in charge? A. Yes sir.

Q. Do you know where his train of cattle came from? A. From Hereford.

Q. In what state? A. Texas.

Q. He had reached Strong City before you got there? A. Yes sir.

Q. Were his cattle unloaded at the time you got there? A. Yes sir.

521 Q. Now at Strong City you were there how long? A. A day and a night.

Q. And loaded you the next morning? A. Yes, by noon, I think.

Q. That would be May 29th or 28th? A. May 28th.

Q. Now, while you were at Strong City you got one bale of hay for each car? A. Yes sir.

Q. Who was this man you speak about as representing the company whom you and Mr. Frost spoke to about getting your cattle loaded out? A. The railroad agent.

Q. What was his name? A. Well, I couldn't say.

Q. Did you learn from any source while there what his name was? A. No, I didn't; he was the agent.

Q. Now, you left Strong City about noon on what day of the month? A. I think it was the 29th at noon.

Q. And reached Kansas City between eight and ten o'clock on the morning of May 30th? A. Yes sir.

Q. And upon reaching Kansas City with the train load of cattle and also the one belonging to the Empire State Cattle Company of which Mr. Frost had charge, together with the other two trainloads, were unloaded in the Union Stock Yards at Kansas City? A. Yes sir.

Q. Mr. Welch, what was the kind or character of the weather say from the 25th of May up to and including the 30th of May, 1903? A. Rainy.

Q. In going to Kansas City from Emporia, did you go over the cut-off waterway or through Topeka, Kansas, to Kansas City? A. Well, I couldn't say; I don't know; it was dark.

522 Q. Do you remember of passing through Argentine on the morning of May 30th before reaching the Kansas City Union Stock Yards? A. No, I don't know whether I passed them or not.

Q. Do you remember whether or not the water goes up around the tracks in the vicinity of the stock yards? A. Yes sir.

Q. On the 30th day of May the Bottoms at Kansas City was covered with water, was they? A. Yes.

Q. And on account of the flood and the rising of the water from the Kaw river and the Missouri backing it up, the cattle were removed from the stock yards' pens on to the viaducts, were they? A. Yes sir.

Q. And on account of the high water in the yards it was impossible to keep the cattle in the yards, was it? A. On the 30th of May the yards were all right when we unloaded there.

Q. That was when they were first unloaded into the yards? A. Yes sir.

Q. But a short time afterwards the yards were flooded, were they not? A. About twelve hours afterwards.

Q. And by reason of that flood it became necessary to remove the cattle from the pens and drive them on to the viaducts you referred to?

Plaintiff objects to the above question for the reason that the same is not proper cross-examination and that it calls for the conclusion of the witness.

Objection overruled; plaintiffs then and there duly excepting.

A. Yes sir.

Q. And by reason of the flooded condition of the yards, it was impossible to feed the cattle in the yards, wasn't it? A. No sir.

523 Q. They couldn't feed them in the pens, could they? A. They could feed the cattle where they were, could not feed them in the yards, no.

Plaintiff objects and moves to strike out the answer for the reason that it is not proper cross-examination and that it calls for the conclusion of the witness.

Q. Commencing on Sunday the 31st day of May and from that time for a week next ensuing, the cattle were fed on the viaduct, on account of the flooded condition of the pens? A. Yes sir.

Q. You left Kansas City about what time? A. The 10th of June.

Q. Did you come right through to South Dakota? A. Yes sir.

Q. Did you accompany the cattle through from Kansas City to South Dakota? A. No.

Q. And the first time you saw these cattle after you last saw them in Kansas was sometime in July last? A. Yes sir.

WILLIAM WELCH.

524 And thereupon the plaintiffs offered in evidence the deposition of Wm. Welch taken on the 17th day of November, 1904, for the purpose of proving the number of deaths which took place in the remnant of the cattle in controversy of the Minnesota & Dakota Cattle company during the winter of 1903—and 1904, said deaths resulting from the injuries received on the viaducts in Kansas City stock yards at Kansas City.

Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial and not establishing the proper measure of damages in this case.

By the Court: The witness having stated in a prior deposition that he was familiar with the market price of cattle at Evart, South Dakota when received there, having testified as to the value of the cattle when received, this being as to occurrences happening after that time, the evidence is excluded.

The Plaintiffs then and there duly excepting.

Mr. Botsford: The plaintiffs also offer in evidence the deposition of Lee Elliott, for the same purpose.

Mr. Angevine: To which the defendant objects for the same reason as above.

By the Court: Does the witness, whose testimony is now offered know or claim to know the value of the cattle when received at Evarts, S. D.

Mr. Ball: The number died.

By the Court: Upon this statement and under the objection of counsel it will be excluded at this time.

Plaintiffs then and there duly excepting.

525 The plaintiffs also offer in evidence for the same purpose the deposition of Lewis LaPlant, taken at the same time.

Mr Angevine: Objected to by the defendant for the same reason as to the others.

By the Court: The same ruling; it will be excluded at this time.

Plaintiffs then and there duly excepting.

The plaintiffs also offer in evidence for the same purpose the deposition of George D. Mathieson.

By Mr Angevine: Objected to by the defendant for the same reason.

By the Court: The objection will be sustained at this time.

The ruling here made is in view of the condition of the record at this time.

Plaintiffs then and there duly excepting.

Which said depositions so offered in evidence by the plaintiffs and excluded by the court, and excepted to by the plaintiffs, are in their order, and in words and figures as follows towit:

526 Q. Mr. Welch, you may state your age, and place of residence. A. I am thirty-nine years old;

Q. Where do you reside? A. Cheyenne River Reservation, in the state of South Dakota.

Q. What is your occupation? A. I am a stock man and handle cattle.

Q. Are you in anybodys' employment at the present time? A. Minnesota & Dakota Cattle Co.

Q. In what capacity? A. I act as foreman of their range out there.

Q. How long have you held that position? A. One year and nine months.

Q. Do you remember the occasion when, I think sometime in July, 1903, a shipment of cattle for the Minnesota & Dakota Cattle Co. was unloaded at Evarts, in this state? A. Yes sir, I do.

Q. Are you able to state the exact date when those cattle were unloaded there? A. I can't tell just the exact date; no.

Q. Do you remember the month? A. It was in July.

Q. How many cattle were at that time unloaded with the shipment referred to? A. I could not tell; I was not right there at Evarts; I met the cattle after they were unloaded.

Q. You may state whether or not you were present at the time the cattle referred to were shipped from Kenna, New Mexico, to Evarts, South Dakota? A. I was.

Q. About how far from Evarts did you meet these
527 cattle? A. About fifty miles.

Q. State whether or not you accompanied the cattle a portion of the distance, and if so how far, en route to Evarts. A. From Kenna, New Mexico to Kansas City.

Q. Now you may state whether or not the cattle which you met as you say, about fifty miles west of Evarts, in the month of July, 1903, were the same cattle or a part of the same cattle that were shipped from Kenna, New Mexico, and which you accompanied as far as Kansas City? A. Part of them were, yes.

Q. What was the condition of these cattle when they were loaded on the cars at Kenna, New Mexico? A. Good.

Q. You may state what was the condition of these cattle when you met them about fifty miles west of Evarts.

The defendant objects to the question for the reason that it is incompetent, irrelevant and immaterial and as calling for the conclusion and opinion of the witness and not pertaining to the fact and that the witness has not been shown as qualified or competent to answer the question.

Question withdrawn.

Mr. Welch, how long have you been engaged in the cattle business in the state of South Dakota? A. About nineteen years.

Q. How much of that time were you engaged in the cattle business in the Cheyenne River Reservation country? A. Fourteen years.

Q. What positions have you held while engaged in the cattle business? A. I have acted as foreman for twelve years.

Q. For whom? A. A. D. Marriott.

528 Q. What business was A. D. Marriott engaged in while you were his foreman? A. Cattle business.

Q. About how man cattle did you have charge of while you were foreman for A. D. Marriott? A. About five thousand head.

Q. Now, you may state what was the condition of these cattle concerning which you have testified when you met them about fifty miles west of Evarts, in the month of July, 1903?

The defendant objects for the reason that no sufficient foundation has been laid for any such question; that it assumes facts not shown to exist and merely calls for the conclusion and opinion of the witness and not the statement of the facts, and that the witness has not been shown qualified and competent to answer the question and it is incompetent, irrelevant and immaterial.

A. They were poor.

Q. How generally did you examine them? A. I looked the herd over and saw that the condition of them was very poor and thin.

The defendant moves to strike out the answer for the reason that it is not responsive to the question and is merely a conclusion of the witness.

Q. You may state whether or not in looking the herd over, as you say, you did so with a view of learning their condition. A. Yes sir.

Q. Now, state just what you did in trying to learn their condition. A. I rode through the herd and looked them over and saw the condition the cattle were in.

Q. What was the brand upon this herd of cattle when they were shipped and when they were met by you
529 west of Evarts? A. They had L F D on the right side and some had A X L on the right side. There were cattle branded H U T on the right side.

Q. When you met these cattle what did you do? Where did you go? A. I went along with the cattle and turned them in the pasture.

Q. About how far was that? A. About twenty miles.

Q. How long were you in traveling that twenty miles? A. Four days.

Q. Did the cattle all get through safely? A. We had to leave them along the trail; drop them out, some of them.

Q. About how many of them? A. About six or seven head going that twenty miles.

Q. Why did you have to leave them; drop them out, as you say?

Defendant objects to the question as calling for the opinion and conclusion of the witness and assuming facts not shown, and incompetent, irrelevant and immaterial.

A. They were poor and could not keep up with the rest of the herd.

Q. What was the condition of their eyesight, if you are able to state?

The defendant objects for the reason that it merely calls for the conclusion and opinion of the witness; that no sufficient foundation has been laid for such testimony and no qualifications shown by which the witness can answer the question, and is incompetent, irrelevant and immaterial.

A. There were some of them blind.

Q. How do you know they were blind?

Defendant objects as calling for a conclusion and opinion of the witness and no qualification or foundation has been laid for such testimony and in its nature a cross ex-
530 amination of its own witness and incompetent, irrelevant and immaterial.

Question withdrawn.

Q. You may state the facts fully upon which you have based the answer just made to the effect that some of these cattle became blind.

Defendant objects as calling for the conclusion and opinion of the witness; that no foundation has been made or qualifications shown by which the witness can answer the question and is incompetent, irrelevant and immaterial.

A. I saw they were blind; they would walk off and fall down in holes as they were going along over the prairie.

Defendant moves to strike out the answer for the reason that it is not responsive to the question and is merely a statement of the conclusion and opinion of the witness.

Q. What was their condition as to being strong or weak at this time? A. They were weak.

Q. What, if anything further was ever done with these cattle that were dropped out, as you say? A. We gathered up what lived and took them on to the ranch when they were able to go.

Q. How many of those that were dropped out did live and were taken in by to the ranch afterwards? A. Very few of them; just what number I could not say.

Q. Can you state about what number were abandoned and not taken on afterward? A. They were left along but just how many were left and did not come along I do not know.

Q. In whose charge did these cattle remain during the balance of the summer and during the fall of 1903, and the winter of 1903 and 1904 and spring of 1904? A. They
531 were in my charge.

Q. And where were they kept during that time? A. In the Cheyenne Reservation.

Q. Were they running at large on the range or kept in the pasture? A. They were kept in the pasture.

Q. Of about what extent in size? A. About nineteen by twenty-four miles.

Q. How, if at all, was this pasture enclosed? A. Three wires and the posts a rod apart.

Q. By that answer do you mean that the pasture was enclosed by a wire fence? A. Yes sir.

Q. Consisting of how many wire? A. Three wires.

Q. What was the condition of that pasture as to water and growing feed? A. It was good.

Q. State particularly as to the water. A. Plenty of water.

Q. In what shape? Running stream or ponds? A. Ponds and running streams.

Q. During any of this time was there a scarcity of water? A. There never was.

Q. What was the feed these cattle had? A. It was grass during the fall and summer.

Q. What sort of grass? A. They call it buffalo grass.

Q. What was their feed in the winter time? A. The same feed.

Q. State whether or not there were proper accommodations in the way of cattle sheds for such cattle as would need shelter.

Defendant objects to the question for the reason that it merely calls for the opinion of the witness and not the
532 statements of facts and the qualifications of the witness has not been shown and it is incompetent, irrelevant and immaterial.

A. Yes sir.

Q. State what accommodations or facilities there were upon this ranch for taking care of sick or disabled cattle. A. We had sheds and grain and hay.

Q. What was your practice and what did you do when cattle were found in the pasture in poor condition?

Defendant objects to the question for the reason that it is immaterial what his practice was and also that it is incompetent, irrelevant and immaterial and calls merely for the

opinion and conclusion of the witness and that no foundation has been properly laid.

A. We drive them to the ranch and take care of them; feed them.

Q. You may state, as nearly as you are able to, how many, if any of those cattle died during the fall of 1903 and the winter of 1903 and 1904 and spring of 1904.

Defendant objects for the reason that it is incompetent, irrelevant and immaterial and that the petition filed in this case that the witness has not been shown competent or qualified to answer the question and such testimony is incompetent, irrelevant and immaterial.

A. About five hundred head.

Q. Do you know about how many of those cattle died during the period covered by the last preceding question? A. I know there was three hundred head died.

Q. You have stated that there were about five hundred of those cattle that died during the time stated and that you know there were three hundred died; please state fully the facts concerning the loss of these cattle during the
533 period mentioned.

Defendant objects for the reason that the witness had not been shown qualified or competent to answer the question, but is merely giving his opinion and as being incompetent, irrelevant and immaterial under the pleadings and issues in this case, and that no sufficient foundation had been laid for this testimony.

A. There were two hundred died in the fall and about three hundred during the winter and spring and until the grass got good and we dipped them in the spring.

Q. How frequently were you in and about these cattle during the time stated? A. There were three men of us riding among them all the time.

Q. How often were you riding among them? A. Every day.

Q. State whether or not these cattle, from the time they were put upon the ranch until they were dipped in the spring, were constantly under your observation and care?

Defendant objects for the reason that it is leading and suggestive, incompetent, irrelevant and immaterial.

Question withdrawn.

Q. You may state how much of the time these cattle were under your personal observation and care? A. All the time.

Q. And during all of this time you were, if I understand you, foreman of this ranch? A. Yes sir.

Q. Mr. Welch, you may state whether or not these cattle which were shipped in were all the cattle upon this ranch during the time stated? A. They were not all the cattle that there were there.

Q. Were there any native cattle there? A. Yes sir.

Q. About how many of those? A. Between four
534 and five thousand.

Q. State the facts concerning their ranging on this place. A. They ranged in the same pasture with the L F D cattle.

Q. Are you able to state about how many of those native cattle died during this same period of time? A. Nothing more than a natural loss would be in a herd of that size.

Q. Please explain what you mean by that answer. A. With five thousand cattle there would be some loss; once in awhile one would die.

Q. Are you able to state, approximately, how many of those native cattle died during that time; that is to say during the late summer and fall of 1903 and the fall and winter of 1903 and 1904 and spring of 1904?

Defendant objects as incompetent, irrelevant and immaterial.

A. I am unable to state definitely.

Q. About what proportion of them died during that time?

Defendant objects as incompetent, irrelevant and immaterial.

A. I could not say just what proportion of the native cattle did die but it was very light.

Defendant moves to strike out all the answer of the witness after the words "I cannot say just what proportion of the native cattle did die" for the reason that it is not responsive to the question and merely a voluntary statement on the part of the witness.

Q. You may state whether the loss among the native cattle on that ranch was the same or about the same in proportion to the total number of such native cattle, as was the loss which you have testified to among the cattle shipped up from New Mexico.

Defendants objects for the reason that it calls for the conclusion and opinion of the witness; that no sufficient foundation has been laid for such testimony or the witness
535 shown qualified to answer such a question and it being incompetent, irrelevant and immaterial.

A. It was not the same.
Q. How did it differ?

Defendant objects for the reason last above given.

A. There was no loss among the native cattle to speak of at all.
Defendant moves to strike out the answer as being not responsive to the question.

Q. I believe you have testified that "Once in awhile one would die", having reference to the native cattle; what classes of the native cattle died?

Defendant objects for the reason that the competency of the witness to answer the question has not been shown and it only calls for the conclusion and opinion of the witness; that no foundation has been laid for such testimony, and under the pleadings and issues it is incompetent, irrelevant and immaterial.

A. Cows; old cows.
Q. In your testimony, you have mentioned the dipping of the cattle in the spring of 1904; state whether or not you were present during all the time the dipping was going on? A. Yes sir.
Q. State whether or not all the cattle upon the ranch were dipped in the spring of 1904? A. Yes sir.
Q. And in what manner was your attention particularly drawn, if it was so drawn, to the loss among these cattle shipped from New Mexico?

Defendant objects for the reason that it is leading and suggestive and assumes facts not shown and incompetent, irrelevant and immaterial.

536 A. We kept tally of these cattle as we dipped them; we were five hundred head short of L F D cattle.

Cross-Examination.

Q. Then the only way you have of determining the amount of cattle which died was from this check or tally you kept at the time you dipped them? A. No sir.
Q. You don't pretend to testify that you personally counted five hundred cattle that died in the fall of 1903 and the winter of 1903 and 1904 and the spring of 1904, do you? A. I counted three hundred head of those cattle that died at that time.
Q. And that is the sum and substance of the number of cattle you counted in person as having died for the period

stated? A. It is not the sum and substance of all the cattle that died.

Q. But it is the sum total of the number of cattle that you personally know died within the period stated? A. I saw three hundred dead ones and we were out five hundred head of cattle or more.

Q. But the only number that you know of personally as having died for the period stated were the three hundred that you counted? A. Yes sir.

Q. You did not count any other dead cattle as the New Mexican cattle I am speaking of during the period embraced in the former question except the three hundred? A. Yes sir, I counted other dead cattle.

Q. If I understood you correctly, you stated that you only counted three hundred of the New Mexican cattle? A. Yes sir.

Q. And no more? A. No, I did not count any more.

537 Q. Did you count these three hundred dead cattle that you have spoken of at one time, or did it cover a period of time? A. It covered a period of time.

Q. Did you make any memorandum of the count at the time you counted? A. We kept account of it at that time; every time that any died we would keep account of it.

Q. Do you recollect the number which you counted, independent from the check you kept? A. No sir, I don't.

Q. You then have to depend upon the check that you kept and which you made on several days within the period stated, for the three hundred dead ones which you counted? A. Yes sir.

Q. Was that check that you kept in writing? A. In a small memorandum book.

Q. And I understand you to say that, independent of that check which you kept in the memorandum book of the dead cattle which you personally counted, you are unable to state the exact number? A. No sir. I did not try to remember any; I just checked them down when we would find them dead.

Q. And then referred to the memorandum of the check book you kept to find the number of dead ones you counted? A. Yes sir.

Q. And by that means is the only way you have of recollecting the exact number of dead ones that you counted? A. Yes sir.

The defendant now moves to strike out and withdraw all of the testimony given by this witness upon the question of the number of dead cattle he counted during the fall of 1903, the winter of 1903 and 1904 and the spring of 1904, for the reason

and upon the ground that the testimony is not the best evidence.

Q. Mr. Welch, you gave your deposition in this same
538 case, or rather concerning this same matter, when the case was pending in the district court of Chase county, Kansas, at Evarts, South Dakota, in 1903, did you not? A. Yes sir.

Q. That is all.

Redirect Examination.

Q. You may state whether or not in testifying to the number of cattle that died during the period heretofore mentioned, you relied upon entries made in the memorandum book concerning which you have testified, or upon a recollection, independent of it? A. I have seen the memorandum book and have written several letters to Mr. Mullen during the winter and spring and it is fresh on my mind and I know.

Q. How long since you have known the number of cattle that died? A. I have known it ever since the middle of May.

Q. In testifying here this morning concerning the number of cattle that died during the period of time stated, did you refresh your recollection by the examination of entries made in any memorandum book or was your testimony based upon your independent recollection? A. I remember it in the book and I have written to Mr. Mullen and I know what I had tallied out at that time and I have written letters that I know that that many died.

Q. How long since you have seen that memorandum book? A. It has been a week.

Q. Where is it now? A. It is at the ranch.

Q. Are you now able to state, independent of that memorandum book, the number of cattle that died during the interval stated? A. Yes sir.

Q. Was the testimony which you gave here this
539 morning concerning the number of cattle that had died, based upon any recent examination of that memorandum book, or was it based upon your independent recollection? A. I have looked at the book several times; it was based upon my independent recollection.

Q. For how long a time last past have you had in your mind a recollection of the number of cattle that had died during the time stated? A. Ever since the middle of last May.

Recross-Examination.

Q. If I understand you correctly, as cattle died, you counted them and made an entry of such numbers as you counted in a book and continued to make such entries as often as the cattle died and you counted them? A. Yes sir.

Q. The entries you made, of course, were made at different times during the period mentioned? A. Yes sir.

Q. And it required a good many entries to be made by you in this book which you kept for that purpose? A. Not a great many; no.

Q. When did you make the last entry in that memorandum book? A. About the fore part of May, 1904.

Q. You have made no entry of that character in that book since that time? A. No sir.

Q. That book you have not with you? A. No sir, it is not here.

Q. It is, however, in existence, is it not? A. Yes sir.

Q. And is on the Cheyenne Reservation in South Dakota? A. Yes sir.

540 Q. That book contains the number of dead cattle which you counted? A. Yes sir.

Q. And you have not referred to it since the middle of May, 1904? A. No, I have not referred to it.

Q. Of course, you did not keep in your mind from one period to another the number of dead cattle you counted on each occasion, did you? A. No sir.

Q. You depended on the book in which you kept the memorandum of such fact to determine the number of dead cattle you counted? A. I just kept it so I would be sure and know how many cattle I had found of that brand.

Q. Independent of the book, you did not know how many cattle in all you had found, did you, until you referred to the book for that purpose? A. Yes sir, I always knew how many cattle we had found up to date.

Q. I thought you said awhile ago, that you did not carry in your mind the number of cattle you counted at any particular time, but depended on the book for that purpose? A. I depended upon the book to know that I would be sure, but I always knew.

Q. But to be certain and definite as to the number of dead cattle you counted, you had to depend upon the notations you made in the book? A. I knew without looking at that; I knew.

Q. When did you make the first count of dead cattle, and how many did that comprise? A. About the first of November, between the middle and the first; the date is down in the book.

Q. Of what year? A. 1903.

541 Q. How many did you count at that time? A. Twenty-[tow] head that first time in the book; I think the number is twenty-two.

Q. I was not referring to what was in the book; I merely wanted to know from your independent recollection how many you counted the first time? A. I could not tell.

Q. You could not state, Mr. Welch, the particular number of times you counted dead cattle, or the number you counted on each occasion, without referring to the book? A. No sir.

Q. Nor could you tell the exact sum total independently and without referring to the entries you made in this memorandum book? A. I can, sir.

Q. That information, however, and the fact that you are able to state the exact number is on account of you having referred to the book and the notations therein made as to the number that you counted? A. Yes sir.

The defendant now renews his motion to strike out all the testimony of this witness concerning the number of dead cattle he counted at various times and the sum total thereof for the reason that such testimony is not the best evidence.

To the granting of which motion the plaintiff objects.

Re-Direct Examination.

Q. I understood you, however, to state that your testimony concerning the number of dead cattle that were found all together or in the aggregate, is based upon your independent recollection and not upon the mere fact that you, from time to time, noted in the book the number of cattle that were found dead?

The defendant objects for the reason that the question is leading and suggestive and incompetent, irrelevant and immaterial.

542 A. I remember it; I know it; that is all; I could not give you any reason but I know it; that is all.

Q. Do you at this time remember it because of an examination you have made of that book for the purpose of this testimony, or otherwise, or do you remember it from your independent recollection? A. I remember it from my independent recollection.

WILLIAM WELCH.

543 Q. What is your age and occupation? A. Thirty-nine years; employed by the Minnesota & Dakota Cattle Co.

Q. Have you been present all the time to-day during the taking of the deposition of William Welch? A. Not all

the time; I was out in the street a few minutes; here most of the time.

Q. Are you working on the ranch of which Mr. Welch is foreman? A. Yes, sir.

Q. Belonging to the Minnesota & Dakota Cattle Company? A. Yes sir.

Q. The same ranch concerning which Mr. Welch testified this morning? A. Yes sir.

Q. How long have you been working there? A. The 8th of January, 1903.

Q. What has been the character of your employment there? A. General work; I have made hay and hauled freight and cut water holes and rode in round-up work and done general work that is done on a range ranch.

Q. How frequently during your employment on this ranch during the fall of 1903 and the winter of 1903 and 1904 and the spring of 1904 did you ride through and around the cattle that were around that ranch? A. In the fall of 1903 I did not ride any; I was putting up hay. In the fore part of the winter I was hauling hay and did not ride hardly any; not more than once a week; but in the spring I was riding nearly every day.

Q. You may state whether or not you met this lot of cattle branded L F D upon their arrival at Evarts sometime in the month of July, 1903; —I have reference to the shipment of cattle testified to by the witness, William Welch.

544 A. Yes sir, I met them at Evarts.

Q. What did you do after meeting them at Evarts?

A. They were in my charge until we go to the pasture.

Q. Did you accompany them out to the pasture? A. I did.

Q. What was the condition of those cattle at that time?

Defendant objects for the reason that no sufficient foundation has been laid for such testimony; that the qualification of the witness to answer the question has not been shown; that it is calling for his conclusion and opinion, and is incompetent, irrelevant and immaterial.

A. They were thin and weak.

Q. How long have you been engaged in the cattle business? A. Since the spring of 1883.

Q. Twenty-one years? A. Twenty-one years.

Q. Continuously? A. Continuously.

Q. How much of that time have you been engaged in the cattle business in the range country of South Dakota? A. All the time; ever since the spring of 1883.

Q. Now you may state what was the condition of those cattle at the time when you met and accompanied them from

Evarts to the ranch of the Minnesota & Dakota Cattle Company in July, 1903.

Defendant objects to the question for the reason that it calls for conclusion and opinion of the witness; that the witness has not been qualified or shown competent to answer the question; that no sufficient foundation has been laid for such testimony; that it is incompetent, irrelevant and immaterial.

A. They were very weak and thin.

Q. Did you ride horse-back in accompanying these cattle out to the ranch? A. Yes sir.

545 Q. You may state the fact whether you were in and out among them and if so, how much? A. I was with the cattle all the time from the time they were unloaded until they were put in the pasture at the ranch.

Q. Did you get them all out to the ranch? A. No sir, we did not.

Q. Why not? A. Some gave out on the road and some died before they got to the first dam three miles from town.

Q. About how many died, if you know, from the time they were unloaded at Evarts until you got out to the ranch? A. If I remember right, there were fifteen head died from the time they were unloaded from the boat until they reached the pasture; there were somewhere in the neighborhood of seventy-five head left on the trail that gave out on the road.

Q. What was finally done with the cattle that gave out on the road and were left on the trail? A. Some few of them died and the rest were rounded up and brought to the pasture.

Q. Do you know how many of them died? A. Not the exact number; no.

Q. State as nearly as you can. A. As I did not round them up, I could not state how many there was; they were rounded up when I was with the hay wagon.

Q. Did you observe the condition of these cattle on the way from the boat to the ranch, as to their eyesight? A. Yes sir; I did.

Q. What was it?

Defendant objects for the reason that it is calling for
546 the conclusion and opinion of the witness and not the statement of the facts; that no sufficient foundation has been laid for such question; that the witness has not been shown qualified or competent to answer the question or to give any testimony upon the matter inquired about, and is incompetent, irrelevant and immaterial.

A. There was a good many of them blind; some of them blind in one eye and some of them in both.

Q. What led you to the conclusion that they were blind, some in one eye and some in both?

Defendant objects to the question for the reason that it is merely calling for his conclusion based upon a conclusion and opinion with no sufficient foundation has been laid or the witnesss qualified or shown competent to answer the question; it is incompetent, irrelevant and immaterial.

A. They would walk into holes and some of them has white all over one eye; one eye would be clear out; one eye would be totally blind, and the other eye they could see all right out of.

Q. What was done during the winter with such cattle, if any, as were in very bad condition?

Defendant objects to the form of the question and as assuming facts not shown.

Question withdrawn.

Q. You may state what was done on that ranch during the time stated with reference to the care given these cattle that you met shortly after they were landed from the boat and accompanied to the ranch. A. They were taken to the ranch, anything that was weak and poor and fed hay and grain; as they rode during the winter and found anything they thought would not winter they would bring it to the ranch and feed it hay and grain.

547 Q. How frequently did you ride in and among these cattle during the spring of 1904? A. From the middle of February until the First of April I rode nearly every day.

Q. What was their condition at that time?

Defendant objects as calling for the conclusion and opinion of the witness; that the witness has not been shown qualified or competent to answer the question; that no sufficient foundation has been laid for the question; that it is incompetent, irrelevant and immaterial.

A. They were very poor and weak.

Q. During this time from say the middle of February to the first of April, when you say you were riding in and among the cattle, did you or did you not observe their condition? A. Yes sir, I did.

Q. And what was the condition?

Defendant objects same as last above.

A. They were weak and a good many of them were dying; they got in the draws and died.

The defendant moves to strike out all of the answer of the witness after the words "They were very weak" for the reason that it is not responsive to the question.

Q. You may state whether or not there were native cattle also upon this same ranch. A. Yes sir.

Q. About how many? A. Between four and five thousand head.

Q. As you were riding in and among those cattle in the spring of 1904, state whether or not you observed the native cattle with reference to their condition? A. Yes sir,

548 I did.

Q. What was their condition in the spring of 1904?

Defendant objects for the reason that it is incompetent, irrelevant and immaterial and not within the issues of this case and merely calling for the conclusion and opinion of the witness.

Q. They were in fair condition.

Q. What, if anything, do you know concerning the number of these cattle shipped up from New Mexico that died on this ranch during the fall and winter of 1903 and the winter and spring of 1904, if any of them did die? A. I know there was a good many of them died during the winter and spring of 1904.

Q. Are you able to state about how many? A. I could not say as to numbers; I have counted them on different creeks where I have rode; as to the exact number I could not say as I never kept any memoradum; when I was riding and saw any dead cattle I would look at them and count them as I rode that day.

Q. Are you able to state how many dead cattle you counted on each of the several times when you found them? A. In the country where I rode to open water for cattle to drink, there was something over two hundred head on two creeks—dead cattle.

Q. What cattle were these that you found dead? A. Mostly Texas cattle; some few old cows.

Q. What cattle do you mean by Texas cattle? A. The New Mexico herd; the only Texas cattle we had in the pasture.

Q. Then by the expression "Texas cattle" you mean these cattle that you received at Evarts? A. Yes sir.

Q. About how many of the native cattle up there died during this winter and spring, if you observed?

549 Defendant objects as incompetent, irrelevant and immaterial.

A. Very few.

Q. What were they, steers or cows; that is those native cattle that died?

Defendant objects same as last above.

A. Cows.

Cross-Examination.

Q. You do not pretend to be at all definite and certain about the number of dead cattle you saw in your riding in the winter of 1903 and 1904, do you? A. Why, yes, I do; I am definite about those creeks I rode on to open water.

Q. What I mean is, Mr. Elliott, you do not pretend to state the exact number of dead cattle you saw along the creeks in the winter of 1903 and 1904, do you? A. I did not ride in 1903; I rode in 1904 and that was the time I saw all of these.

Q. With that explanation, you do not pretend to testify to the exact number of cattle you saw dead in the creeks during that winter? A. Not to one head; not exact; no.

Q. The number you gave in your direct examination was merely an estimate you saw dead there, wasn't it? A. It was somewhere right around two hundred twenty-five head on those two creeks as I opened water.

Defendant moves to strike out the answer for the reason that it is not an answer to the question asked and is therefore not responsive.

550 Q. The question I asked was that the number you stated on your direct examination of dead cattle found along the creeks during the winter of 1904, was only an estimate of yours and was not intended to be an exact count, was it? A. I actually counted them; two hundred and twenty-five head.

Q. And that included the number of New Mexican cattle and also the native cattle? A. Yes, the New Mexican cattle and the native cattle on those two creeks, that I was opening water on.

Q. On your direct examination I will ask you to state if this question was asked to you and you answered it in this way: "Q. Are you able to state how many"—referring to the number having died during the winter and spring of 1904—and did you answer as follows: "I could not say as to numbers; I have counted them on different creeks where I have rode; as to the exact number I could not say as I have never kept any memorandum; when I was riding and saw any dead cattle I would look at them and count them as I rode that day." A. I did.

Q. What kind of a winter, Mr. Elliott, was the winter of 1903 and 1904, in South Dakota? A. It was a little above an average winter for cold.

Q. As a matter of fact, Mr. Elliott, the winter of 1903 and 1904 was somewhat above the average as to coldness and severity, was it not? A. It was a little above the average.

Q. And also it was to a certain extent a long winter, was it not? A. I don't know as it was any longer than it ordinarily was; we had more cold weather on an average; spring broke about the same time of year as it always does.

Q. Added to the extreme coldness, or coldness which
551 was above the average, was there a good many severe storms during the winter? A. We had steady cold weather but not severe storms.

Q. Was there any considerable amount of snow during the winter? A. There was considerable snow, yes.

Q. At times to what depth did the snow fall? A. I don't know just to what depth it was last winter; the snow was not deep enough to hurt anything but it was a steady cold.

Q. For approximately how many months did the winter continue; I mean the winter of 1904? A. About sixty days.

Q. And for that period it was severe, was it not? A. It was steady cold; yes sir.

Q. And colder than it had been for some years previous? A. The winter of 1903 was harder in some parts than the winter of 1904.

Q. I am referring especially to that section of country in which the Cheyenne River Reservation is located; what was the condition of the winter in that locality in 1903 and 1904? A. It was cold.

Q. And for the length of time you stated a while ago? A. Sixty days.

Q. Did the snow drift along the creeks much during that time? A. Not a great deal; no.

Redirect Examination.

Q. You say these two hundred and twenty-five dead cattle that you counted along those two creeks included native cattle also? A. Yes sir.

Q. About how many native cattle? A. I could not state the exact number of native cattle; but [fery] few; all
552 the native cattle that were dead were old cows.

Q. Did you have any more snow out there that winter than you ordinarily have in that locality in South Dakota? A. We had more there than the winter before; the winter before we didn't have any.

Q. Did you have more than the average amount of snow fall during the winter of 1903 and 1904? A. Well, now, that is a pretty hard question to answer; you can take it in twenty miles in this country there will be no snow at all and twenty miles west they will have a heavy fall.

Q. Did you have more snow fall on that ranch in the winter of 1903 and 1904 than you ordinarily have? A. No, I don't think we did.

Q. About what was the average depth of snow on this ranch during the winter of 1903 and 1904? A. I should think an average of six or seven inches of snow.

LEE ELLIOTT.

553 Q. Mr. La Plant, you may state your age and place of residence? A. I am sixty-nine years old; I live in Stanley county, state of South Dakota.

Q. How long have you lived in the state of South Dakota? A. Forty-nine years.

Q. What has been your business during the forty-nine years you have resided in the territory of Dakota and state of South Dakota? A. Raising cattle and horses the biggest part of the time.

Q. During how many years would you say you have been engaged in the cattle business out here? A. Since 1864.

Q. How long have you been engaged in the stock business in the neighborhood of the Cheyenne River Reservation in the state of South Dakota? A. I had stock here in this country as long ago as 1877.

Q. How deep can the snow be here on the ground and not interfere with cattle obtaining their feed from the grass?

Defendant objects to the question as calling for a conclusion and opinion of the witness and not stating any facts; that the qualification of the witness has not been established to answer the question, and is incompetent, irrelevant and immaterial, and no foundation therefor.

A. From twelve to fifteen inches.

Q. During the time that you have been engaged in the stock raising business in the territory of Dakota and state of South Dakota, and more especially during the time when you have been engaged in that business in the vicinity of the Cheyenne River Reservation, you may state whether or not you have had occasion to observe cattle taking their feed, winter after winter, through the snow as it lay
554 upon the ground? A. Yes, sir, I have.

Q. Would an average depth of six inches of snow interfere at all with cattle grazing upon the grass beneath the snow?

Defendant objects for the reason that it is calling for the opinion and conclusion of the witness; that the witness has not been shown qualified to answer the question or give his opinion; that it is not the subject of expert testimony and the witness has not qualified for such; that no sufficient foundation has been laid for the testimony; that it is incompetent, irrelevant and immaterial.

A. It would not.

Q. Mr. La Plant, have you ever imported cattle into this state from the state of Texas [of] New Mexico? A. Yes sir.

Q. How often and in what numbers? A. I have shipped cattle from Texas and New Mexico and Arizona, a dozen different times.

Q. And where did you bring them? A. Stanley county, South Dakota.

Q. In the neighborhood of the Cheyenne River Reservation? A. Yes sir, right on the Reservation.

Q. You may state whether or not you have also taken occasion to observe other cattle shipped into the same locality from Texas and New Mexico?

Defendant objects as incompetent, irrelevant and immaterial.

A. Yes sir, I have.

Q. About how many other such shipments do you believe you have seen here?

Defendant objects as incompetent, irrelevant and immaterial.

A. I have seen so many of them that I could not say.

Q. Covering a period of about how many years?

555 A. About twelve years.

Q. Now you may state, Mr. La Plant, from your own experience as a shipper of cattle from Texas and New Mexico, upon the Cheyenne River Reservation country in the state of South Dakota, and your observation of other shipments from those states to the same locality, you are familiar with the seasons of the year when such cattle can safely be brought into this state and taken through the following winter? A. Yes sir, I am.

Q. You may state how late in the season such cattle can safely or prudently be brought here from the states mentioned, with a view to being put upon the range and taken through the following winter.

Defendant objects to the question for the reason that the matter is not subject to or of expert testimony calling for the conclusion and opinion; that no sufficient foundation has been laid for the testimony nor the witness shown qualified to answer the question; it is not within the issues of the case nor tend to prove or disprove any of the issues in the case; it is leading and suggestive; incompetent, irrelevant and immaterial.

A. Not any later than the first part of June.

LOUIS LA PLANT, Sr.

556 Q. Mr. Mathieson, please state your age and where you reside. A. Age, fifty-seven years; I reside in Fort Pierre, Stanley county, South Dakota.

Q. What is your business? A. Stock raising.

Q. How long have you been engaged in that business in the state of South Dakota? A. Since 1885.

Q. Have you had any experience in the stock raising business upon the country known as the Cheyenne River Indian Reservation? A. My range is not as far north as that; it is on Bad river, White river and Cheyenne river.

Q. About how far from the Cheyenne river country does your range extend? A. Our cattle sometimes get up across the Cheyenne river; they sometimes get across White river.

Q. About how far distant is your range from the Cheyenne river country? A. About forty miles south of the Cheyenne river.

Q. You may state whether or not you are familiar with the conditions that prevail in the Cheyenne River Reservation country? A. I am.

Q. State whether or not they differ in any particular respect from the conditions that prevail where you are engaged in the stock raising business? A. The same conditions prevail in relation to raising stock in that country as in ours.

Q. You may state whether or not you have had any experience and if so how much, in shipping cattle from Texas and New Mexico to your range in South Dakota? A. I have bought cattle in New Mexico, and shipped them to this country.

557 Q. About how often and in what numbers? A. In 1891 I shipped about three thousand head from that country up here.

Q. Have you ever shipped any other cattle from that country up here? A. No sir, that is all I have shipped.

Q. State whether or not you have observed other cattle shipped to this range country from Texas and New Mexico and if so, about how many shipments and when? A. I

could not tell you how many shipments but I have seen a great many since I have been in the cattle business.

Q. From your own experience as a shipper, and your observation of shipments made here by other persons, you may state whether or not you are familiar with the seasons of the year when cattle can safely be shipped into this part of the state of South Dakota from Texas and New Mexico. A. I am familiar with the best season of the year to ship in here.

Q. How late in the season can cattle be safely shipped from Texas or New Mexico to the range country known as the Cheyenne River Reservation in the state of South Dakota, with a view to being put on the range and carried through the winter and spring following.

The defendant objects to the question for the reason that it calls for the opinion and conclusion of the witness; that no sufficient foundation has been previously laid or the witness shown qualified or competent to answer the question; that it is not within the issues in this case or subject to expert testimony; that it does not tend to prove or disprove any of the issues in this case, and is incompetent, irrelevant and immaterial.

A. Cattle must be got in here, in my judgment, in time to get on to green grass before it is cured by the hot winds and sun.

558 Q. What month do you state to be the latest when such shipments can safely be made?

The defendant objects for the reason and upon the grounds last above stated.

A. The month of June.

Q. What part of the month of June?

Defendant objects same as last above.

A. The earlier they can be got in in the month of June the better.

Q. In your opinion, can cattle be brought in here about the middle of July safely?

Defendant objects for the reasons last above stated.

A. I think not.

Cross Examination.

Q. How far did you say your ranch was from the Cheyenne River Reservation? A. My home ranch is about forty miles.

Q. You are acquainted, however, with the conditions as to climate and weather in the Cheyenne River Reservation, are you? A. I am.

Q. And I understand you to state that there is no appreciable difference between the climate and weather in the Cheyenne River Reservation and that that prevails on your ranch? A. It is just about the same.

Q. Have you been in the Cheyenne River Reservation frequently? A. I have been there pretty near every year.

Q. What was the condition of the climate and weather in the locality of the Cheyenne River Reservation and also your ranch during the winter of 1903 and 1904?

Objected to by the plaintiff as not proper cross examination.

559 A. Last winter was a very mild winter.

Q. I will ask you to state if it is not a fact that last winter was above the average for cold weather over the previous winters?

Objected to by plaintiff as not proper cross examination.

A. You take 1902 and 1903 it was a harder winter than last winter but last winter averaged better than most winters.

Q. What was the condition of affairs during the winter as to the fall of snow?

Objected to by the plaintiff as not proper cross examination.

A. There was no- any too much snow on what is known [—] Sioux range and in some localities there was not enough. That includes all the country in the White river and Cheyenne river countries.

Q. Do you remember what the lowest temperature was during last winter in the neighborhood of or locality of of the Cheyenne River Reservation and your ranch?

Objected to by the plaintiff as not proper cross examination.

A. I was not where there was a thermometer all winter; I do not know what it was.

GEO. D. MATHIESON.

560 Charles Steube—sworn, testified on behalf of the plaintiffs as follows on:

Direct Examination.

Q. By Mr Ball: What is your name? A. Chas Steube.

Q. Where do you live? A. New Ulm, Minn.

Q. What is your business? A. Butcher and in the cattle business.

Q. Are you interested in the Minnesota & Dakota Cattle Co? A. I am.

Q. Where does that company do business? A. West of the Missouri river.

Q. Where are its pastures and ranches? A. It is on the Cheyenne agency, where the pasture is. Cheyenne River Agency.

Q. What state? A. It is leased from the government.

Q. Where is the Cheyenne River Agency? A. It is near Evarts, South Dakota.

Q. How far are the pastures from Evarts, South Dakota. A. I guess about 65 miles to the corner of the fence.

Q. How much pasture has the company there?

By Mr Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial; objection sustained.

Plaintiffs then and there duly excepting.

Q. They range the cattle do they which they buy? A. Yes sir.

Q. Do you know anything about the purchase of these cattle in Texas in May or April, 1903? A. I do.

Q. What did you have to do with it? A. I say Mr Mullen, my partner, I was there and he bought them; we were both there when we bought them, contracted for them.

Q. What time was that? A. About the 20th of April, when we bought them as near as I can recollect.

Q. About the 20th of April when you bought them? A. Yes sir, I guess so.

561 Q. When did you ship them? A. The first time we shipped out on the 25th day of May between five and six o'clock.

Q. What point? A. Kenna, New Mexico.

Q. How many cars in that train? A. 21 loads.

Q. Who went with your train for your company? A. Mr. Welch, William Welch and another helper, by the name of Newton, I think his name is Newton, Welch was in charge of them, and foreman.

Q. What was the next train? A. The next train on the next day, between six and seven o'clock on the 26th, between six and seven o'clock p. m.

Q. In the evening? A. Yes sir.

Q. And on the 26th? A. Yes sir.

Q. Was that from Kenna also? A. Yes sir, also from Kenna, New Mexico.

Q. How many cars was there in that train? A. We loaded 22 cars and the engine could not pull it, one could not pull it up hill and went back again and left three cars and started with 19 cars.

Q. What became of those three cars? A. I took charge of another train of 17 cars which were loaded at Bovina and received those three cars at Amarillo.

Q. Making that through train how many cars? A. 20 cars.

Q. How many cattle in all? A. We had 2293 head.

Q. In the three trains? A. Yes sir.

Q. What time did the train, the third train with the men there leave Bovina? A. That was probably between nine and ten o'clock in the evening as far as I recollect on the 26th day of May.

Q. Where was the first stop made by your train? A. At Wellington, Kansas.

Q. Were you personally with the third train? A.
562 Yes sir, I was in charge of the third train.

Q. Did two Kenna trains precede you out of Bovina? A. One train left the day before and the other train ahead of us.

Q. Were they both ahead of you when you pulled out of Bovina? A. Yes sir.

Q. What time did you get to Wellington, with your third train? A. I got there between six and seven o'clock on the 27th of May in the evening.

Q. How long did you stay at Wellington. A. Can I say what I asked the yard master?

Q. Do you know about how long you staid there? A. We loaded out on the 28th of May and left there between five and six o'clock in the afternoon.

Q. In the afternoon of the 28th? A. Yes sir, it was the 2nd train which left Kenna.

Q. Your Bovina train when did that leave there? A. As soon as this train was out we loaded out, started in loading this other train, Bovina train; when we loaded eight cars, a man came up and said, we had to reload. (unload)

Q. What did you do then? A. I went to the agent and asked him what was the reason we could not go with the other train which left, or if the other train would come back which just went ahead.

Q. Did you unload those eight cars? A. The yard crew unloaded them and I went right to the agent.

Q. How long did you remain there with your Bovina train? A. During the night probably about one, or during the morn-

ing, one o'clock, somebody rapped on the door of the hotel and told me they wanted to load the cattle.

Q. One o'clock when? A. It was from the 28th to the 29th. In the morning about one o'clock.

563 Q. In the morning of the 29th? A. Yes sir.

Q. When were you loaded out? A. We left about seven or eight o'clock in the morning; we went to the yards there was no crew there, and I staid there at least an hour and there was a caboose standing on the track and I went to the caboose; then after a while, I don't know how long, the train got there we left between seven and eight o'clock on the 29th of May in the morning.

Q. When, if at all, did you see these other two trains, Kenna trains, after you left Wellington? A. I saw that train at Emporia on the track.

Q. When your train got up there? A. Yes sir.

Q. Had you stopped between Wellington and Emporia with your train? A. No sir.

Q. You came from Wellington straight on to Emporia. A. Yes sir.

Q. Did you see anything of the second train? A. No sir, I did not.

Q. I mean down right there? A. No sir.

Q. Where did you next unload after you left Wellington, that Bovina, train? A. Kansas City stock yards.

Q. At what time did you reach the Kansas City stock yards? A. Between six and seven o'clock on the 30th day of May in the morning.

Q. When did you see these other two trains of the Minnesota & Dakota stock? A. I came in first and the train which left Kenna the 25th—we came all in at once two of our trains and Mr. Frost.

Q. Got in that morning? A. Yes sir.

Q. Saturday morning? A. Yes sir. Saturday

564 morning between six and seven o'clock.

Q. Where was that second Kenna train when you got in here? A. When I stepped off the train I went to the exchange building and in about the middle of the yard i saw one of our men by the name of Cleveland, who left on the second train, standing in the yard, on the fence.

Q. Was that train already in here when you got here? A. They got in here the day before, on Friday, in the afternoon between—

Mr. Angevine: We object to that when that train got in.

Q. You were not here when that came in; you were not here when it came in? A. No sir.

Q. You found it here when you got here? A. Yes sir.

Q. Were all of those trains unloaded, the two trains that got in here, yours and the other one got in that morning and Mr. Frost's? A. Yes sir.

Q. What time were they unloaded? A. I could not tell exactly; as soon as I got in I went to the exchange building, I wanted to see the Santa Fe agent.

Q. You went to the exchange building to see the Santa Fe agent? A. Yes sir.

Q. About what time in the morning was that? A. That was a little after seven o'clock.

Q. Where did you go when you first got to the exchange building? A. I went to the Santa Fe office.

Q. Did anybody go with you? A. No sir.

Q. You first went to the Santa Fe office? A. Yes sir.

Q. You mean the live stock office? A. Yes sir.

Q. Where was it? A. Down in the basement of the exchange building.

Q. Did you see anybody there? A. The office was
565 locked, I could not get in.

Q. Then what did you do? A. I went into Mr. Allen's office.

Q. Mr. L. A. Allen who testified here the other day? A. Yes sir.

Q. What did you do after that? A. I went down with Mr. Allen; I staid awhile in Mr. Allen's office and talked together and then we both went down to the Santa Fe office, wanted to see if the Santa Fe agent was in.

Q. Who did you find at the Santa Fe office then or did you find anybody there? A. Mr. Brown was there then.

Q. Did you know Mr. Brown before that? A. I seen him before that when we went out to Texas to buy those cattle, I was in his office before.

Q. Who were you with when you were in there before? A. Mr. Mullen.

Q. What for? A. To try and get the rates from Texas—

Mr. Angevine: Objected to by defendant, as incompetent irrelevant and immaterial; objection sustained.

By the Court: He can show they were paid and what was paid.

Q. When you and Mr. Allen went in there to see Mr. Brown then, that was the first time you found him there? A. Yes sir.

Q. About what time Saturday morning was that? A. Probably half past seven; after seven o'clock, I could not tell exactly.

Q. Now what did Mr. Allen say to Mr. Brown and what did he say to you on that occasion.

Mr. Angevine: Objected to by defendant as incompetent, irrelevant and immaterial.

Objection overruled; defendant then and there duly
566 excepting.

A. Mr. Allen said to Mr. Brown, here is Mr. Steube got in three train loads of cattle and told him that one train load came in yesterday afternoon and that train ain't out yet and wanted to see him about it and get those cattle out as soon as possible.

Q. What did Mr. Brown say? A. He says all right, we are arranging it now.

Q. What was done then? A. We went, Mr. Mullen and I, went out and Mr. Allen says, let us go to the Burlington agent if we can hurry him up to get out your cattle.

Q. Did you go to the Burlington agent? A. We did.

Mr. Angevine: Defendant objects to the testimony, as incompetent, irrelevant and immaterial; overruled.

Defendant then and there duly excepting.

Q. Where did you go after you went to the Burlington agent. A. We went back to the Santa Fe office.

Q. About what time was that, the second trip to the Santa Fe? A. Probably fifteen or twenty minutes later.

Q. Who was in the office [them] of the Santa Fe? A. Several men were in there; Mr. Brown was not in there.

Q. Did you have any talk with anybody in charge of the office? A. Not at that time.

Q. Mr. Brown was not there? A. No sir.

Q. What did you do then? when you did not find him? A. Mr. Allen says let us go to the yard and look at the yard, and we went and looked at the cattle.

Q. How long were you out in the yards? A. Probably half an hour.

Q. And then where did you go? A. I went and
567 took breakfast and Mr. Allen I guess went to his office; I guess Mr. Allen went to his own office.

Q. You went back to breakfast? A. Yes sir.

Q. And what did you do after breakfast? A. I went to the Santa Fe office again.

Q. Did you go by yourself or with anybody? A. At that time, Mr. Frost went with me.

Q. Did you see Mr. Brown at that time? A. I did.

Q. What did you tell him? A. I asked him if we were going to get those cattle out, and he says well, we try to get them out now. Trying to get them out now.

Q. Did Mr. Frost say anything to him? A. Yes sir, he says we would like to get out with those cattle as soon as possible, and he says that is what we are trying to do, to get them out.

Q. What time of day was that? A. That was probably eight o'clock or a little later.

Q. Up to that time had you gone to any other of the railroad offices? except the Burlington? A. No sir.

Q. Did you say anything to Mr. Brown about your visit to the Burlington office? A. I did yes sir.

Q. What did you say to him?

By Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial.

Objection overruled; defendant then and there duly excepting.

A. I says, I can't see why we can't get them out at once, at least the train got in yesterday; the Burlington man told he can get them out as soon as he gets orders.

Q. What did Mr. Brown say to that?

By Mr. Angevine: Objected to by defendant as in-
568 competent, irrelevant and immaterial.

Objection overruled; defendant then and there duly excepting.

A. He says the Missouri Pacific takes out your cattle.

Q. What did you and Mr. Frost do then? A. Wanted to find out when, and he says I let you know soon.

Q. That was about what time in the morning? A. That was after eight o'clock then.

Q. Well what did you and Mr. Frost do then, did you go anywhere else? A. We went out and seen the boys.

Q. Who do you mean by the boys? A. Our helpers which was along with them and told them they should be around the yards, that we would get out soon. The- should all be there.

Q. What did you do then after that? A. After a while we went into Mr. Brown's office and asked him when we would get out.

Q. Back to Mr. Brown's office? A. Yes sir, and asked him when we would get out.

Q. What time was that? A. By that time probably was nine o'clock.

Q. What was said then? A. He says we get you out about noon.

Q. Where did you go then? A. I saw one of my men and told him—

Mr. Angevine: We object to what he told the man.
Objection sustained.

Q. Did you go to any other railroad office then during the forenoon? A. No sir.

Q. What time after this last time, you have mentioned, did you go back to the Santa Fe, if at all? A. We went about noon.

569 Q. About noon? A. Yes sir.

Q. Who went with you, that time, if anybody? A. Somebody along with me.

Q. That came in with you that time? A. Mr. Frost.

Q. Who did you see on that occasion? A. Mr. Brown.

Q. What did you say to Brown and what did he say to you? A. He says they were ready to ship us out, and Mr. Brown says now we can't get out, it is cancelled or something like that we could not get out, the Missouri Pacific refused to take us out.

Q. The Missouri Pacific refused to take you out? A. Yes sir, cancelled the order, I don't know exactly the words he mentioned, but that was the meaning of it.

Mr. Angevine: We object to the witness stating that was the meaning of it, and move to exclude the testimony.
By the Court: I think he better state what was said.

Q. In substance what did Mr. Brown say to you now, if you can, make use of the exact words. A. That the Missouri Pacific would not take them.

Q. What time on Saturday was that? A. As far as I recollect it was about noon.

Q. Did he say why, or give any reason, why the Missouri Pacific would not take them? A. No sir.

Q. Did you have any other conversation with him after that time than at noon on Saturday? A. I was once or twice since that.

Q. On the same day? A. Yes sir.

Q. What time did you go back next? A. It was probably an hour or so later probably an hour and a half.

570 Q. What occurred on that occasion? A. He asked whether there was any show to get us out.

Q. What did he say? A. No sir could not get us out.

Q. What was the last time you went to see him on Saturday? A. That was about one o'clock or a little after.

Q. At any of these various interviews was there anything said between you and Mr. Brown [oe] by him in your presence or any one to him in your presence in regard to the high water? A. When I came in in the morning and asked Mr. Brown what reason the train of cattle which came in the day before was not out by this time, he said it was Saturday, and there was not much going on on Saturday, and that is the reason that the train was not out.

Q. Was one o'clock the last time you saw him on that day? A. Yes sir.

Q. Where did you go then? A. I went around to the yards and the cattle, where the cattle were.

Q. Were the cattle fed that day? A. Yes sir, as soon as I came in, in the morning when I saw the men which came in the day before, I told them to go and tell our foreman to get water and some hay at once.

Q. They were as a matter of fact fed on Saturday and watered? A. Yes sir.

Q. Now where were you that night? A. In the Transit house.

Q. You stopped at the Transit house? A. Yes sir.

Q. Did you do anything Sunday morning? A. No sir, I did not do anything, I could not do anything.

Q. When did the water come into the yards? Sunday morning? A. I got up about eight o'clock in the morning and there was some water in the pens and in the street.

Q. What time did the water come up in the yards so
571 that these cattle had to be moved up on the viaducts?

A. They moved them up on the viaducts, started in about ten o'clock.

Q. They started in about ten o'clock? A. Yes sir, on Saturday evening.

Q. On Saturday evening? A. Yes sir.

Q. Moved them up into the viaduct about ten o'clock Saturday evening? A. They started in there from Saturday until Sunday, and put them on the viaduct.

Q. Started to move them on the viaducts Saturday night? A. Yes sir.

Q. What time did they get them all up there? A. The superintendent of the yard told me in the morning.

By Mr. Angevine: We object to what the superintendent told him.

Q. Did you see them put them up there; state what time it was? A. No sir, I did not see them put them up there.

Q. Were you present when they started to put them up there? A. No sir. I was in bed.

Q. You don't know when they were put up there personally? A. Only what the superintendent told me in the morning.

Q. What did the superintendent tell you? A. No I did not, otherwise, I did not.

Mr. Angevine: The defendant moves to strike out what the witness stated about the cattle being up, put up Saturday night, as hear say evidence.

By the Court: Objection sustained.

Q. Mr. Ball: What I am trying to get at is what you know about it Mr. Steube; when did you see the cattle first Sunday morning? A. In the morning when I got up from my room.

572 Q. About what time? A. About eight o'clock Sunday.

Q. Where were they then? A. On the viaduct.

Q. All of them? A. Yes sir.

Q. Where were they the last time you saw them before? A. In the yards.

Q. In the pens? A. Yes sir.

Q. Now were these cattle of Mr. Frost, of the Empire State Cattle company, and of the Minnesota & Dakota Cattle company, were they kept separate on the viaducts? A. No sir, they were all mixed.

Q. They were all mixed in together? A. Yes sir.

Q. How long did they remain on those viaducts. A. Part of them been taken down [illegible] Saturday and driven back again, but all were taken down on Sunday, not until Friday as testified here before, that is a mistake.

Q. That is a mistake? A. Yes sir.

Q. When was a part of them taken down and driven back? A. On Saturday.

Q. Saturday following this Sunday morning? A. Yes sir.

Q. Then when were they taken down and staid down? A. On Sunday.

Q. That is a week from the first Sunday morning they went up? A. Yes sir.

Q. Now when you got up that Sunday morning and found them up in the viaduct, were all of these cattle, four trains up in the viaduct together? A. Yes sir.

Q. That was three trains of the Minnesota & Dakota Cattle Company and one train of the Empire State Cattle company? A. Yes sir.

Q. They were all up in the viaduct that morning? A. Yes sir.

Q. Were you there when they were taken down off of the viaducts? A. Yes sir.

573 Q. You were there between times, when over there Sunday, until they were taken down, were you there at the yards at all? A. I was there all of the time.

Q. While the flood was on? A. Yes sir.

Q. Where did you stay? A. In the Transit house.

Q. You staid at the Transit house while the water was in? A. Yes sir.

Q. Did you go up town at all? A. No sir, I did not.

Q. Had you [—] on the viaduct? A. No hardly.

Q. Did they feed you? A. I cooked coffee myself, there was no cook in there.

Q. What if anything did you see about feeding these cattle during the time they were on the viaduct and watering them? A. They got the first feed on Tuesday morning ten o'clock, not 12 o'clock as some testified, I know that positive.

Q. To what extent were they fed, just go over that rapidly, we do not want to consume much time. A. They did not get very much that day because they did not have help.

Q. They did not get much because they did not have help? A. No.

Q. How did they feed them? A. They had boats, they hauled boats there from the hay barn and then some men hauled it up on there back on the viaduct.

Q. About how many of the cattle got feed on that Tuesday, about what amount? A. That is hard telling.

Q. Just approximate it? A. May be three hundred head.

Q. They had something over three thousand? A. There was something over three thousand; yes sir, there was 3400.

574 Q. Well when were they fed next? A. The next day again.

Q. About what time next day? A. They started in between six and seven o'clock in the morning.

Q. What time did they finish feeding that day? A. They quit ten minutes past six that day.

Q. You mean when they finished feeding that day. A. When the men quit.

Q. Yes? A. It was after six o'clock.

Q. In the evening? A. Yes sir.

Q. How many boats did they have engaged in taking hay over there? A. They had two boats at that time I judge.

Q. How large boats were they; what sort of boats. A. Regular row boats, what they call it.

Q. About what proportion of cattle, do you think got any feed on Wednesday, the next day. A. Some more, they started in, they got more that day because they started in earlier, and more cattle had feed that day.

Q. Than the day before? A. Yes sir.

Q. Were they watered during this time? A. Not that day.

Q. When was there any effort made to water them? A. The next day, on Wednesday.

Q. Wednesday? A. Yes sir.

Q. How did they do that? A. Well they drove them down to the end of the viaducts on the incline and let part of them drink.

Q. Where the flow of the water came to the viaduct? A. Yes sir.

Q. About what proportion of the 3400 head which was there would you say were watered, during that day? A. Perhaps two or three hundred, it is hard telling, it is
575 only guess work.

By Mr Angevine: Defendant moves to strike out the statement of the witness as to the number which were watered; he says it is guess work.

Motion sustained.

Q. State whether the greater part of them were gotten to the water on that day? A. No sir.

Q. Those which got down to the water on the incline, did they drink the water?

By Mr Angevine: Objected to by defendant as incompetent, irrelevant and immaterial.

Q. Did you see them when they were watering them? A. Yes sir, all around the house.

Q. State whether the cattle drank the water when they were driven down to it? A. Some did and some didn't.

Q. Now was this method of feeding and watering, and attempting to feed and water them, pursued during that week while they were up in the viaduct, every day after Wednesday? A. Yes sir.

Q. And the same thing every day? A. No they were not on Friday, they got a good deal more that day than any other day before.

Q. On Friday they got more feed than they had any day before? A. Yes sir.

Q. How about the water on Thursday down to Friday and Saturday? A. It was the same, as it was on those other days, I guess some of them did not drink.

Q. You say they were finally taken down on Sunday? A. Yes sir.

Q. A week after they were driven up? A. Yes sir.

Q. Were you there when they were taken down? A. Yes sir.

576 Q. State to the jury what their condition was when they were driven off of the viaducts? A. They were very poor, thin and weak, and we had to help some of them up, three men helped them up and got them in some of the pens.

Q. Were any of them dead at that time? A. Yes sir, hundreds of them on the viaduct.

Q. On the viaduct? A. Yes sir.

Q. Do you know how many were dead at that time? A. When they took them down?

Q. Yes? A. No I do not.

Q. You do not know how many of them were dead at that time? A. No sir not at that time.

Q. Those which were alive tell what was done with them? A. Put them back in the pens again.

Q. That was on Sunday, that would [—] the sixth of June? A. It was on Sunday, I dont' know the exact date.

Q. [How] how long did they remain in the pens after the live ones, those which were alive taken down, how long did they remain in the pens? A. We shipped the first train out on the 13th day of June.

Q. You shippped the first train out on the 13th of June? A. Yes sir.

Q. For what point? A. Emporia, back to Emporia, Kansas.

Q. In the meantime had any of them died in the pens after thew were taken down? A. Yes sir, a good many.

Q. Do you know how many? A. No sir, I do not.

Q. How many train loads were taken back to Emporia? A. Three train loads.

Q. How many cars.

By Mr Angevine: Objected to by defendant as incompetent, irrelevant and immaterial.

577 By the Court: It is wholly immaterial; objection sustained.

Q. All that was left of them was taken back in the three trains down to Emporia? A. Yes sir.

Q. Did you go along? A. I did I went on the last train, on the 15th day of June.

Q. How long did you remain at Emporia? A. We arrived the next morning I guess about eight o'clock. We got out the same day.

Q. Did you go out to where the cattle were taken? A. I did not.

Q. You did not go out to the pastures? A. No sir.

Q. Did you have any or the Minnesota & Dakota Cattle Company and Mr. Frost have any man to stay there with them? A. We left some men there.

Q. What men did you leave there? A. We left a man there by the name of Cleveland and Newton.

Q. Did Mr. Frost leave any man there? A. Mr. Frost left one man there a fellow by the name of Newton.

Q. Did you think it necessary to leave them to look after the cattle while they remained at Emporia? A. We thought we better leave these men there they could take care of the cattle and look after the cattle.

Q. And you did? A. Yes sir.

Q. Now when did you leave there, where did you go? A. I went home to New Ulm.

Q. To New Ulm, Minn.? A. Yes sir.

Q. When did you see these cattle the remnant of them next? A. I went back to Emporia and shipped them out there the first train I guess on the 10th day of July.

Q. You went back before they were moved from Emporia, you went back to Emporia? A. And shipped
578 them up to Evarts, South Dakota.

Q. Did you go with the cattle from Emporia to Evarts? A. I did. Yes sir.

Q. By what way from Emporia did you go with the trains of cattle on the way to Evarts? A. By the way of Atchison Council Bluffs and Sioux City.

Q. On the Santa Fe to Atchison? A. Yes sir.

Q. Council Bluffs to where? A. Council Bluffs to Sioux City.

Q. How from there over the Milwaukee road? A. Yes sir over the Milwaukee road. And from there to Evarts, South Dakota.

Q. In going from Emporia to Atchison where did you cross the Kansas river? A. I don't know I guess it is Topeka.

Q. Did the trains get through safely from there? A. Yes sir.

Q. Did anything happen to them from Emporia to Evarts? A. No sir.

Q. Now when you shipped them to Emporia and from Emporia to Evarts, were the Frost cattle, or the Empire State cattle and Minnesota cattle separated? A. No sir, we did not want to separate them; we did not want to disturb them.

Q. Where were they finally separated? A. In Evarts, South Dakota.

Q. After arrival there? A. Yes sir.

Q. They were together from the time they were driven on the viaduct until they reached Evarts? A. Yes sir.

Q. What time was that? A. The first train arrived on the 13th day of July.

579 Q. Now up to the time that they reached Evarts, how many died of the cattle altogether, in both bunches, if you know how many died. On the viaducts, in the yards, at Emporia, or elsewhere up to the time of receiving the remnant at Evarts? A. About 485 or 490 head.

Q. Whose cattle? A. Well, Minnesota & Dakota Cattle Company, and also Mr. Frost.

Q. How many head of the Minnesota & Dakota Cattle Company were dead? How many of them left alive when they reached Evarts? A. We were short 467 head—

Mr. Angevine: We object to their stating what they were short in proving their loss.

By the Court: It amounts to the same thing.

Objection overruled; defendant duly excepting.

Q. How many Minnesota & Dakota cattle? A. 467 head.

Q. Then how many did you have left out of the 2293 head. A. We had 1831 head—that is right 1831.

Q. How many of Mr. Frost's were dead, or do you know about that of your own knowledge? A. Yes sir. Mr. Frost told me.

Q. If you do not know of your own knowledge do not state; you did not count the cattle? A. No sir.

Q. Now state what was the cause of the death of these cattle?

By Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial, and calling for the conclusion of the witness. The jury is capable of drawing their conclusion after the witness has stated the facts.

By the Court: Objection sustained; plaintiffs then and there duly excepting.

580 Q. Do you know what these cattle were worth per head at the point of shipment when they were shipped from Texas and New Mexico; the question is do you know what they were worth there at that time when you shipped them? A. Yes sir.

Q. Now what were they worth at the time you shipped them?

By Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial, the witness has not shown himself competent to testify and the question does

not call for the true measure of damages or value, not being the market value.

Objection overruled; defendant then and there duly excepting.

A. There were 2249 head and we paid $22 per head.

By Mr. Angevine: Defendant moves to strike out the answer as not responsive to the question, and as incompetent, irrelevant and immaterial.

By the Court: Motion sustained.

Q. According to the rule you can't state what you paid for them; I ask you what they were worth at Bovina after they were shipped? A. $22 per head.

Q. Now had you had any previous experience in handling these cattle and knew of the value of this kind of cattle? A. Yes sir.

Q. For how many years? A. I was handling cattle on the ranch for fifteen years.

Q. Prior to this? A. Yes sir.

Q. Now state what in your judgment this remnant of the cattle were worth at the time they were delivered at Evarts, in July, 1903?

By Mr. Angevine: Objected to by the defendant as
581 incompetent, irrelevant and immaterial and the witness has not shown himself competent to testify, and not being the proper measure of damages.

Q. By the Court: Do you know what they were worth per head at the time you received them there at Evarts? A. I do.

[Q.] By the Court: You may state.

Defendant then and there duly excepting.

Q. What was their market value at Evarts this remnant which was held down there? A. $15 per head I guess no cattle men would buy them at all to keep them on open ranch.

Q. Were you at any expense in regard to attending and looking after these cattle? I mean personally? A. Yes sir.

[Q.] If it please the court, I had an exhibit of the account introduced yesterday; I do not know what has become of it; I have duplicates here, it was exhibit number 9; I will ask you to look at this account and ask you whether that is a correct statement of your expenses incurred.

By Mr. Angevine: The defendant objects to this way of interrogating the witness and object to the witness using that

memorandum [is] a memorandum to refresh his recollection and under the conditions shown it is not competent.

By the Court: If he knows what the expenses were, if not he can refer to any proper memorandum to refresh his recollection.

Q. Do you know how much your expenses were occasioned by having to stay here at Kansas City, and take these various contracts? A. Yes sir.

Q. How much did they amount to? in the aggregate.

582 By Mr. Angevine: Objected to by defendant as incompetent, irrelevant and immaterial and not being the proper measure of damages in this case.

By the Court: Objection overruled, defendant then and there duly excepting.

Q. State the amount? A. $265.73.

Q. Were those expenditures reasonable and necessary in looking after these cattle after they got into this trouble, or not?

By Mr. Angevine: Objected to by defendant as incompetent, irrelevant and immaterial, and calling for the conclusion of the witness, and not a statement of facts.

By the Court: What were they for.

Q. State what the expenses were for Mr. Steube, what expenses you paid out constituted this bill of $265.73. A. Part was for my expenses and then we had three men here and which was for board for those three men in Kansas City and paying board for these men at Emporia during the time when they held the cattle and their wages and for feed and for horses and railroad fare home and back again.

Q. Those sums represent what you are actually out of pocket on this? A. Yes sir that is correct.

Mr. Angevine: The defendant moves to strike out the testimony for the reason it does not appear that the items or any of them are competent charges against the defendant.

By the Court: Overruled; defendant then and there duly excepting.

Q. Did the Minnesota & Dakota Cattle company reimburse you personally for those expenditures of your company? A. Yes sir.

Cross Examination.

By Mr. Angevine:

583 Q. I notice one item in this, hotel bill in Kansas City, your personal expenses $48.60, were you, did you

rent the whole hotel during the time you were there? A. No sir I did not but I had this board bill included for three men, during that time.

Q. You were at the Transit house all by yourself during the time you were there? A. Yes sir mostly.

Q. And cooked your own meals, I believe you stated while you were there? A. Yes sir some times.

Q. Did you charge for that in there? A. They charged me.

Q. You charged for cooking your own meals did you.

By the Court: I understand the witness says that is money he actually expended.

Q. You were at the Transit house during all of the time of the flood? A. Yes sir.

Q. And every body else [buy] you left didn't they everybody left the hotel but you? A. No sir. There was two more men in that hotel besides me.

Q. What time in the morning of Sunday morning the 31st of May was it when you got up? A. About eight o'clock.

Q. You stated there was some water in the street at that time? A. Yes sir some water.

Q. How much water? A. Probably a foot.

Q. What time did the other people leave the hotel? A. I guess not anybody left that day.

Q. Why didn't you leave the hotel that day? A. I would not leave it I wanted to stay where the cattle was just as long as I could.

584 Q. As a matter of fact a boat came down after you and the people wanted you to go out in a boat? A. Not after me.

Q. Were you asked to get in a boat and go out? A. They asked me if I wanted to go out.

Q. You would not get in the boat because the [currect] was so swift and you were afraid of it? A. No sir.

Q. Wasn't that it? A. No sir.

Q. Didn't people come after you to take you out and told you the hotel was liable to collapse? A. Yes sir.

Q. What did you say to that? A. Then I collapsed too.

Q. You would not get in the boat? A. No sir.

Q. The stream was full of driftwood at that time running very rapidly? A. There was some driftwood and boards.

Q. And the current very swift? A. Yes sir.

Q. And the water rose very rapidly when it commenced to rise didn't it? A. Not so very [—] on Sunday forenoon, nor the whole Sunday.

Q. By Sunday evening the water was over the floor in the Transit house on the first floor, wasn't it? A. Yes sir.

Q. You had to go up stairs before night? A. Yes sir.

Q. What time did you have to go up stairs? A. I could not tell you exactly, that is only a platform or eight steps up.

Q. From the street? A. Yes sir. And it is what you call second floor where the dining room is.

Q. The floor where the office is about seven or eight steps above the street? A. Yes sir.

Q. You had to leave that floor about noon didn't you? A. I guess that is correct.

585 Q. And the water got very nearly to the ceiling of that story by night didn't it. A. No.

Q. How high did it get there that floor by six [colock] that evening? A. I could not tell exactly.

Q. About how high was the water in the office of the Transit house by six o'clock that evening? A. I could not tell you.

Q. Give an idea how high it was? A. No sir I did not look down there I only looked in the street and watched where the water was raising.

Q. You went up stairs and staid there di- you? A. Yes sir.

Q. You drank the flood water while you were there didn't you? A. Not the first three days I guess.

Q. What did you have to drink the first two or three days? A. They had some water in the house left.

Q. What else? A. Had some meat and bread and potatoes.

Q. You did not drink that did you? A. We had some beer there.

Q. Plenty of it didn't you? A. No sir.

By the Court: That is immaterial.

Mr. Angevine: Might affect the question of his knowledge of the feeding.

By the Court: I think not.

Q. Now what part of the hotel did you stay while you were there. A. I staid in the room facing to the north side of the street.

Q. You staid in the room facing north. A. Yes sir.

Q. And the stock yards are southwest of the Transit House, the part of the stockyards where the cattle were? A. Yes sir.

Q. And the cattle were nearly a quarter of a mile from the Transit House were they not during the flood? A. On the [viaduvt] I guess that is right, yes sir.

586 Q. Now Mr. Steube, you know that during that flood for the first two or three days, Sunday and Monday and

Tuesday all of the available boats that could be pressed into service were in use rescuing people from houses in the flooded district? A. I don't know.

Q. You saw them engaged in that business? A. Yes sir.

Q. All over the city so far as you could see from your room? A. Yes sir.

Q. And that the stock yards company were doing the best they could in feeding and caring for those cattle during the flood? A. Not according to my judgment.

Q. They were not giving them all the feed they could eat? A. They did not give them any feed on Sunday or Monday, until I sent word to Titus.

Q. They were fed on Sunday before they were put in the viaduct were they not? A. They were put up on Saturday night and did not get a mouthful on Sunday.

Q. Didn't you state awhile ago you did not see them on Saturday night; the last you saw of them they were in the pens? A. Yes sir.

Q. That is the last you saw of them? A. Yes sir.

Q. And the next you saw of them they were in the viaducts on Sunday? A. Yes sir, Sunday morning.

Q. You don't know when they were put up on the viaducts, do you of your own knowledge? A. Yes sir.

Q. Of your own knowledge? A. Yes sir.

Q. How do you know it? A. It was around ten o'clock I heard halloo, halloo and I expected that probably a train came and had shipped in some cattle.

587 Q. You did not see the cattle put up on the viaduct? A. No sir.

Q. You don't know of your own knowledge when they were put up do you? A. I have not seen them.

Q. You don't know but what they were in the yards Sunday morning and fed there do you? A. That I do know, yes sir I do know they were not fed.

Q. How do you know it? A. When I got up eight o'clock they were in the viaduct.

Q. And they could have been fed two or three hours before that in the yards might they not? A. Might be yes, but they were not.

Q. How do you know they were not? A. The superintendent told me in the morning he took them up about ten o'clock and had them up by one o'clock at night.

Q. You stated two or three times of your own knowledge you knew nothing about it. A. That is all I know.

Q. You don't know? A. I told you as far as I know, I did not see them.

Q. And all you do know about it is hearsay evidence? A. What the superintendent of the yard told me.

Q. When you went to Mr. Brown's office on the morning of the 30th and asked about getting the cattle out, he told you he was doing the best he could to get them out? A. He was arranging it, yes sir, and he was doing all he could to get them out.

Q. And he was doing all he could to get the Missouri Pacific to take them out, didn't he? A. He did not mention the Missouri Pacific.

Q. Didn't mention the Missouri Pacific at all? A. Yes sir—not at that time.

588 Q. He told you when he first [mentuoned] what road they were to go out on, they were to go on the Missouri Pacific? A. No sir.

Q. He did not? A. No sir, he did not.

Q. Didn't you state awhile ago he said they were to go out on the Missouri Pacific? A. I did; but that was later than that time, I was at least four times in his office.

Q. Before that he did not tell you how they were to go out at all when he was doing the best he could to get them out? A. Arranging to get them out.

Q. The best he could that is what he said? A. I don't know exactly he said that, or used those words.

Q. And then at noon he told you that the Missouri Pacific had refused to take them out did he? A. Yes sir.

Q. That is the last conversation you had with him about it was it? A. No I went in again probably, I don't know, an hour later and asked him if there was any way to get them out on another road.

Q. And he told you then that the Missouri Pacific had refused to take them out on account of the high water? A. That was about an hour before we went the last time.

Q. That is before you went at noon? A. Yes sir.

Q. And he told you that the Missouri Pacific said they could not take them out on account of high water? A. I guess that is what he said.

Q. You knew that Mr. Brown was not the man who arranged the shipment of routing of cattle, didn't you? A. I don't know what, I don't understand.

Q. You don't know who made the contract for the shipment of the cattle through Kansas City instead of through Atchison? Do you; you knew nothing about who made that con-

589 tract, did you? A. From here to Atchison.

Q. The contract whether the cattle were brought from Strong City to Kansas City instead of taking them to Atchison, you knew nothing about the arrangements of that, A. I don't know, I expect some one made the arrangement.

Q. You don't know who made the arrangement for bringing the cattle by way of Kansas City in preference to Atchi-

son? Did you? A. I believe the railroad company or not, I haven't any idea, the head officers.

Q. When you were in Strong City the agent at the station there told you that the cattle could not go forward at that time on account of the high water, didn't he? A. I never saw the agent at Strong City.

Q. While you were in Wellington, you were told by the agent that the cattle were being delayed on account of high water on the Burlington, were you not told that? A. No sir he did not tell me the Burlington I asked him in the morning.

Q. Now, if you would answer the questions; the agent at Wellington told you that the cattle were being delayed on account of the high water? A. Yes sir, washouts.

Q. Washouts on the road, did he tell you what road it was? A. He did not say before he says, we could not get out, we were ordered between eight and nine o'clock in the morning with those cattle, and when we came there then he said that we could not take them out on account of the washouts, that is right.

Q. Then when you came to Strong City you were stopped there again and the agent or the conductor or some railroad man told you that you were again delayed on account
590 of washouts, didn't they? A. No sir.

Q. Didn't Frost tell you? A. I did not speak to Frost.

Q. Did anybody tell you while you were at Strong City, that you were being delayed on account of high water? A. Never stopped at Strong City that I know of, went right through.

Q. Was not your train at Strong City delayed at all? A. No sir.

Q. Were you delayed at Wellington, went direct to Emporia? A. I went direct to Kansas City?

Q. Was the train you were with united with another train before you got to Kansas City? A. What was that.

Q. Was the train you were with united with another train either at Strong City [of] Emporia, and the two trains consolidated? A. If we got more cars on our trains, at some place we did.

Q. Do you know where that was? A. No sir.

Q. That was Strong City? A. It may be, I know we got more cars, I don't know, six or eight more cars, I don't know exactly at which place.

Q. And before you got to Emporia, you knew you had beeen again delayed on account of the high water, didn't you? A. No, sir, I did not know.

Q. Didn't you hear that? A. I didn't know that we ever was delayed; we stopped two hours at Emporia, I inquired there and they said they [—] to lay there for orders, that is what they told me.

Q. They told you they could not go by way of Atchiso on account of the floods? A. They never told me one word, nobody.

Q. You say the cattle were mixed on the viaduct, that is the cattle of the Minnesota and Dakota cattle company and the Empire State Cattle Company? A. Yes sir.

591 Q. There was no way to keep them separated there? A. No sir.

Q. Could not keep them any other way? A. No sir.

Q. You say that on Tuesday they were about all of them fed you think, were they? A. Started in about ten o'clock.

Q. Kept on feeding until six o'clock? A. Yes sir.

Q. In the evening? A. Yes sir.

Q. And the only way they had of getting that to the cattle was by bringing it in boats? A. Small boats, yes sir.

Q. And then drawing it up to the viaducts with a rope did they? A. No sir, some man hauled the bale, laid it over the top, and some times two men took hold of it.

Q. How did they get it up on the viaduct? A. Just as I told you they took it with a boat from the hay barn to the viaduct with a boat and threw the hay off on the viaduct and some man take it on up or throw it back, and sometimes two men take hold of the bale and take it up to the viaduct.

Q. Did you watch them to see how many bales they put in on Monday? A. Yes sir.

Q. How many did they put in on Monday? A. How many bales in all.

Q. Yes? A. Probably 50 or more.

Q. Did you watch them? A. I did not count them.

Q. You just estimated it? A. Near as I could, yes sir.

Q. Do you know how many bales they put in there on Tuesday? A. They put in a good deal more.

Q. Do you know how many they put in on Tuesday? A. No sir.

Q. You did not keep watch of it, did you? A. No sir.

Q. As a matter of fact from that time on they

592 furnished them all the hay that they could with the facilities they had, didn't they? A. They had no facilities and help enough, that is what I mean.

Q. Nor boats enough? A. If they only had more men and arranged it different the cattle could have been fed better, they could put the hay down on the incline off the viaduct if they only had men enough to carry it along.

Q. How many men did they have to each boat? A. On a boat they had two men.

Q. And not room for any more men there? A. No sir, but those men helped carry up the hay also and not went right back to the barn.

Q. Are you acquainted with Mr. Titus the live stock agent of the Santa Fe road? A. I have seen him, yes sir.

Q. You saw him on Sunday did you not? A. I did.

Q. May 31st? A. I did.

Q. What time in the day was he taken out of the hotel? A. I could not tell probably ten o'clock.

Q. Soon after you got up in the morning was it? A. Probably two hours something like that.

Q. The water was two or three feet deep on the sidewalk then was it not? A. No sir not that much I don't think so.

Q. How deep was it? A. I could not tell.

Redirect Examination.

Q. What time did you first find you were coming to Kansas City? A. The first time with those cattle.

Q. When did you first know you were coming to Kansas City? A. When I got near the yards I said well we got at Atchison at last, and a man said Kansas City, you mean.

593 Q. That was the first you knew of it? A. Yes sir I was asleep and somebdy called me and said we are getting in now get up.

M. Mullen sworn testified on behalf of the plaintiffs as follows on:

Direct Examination.

Q. What is your name? A. M. Mullen.

Q. Where do you live? A. New Ulm, Minn.

Q. Are you president of the Minnesota & Dakota Cattle Co.? A. I am.

Q. Do you know the Empire State Cattle company and Mr. Frost? A. Yes sir.

Q. Who owned these three trains of cattle which were shipped from Kenna and Bovina? A. The Minnesota & Dakota Cattle Co.

Q. When did you- company buy those cattle. A. We bought them on the 24th day of April, 1903.

Q. From whom did you buy them?

By Mr. Angevine: Objected to by defendant as incompetent, irrelevant and immaterial.

By the Court: Objection sustained; plaintiffs then and there duly excepting.

Q. Who attended to the shipment of the cattle for the company? A. I was present when we loaded the first train at Kenna and then I superintended loading the last train at Bovina.

Q. What time was the first train loaded at Kenna? A. In the evening of May 25th and in Bovina the evening of the 26th.

Q. Had you previously made arrangement for the shipment and had the freight rates arranged? A. I did, yes sir.

594 Q. With whom did you make that arrangement? A. With Mr. Brown of the Santa Fe office.

Mr. Angevine: The defendant moves to strike out [them] answer as incompetent, irrelevant and immaterial.

By the Court: Overruled; defendant then and there duly excepting.

Q. How much per car were you to pay for these cattle.

By Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial.

By the Court: Sustained.

Q. What was the freight which you paid was it by the hundred pounds or by the car load. A. Paid by the car load.

Q. How much was that? A. From Kenna $111 per car, from Bovina $100 per car.

Q. To what point? A. Evarts, South Dakota.

Q. Was that a through rate? A. Yes sir.

Q. Did your company pay that rate on those cars? A. Yes sir.

Q. For the cars which ultimately reached Evarts did you pay that rate? A. Yes sir.

Q. After you superintended loading the first train at Kenna and the last train at Bovina, where did you go? A. I took the passenger train the next day, Wednesday and went to—

Q. From what point? A. Bovina and stopped off at Sioux City until I could hear something of the cattle.

Q. What time did you reach Sioux City? A. Thursday evening.

Q. Where did you go from there. A. I remained there until I got a telegram from Mr. Titus telling me that the cattle were here, and all right and I went home to Minnesota and got home Sunday morning.

Q. You got home Sunday morning? A. Yes sir.
595 Q. May 31st? A. Yes sir.
Q. When did you next see the cattle? A. On the 6th day of June, Saturday the 6th.
Q. You came back around here to Kansas City? A. Yes sir.
Q. Where were they [wehn] you first saw them again? A. On the viaduct.
Q. At the Kansas City stock yards? A. Yes sir.
Q. Were you there when they were taken down from the viaducts? A. No sir I was not I was there when the last were taken down on Sunday.
Q. The following Sunday? A. Yes sir.
Q. State what their condition was after they were taken down? A. Very sad, very poor and very weak; Mr. Allen and I went up on the viaduct on Saturday evening after I got here, we got a boat and went into the viaduct and we got up on top and walked part way across and along the viaduct and they were a sad lot of looking cattle and a great many dead ones up there Saturday evening.
Q. Up on the viaduct? A. Yes sir.
Q. At that time had the live ones been driven down, taken down at that time? A. No sir this was Saturday evening.
Q. How long did the cattle remain here after they were taken down? A. Until the 13th or 14th of June, they were shipped back to Emporia I think it was, in Kansas.
Q. Were you here during that time? A. I was here when the first ones were loaded.
Q. To go back to Emporia? A. No I did not, I went to Minnesota.
Q. You mean when the first ones were loaded to take them to Emporia, you were here at that time? A. Yes sir.
Q. Then where did you go after leaving here? A. I went to Minnesota, home.
596 Q. When did you next see the cattle? A. I saw them next at Evarts.
Q. What time was that? A. 13th or 14th of July.
Q. Were you there when they arrived? A. Yes sir.
Q. Now what condition were they in? A. Their condition was very poor, [hand] not seen them very much from the time they were here.
Q. Do you know Mr. Mullen what those cattle were worth in Texas, at the time and place when they were shipped?

Objected to by defendant as irrelevant and incompetent and not tending to prove the proper measure of damages.
Objection overruled. Defendant duly excepting.

A. Yes sir, worth $22.

Q. How long have you been in the cattle business? A. 9 years.

Q. Were you familiar with this kind of cattle and their values at that time in Texas? A. Yes sir I bought a great many.

Q. Now the remnant of them which was delivered at Evarts on the 14th of July, do you know what about them; what they were worth at that time? A. I think I do.

Q. State what they were worth at that time?

Objected to by defendant as irrelevant and incompetent and not tending to prove the proper measure of damages. Objection overruled. Defendant duly excepting.

A. Their value would not exceed $12 per head.

Q. How much was the transportation charges per head, what it amounted to from Kenna and Bovina up to Evarts? A. The freight?

Q. What would it average.

By Mr. Angevine: Objected to by defendant.

By the Court: He can state what he paid.

Mr. Ball: It bears on the question of the value between the two points.

By the Court: I understand, but what was paid out.

By Mr. Ball: How much freight did you pay on these cattle?

By Mr. Angevine: Objected to by defendant as incompetent irrelevant and immaterial, and not the proper measure of damages. It does not tend to prove the measure of damages.

597 By the Court: Objection overruled; defendant then and there duly excepting.

Q. How much freight did you [pau] on these cattle, on the whole consignment? A. You mean per car or the gross amount.

Q. The gross amount? A. Something around six thousand dollars I think I can't state the exact amount.

Q. Look at these receipts (handing papers)

By the Court: Haven't you some way computed this matter without taking up time.

Q. Mr Ball: Can you give the total sum in round numbers the total sum. A. In around six thousand dollars. There was 59 cars in all; I don't just understand how this is made out here.

Q. How many six thousand dollars? A. Yes sir.
Q. Your company paid that? A. Yes sir.
Q. Now in making this statement of the shipment from Emporia up there was there any other additional cars arranged necessary? A. No sir.
Q. On account of the death loss there was less cars and you only shipped 35 to the car from Emporia on account of the condition of the cattle. A. On account of the condition of the cattle, we shipped 28 29 and 40 head from Texas and New Mexico.
Q. There was less cars on account of the death loss reached Evarts than started from the original points? A. Yes sir.
Q. Now how much extra [carage] for the number of cattle they did bring on there was there.

By Mr Angevine: Objected to by defendant as calling for the conclusion of the witness; he can state what he paid if he knows.

By the Court: Yes.

598 Q. By Mr Ball: What I am getting at Mr Mullen, state if in loading them out from Emporia for Evarts they could only put 35 head in a car, that increased the charge per car.

By the Court: It don't matter how many cars there was, what did he pay.

By Mr Ball: That is on the value we should pay the freight of course; the extra charge of freight was on us, the first item of damages, by reason that there was eight cars more required to ship that consignment from Emporia to Evarts by reason of this debilitated condition of the cattle. And that we ought not to have to pay.

By the Court: Suppose you put one animal in a car and have as many cars as animals.

By Mr. Ball: We paid a hundred dollars per car.

By the Court: It don't matter how many cars there were; the entire amount paid divided by 1826.

Q. By Mr Ball: Were you at any expense on account of the cattle being in Kansas City, expense for that company, on account of the cattle being caught here in Kansas City? A. Yes sir.
Q. I will hand you this account and ask you to state how much you paid on [on] those matters and for what?

By Mr Angevine: Objected to by defendant as incompetent irrelevant and immaterial.

By the Court: Money paid out by this man?

By Mr Ball: Yes sir.

By the Court: Objection overruled; defendant then and there duly excepting.

A. This itemized bill is money paid out by me in connection with these cattle; it was not all my personal expense money; I paid it out for others on that trip.

Q. Is that a correct statement of what you did pay
599 out on account of these matters? A. Yes sir, just as it stands on our books at home, $423.14.

Q. Did your company reimburse you personally for this expense? A. Yes sir.

Q. Was the company at any expense out there for sending for these cattle in June? Sending to Evarts for them? A. Yes sir.

Q. How far is the ranch or pasture from Evarts by the trail? A. The way we travel it is from 75 to 90 miles on a direct line from the river, west side of the river, from one corner of our pasture 64 miles.

Q. Did the company send an outfit over there to get these cattle in June? A. Yes sir we had our outfit there waiting for the cattle.

Q. What did that consist of? A. It was an assistant foreman and a lot of men and a number of horses.

Q. Do you know how long they remained at Evarts? A. I think somewhere about ten days.

Q. Did they remain there until the cattle came? A. No they returned to the pasture.

Q. What was the expense of that extra trip of ranch outfit? A. I could not state from memory.

By Mr Angevine: Objected to by defendant as incompetent irrelevant and immaterial.

By the Court: Objection overruled; defendant duly excepting.

A. I say I could not tell from memory, I think I have a statement there.

Q. To refresh your recollection I will hand you that memorandum of account which was introduced in evidence. A. This statement is correct as made up.

Q. What is the amount of that? A. Those men
600 coming in there?

Q. Yes? A. It is $434.50.

Q. That is the reasonable time of the men and horses. A. Just what we paid them and their board and expenses.

Q. What the company was actually out on that trip? A. Yes sir.

Adjourned to January 21, 1905, 10 a. m.

January 21, 1905, 10 A. M. resumed.

Q. By Mr Ball: In regard to what you paid on these cattle freight and feed bills at Evarts, can you state that with more definiteness than you did yesterday? A. Yes sir.

Q. Please state that? A. Two bills for freight and bill for feed amounted to $6438.00

Q. Did your company pay that on receipt of the cattle at Evarts? A. Yes sir.

Q. How many cattle did you receive at Evarts? A. We branded 1828 head.

Q. Did you brand all that were received or delivered? A. Yes sir. There were four or five laying around could not get up.

Q. What became of those? A. Died in the yard.

Q. At Evarts? A. Yes sir.

Mr. J. D. Carr—recalled testified on behalf of plaintiffs as follows:

Direct Examination.

Q. By Mr Botsford: You may state whether you remained at Evarts with any part of the men and if so
601 how many men waiting the arrival of this second train load of cars? A. I waited there about six or seven days, I could not say just exactly how many, as to whether it was six or seven, I know it was one or the other.

Q. Was it specially on account of waiting for this train load of cattle to come in, was that after the departure of the cattle from the first train? A. That was after the arrival of the first train, waiting for the second train to come in.

Q. How many men did you wait there with on account of this second train? A. I had nine men.

Q. You may state how long you say you remained? A. Six or seven days.

Q. State whether you returned in the same month of June 1903, with any other men, and if so with how many men expecting the arrival of this second train; and how long you remained there for that purpose. A. I took the first bunch of cattle and turned them loose in the pasture and went straight back to receive this second train load of cattle.

Q. What time was that? A. I could not say exactly as to the date.

Q. What month was it in? A. It was in June—as quick as I turned the first bunch loose, I went back.

Q. How many days or weeks was it after the arrival of the first train, you made the second return? A. It was possibly two weeks, it was two weeks.

Q. How many men did you return with at that time, Mr. Carr? A. Six men.

Q. How long were you at Evarts with those six men waiting the coming of this second train at that time?

By Mr. Angevine: Objected to by defendant as incompetent, irrelevant and immaterial; one of the plaintiffs testified as to the aggregate amount of the expense, I do not see
602 its materiality.

By the Court: Is this included in the amount; I do not think it is material.

Cross-examination waived.

Mr. Ball: We now offer in evidence the deposition of Lee Elliott taken November 4th.

Mr. Angevine: Objected to as incompetent irrelevant and immaterial and not tending to prove any issue in the case; the court has ruled on the testimony already given as to the value of the cattle, and their condition in which they arrived as being the measure of damages.

By the Court: What is the purpose of this.

By Mr. Ball: It is testimony as to their condition at this time; and it pertains to their condition before they ever got into the pasture.

By the Court: While the matter spoken of might go to make up the elements of damage in the case and go in the way of fixing judgment as to the value of the cattle, yet men who have qualified themselves to speak have given their judgment as to the value of these cattle when received, which would include the weakened and debilitated condition of the cattle, any man qualified to speak would consider those matters as to passing judgment at the place when received for the purpose—I will sustain the objection.

Mr. Ball: We offer it for the additional purpose of aiding the jury, if possible in determining who of the different witnesses in this case, in giving their judgment on the value were more nearly correct.

By Mr. Angevine: Defendant objects to it for the
603 the same reasons.

By the Court: I think there is nothing in the state of the case, I have read the direct examination of the witness and I do not think anything in it makes it material. Objection sustained.

Plaintiffs then and there duly excepting.

Which said deposition is heretofore copied in full in this record when before offered in evidence page [—].

Mr. Botsford: On behalf of the plaintiffs we offer in evidence the deposition of Samuel W. Moore.

Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial and not tending to prove any issue in the case.

By the Court: The court having read the direct examination of this witness is of the opinion that under the present condition of the record and state of the case at this time, there is nothing in the deposition which should be read at this time.

Plaintiffs then and there duly excepting.

Mr. Botsford: The plaintiffs likewise offer in evidence the deposition of Mr. Gardiner Lathrop.

Mr. Angevine: Objected to by the defendant as incompetent irrelevant and immaterial and not tending to prove any issue in the case.

By the Court: The same ruling will be made; under the present condition of the case there is nothing to go [—] the jury.

Plaintiffs then and there duly excepting.

Which said deposition of Samuel W. Moore and Gardiner Lathrop, are in words and figures as follows:

604 It is Hereby Stipulated and Agreed, by and between the parties to both of the causes above in which these depositions are being taken, that any and all objections which counsel on either side may desire to make to any portion of the evidence herein, may be made by counsel at the trial, without such objections being inserted in these depositions, save only objections to the form of questions as leading or suggestive, and this stipulation shall apply to all depositions taken under these notices.

Samuel W. Moore, of lawful age, being produced, sworn and examined on the part of the plaintiffs, deposes and says:

Direct Examination

By Mr. J. S. Botsford:

Q. Please give your name, profession and residence? A. Samuel W. Moore, attorney at law; residence Kansas City, Missouri.

Q. You are a member of the firm of Lathrop, Morrow, Fox & Moore, I believe? A. Yes sir.

Q. And have been a member of that firm how long? A. Approximately ten years.

Q. Is that firm of attorneys of the defendant, Atchison, Topeka & Santa Fe Railway Company? A. No sir. Gardiner Lathrop is the solicitor for Missouri and Iowa for that company, and I am assistant attorney.

Q. Did that relation between Mr. Lathrop and the Santa Fe Company exist all during the year 1903? A. Yes sir.

Q. And also between you and the company as assistant? A. Yes sir.

Q. You know of these cases in which you are giving this deposition, do you, Mr. Moore? A. I understand such cases have been brought.

Q. Did you have your attention as assistant attorney
605 of the Santa Fe Company called to these portions of the cattle involved in these controversies during the year 1903, and if so, when? A. As I recall it, my attention was called to the cattle in controversy in these cases on May 31, 1903.

Q. Where were the cattle involved in these controversies at that time? A. I did not see them, but my information was that there were certain cattle in the stock yards in this city, which I suppose are the cattle in controversy in these cases.

Q. State in your own way, please, under what circumstances your attention was called to these bunches of cattle at that time? A. Sometime in the forenoon of Sunday, May 31st, 1903, I started to walk down town from my home and was overtaken by Mr. L. A. Allen, of this city, who was,—who said he was trying to get to the Stock Yards because he had some cattle there and was fearful that some damage had happened to them by reason of the flood. He may have told me the names of the owners of the cattle,—quite likely did.

Q. What did you do after that conversation with Mr. Allen? A. I got into the carriage in which he was riding, and we came down town and drove thence to the West Bottoms near the Depot, and tried unsuccessfully to get to the Stock Yards.

Q. What prevented you from getting to the Stock Yards? A. The high water.

Q. Did you ascertain then, or thereafter, and if so when, what bunches of cattle Mr. Allen had reference to in his conversation with you? A. I knew nothing about the cattle at the time, except Mr. Allen stated they were cattle in his charge as a commission man. I did not accompany him as attorney for the company and did not have the slightest suspicion that the railroad company had or ever would have any interest or
concern with them. Mr. Allen is an old friend of mine
606 and I went with him in that capacity.

Q. Were those the same bunches of cattle involved in these controversies? A. That is my understanding.

Q. Did you do anything during that day or during the month of June, respecting those bunches of cattle in any way? A. I did nothing that day except to accompany Mr. Allen in his efforts to get to the Stock Yards.

Q. Did you during the following week do anything and if so, what? A. I don't recall when it was,—probably the date on the bonds would show,—but sometime afterwards and while the cattle were, as I was informed, on pasture in Kansas, I had something to do with the execution of some bonds given by the plaintiffs in these actions.

Q. Those bonds, Mr. Moore, were given by the plaintiffs to the defendant, Santa Fe Railway Company, were they? A. Yes sir.

Q. Where were the cattle when those bonds were given? A. Of course, I have no personal knowledge as to where the cattle were, but it was my understanding that the cattle were in Kansas, and it seems to me at Emporia.

Q. On pasture at Emporia? A. Yes sir, on pasture at Emporia.

Q. Who did you represent in the taking of these bonds? A. The Railroad Company.

Q. The Santa Fe Railway Company? A. Yes sir.

Q. Was Mr. Lathrop in the city at that time? A. I think he was not in the city at the time the bonds were signed. He had had charge of the prior negotiations in reference to the bonds, and had prepared a blank form of bond to be executed, but I think he left the city before the bonds were actually signed.

607 Q. And in that way you took up the matter in his absence? A. When he went away he left the matter with me, and I was present when the bonds were executed.

Q. Mr. Moore, do you remember the claims that were made by the plaintiffs at that time, respecting those bunches of cattle at the time those bonds were given, and also the claims that were made by the Santa Fe Railroad Company against the plaintiffs respecting those bunches of cattle? A. I know it was claimed by Mr. Ball, representing one of the plaintiffs, and by yourself, or one of your partners, representing the other plaintiff, that suits would be brought or claims asserted against the Railroad Company on account of some of the cattle lost in the flood, or by reason of the flood; and on the part of the railroad company it was claimed that the owners of the cattle were responsible for the cost of pasturage and taking care of the cattle after the flood, and during the time when it was necessary that the cattle should be put in condition to be transported by rail.

Q. Did the claim of the Railroad Company embrace the charges of the Stock Yards Company, which had been paid by the Railroad Company? A. It is my recollection that it did, but I am unable to state positively.

Q. State, Mr. Moore, whether the matters of controversy between the plaintiffs on the one hand, and the Railroad Company on the other hand, from the time of the flood disaster down to the giving of those bonds, had fallen under the control of Mr. Lathrop and the Missouri attorneys of the Santa Fe Company, and whether Mr. Hurd, the Kansas solicitor of the Santa Fe Company, so far as you know, up to that time had had anything to do with these cases? A. I can't tell anything as to what Mr. Hurd or anyone else did, if any-
608 thing. I only know those things that were done by Mr. Lathrop or by myself in connection with the giving of the bond and the shipment of the cattle out.

Q. Had you personally had any consultation with either Mr. Titus or Mr. Brown or Mr. Combs, the live stock agents of the Santa Fe, prior to the giving of these bonds? A. I think I had a consultation with Mr. Combs, not with the other gentlemen you mention.

Q. When was the conversation that you had with Mr. Combs? A. It was about the time of the giving of the bonds, and perhaps a little before that, though it is my present recollection that Mr. Combs was present at the time the bonds were signed.

Q. Mr. Combs was then and still is the Assistant Live Stock Agent of the Santa Fe Company, at Kansas City, Missouri, and Kansas City, Kansas, was he not? A. I think so.

Q. The Assistant General Live Stock Agent? A. I think so.

Q. Mr. Moore, so far as you know, had Mr. Hurd in any way been brought into connection with the company in these matters or in the controversies between these plaintiffs and the company prior and down to the giving of those bonds had you known of his having any connection with the case for the company? A. I do not recollect. I have no recollection now of as to whether he had anything to do with the cases or not. It is possible he may, and it was quite possible that he may have had something to do with it without my knowing anything about it.

Q. Do you know anything about his having had any connection up to that time? A. I can't say without going through the office files.

Q. [Has] you ever been brought in connection with
609 Mr. Hurd in any way respecting these cases, prior to the giving of those bonds, and prior to bringing any suits,—that is, you personally? A. I am quite sure I never

had any personal talk with Mr. Hurd between the time of the flood and the time of giving the bonds. Whether there was any correspondence or not I can't say from recollection.

Q. Had you had any conversation with Mr. Lathrop during that period intervening between May 31, 1903, and the time of giving those bonds? A. Yes sir. When Mr. Lathrop went away he turned over to me the papers in the case and the form of bonds he had prepared, and we talked about it, and I think that we talked the situation over before that, that is as to the propriety of handling the matter by the giving of bonds in the manner in which it was afterwards handled.

Q. Do you remember whether you had any conference with Mr. Lathrop during that period, Mr. Moore, respecting either the request which was made by the Company to the plaintiffs to take these cattle off the hands of the Company here after the flood subsided, and also respecting the further question of the company taking the cattle out to its pasture in Lyon County, Kansas? A. My recollection is that we discussed the situation,—the entire situation.

Q. Including those matters? A. I presume including those matters.

Q. Now, how long was that after the flood subsided that those matters commenced to be discussed by you and Mr. Lathrop? A. It is impossible for me to say.

Q. Do you remember which month it was? A. I do not.

Q. Was it in the summer of 1903, according to your best recollection? A. I think it must have been.

Q. What did you do with those bonds that were
610 given by the plaintiffs to the Santa Fe Company, after they were executed? A. I don't recollect what was done with the bonds.

Q. Were they turned over to the Company? A. I don't remember whether they were detained in our office or turned over to the Company—probably turned over to the Company.

Q. And that is the last you have seen or know about them? A. Yes sir, the last I saw of the bonds, I think, was when suit was prepared and filed in the United States Court at Kansas City, Missouri.

Q. Against the Minnesota & Dakota Cattle Company on its bond? A. Yes sir.

Q. There never was any suit brought on the other bond, so far as you know? A. I think not.

Q. Mr. Moore, I suppose your jurisdiction and territory as assistant attorney of the Santa Fe Company, covered the same states, Missouri and Iowa, that were embraced within

Mr. Lathrop's jurisdiction as general attorney or solicitor? A. Yes sir.

Cross-Examination

By Mr. Angevine:

Q. Your duties as assistant solicitor were solely those pertaining to the legal department of the road, were they? A. Yes sir.

Q. They had nothing to do with the traffic department, had they? A. Nothing whatever.

Q. In the preparation of the bonds that you have spoken of, or in having them executed, you simply knew that there was a controversy between the railroad company and the owners of the cattle in regard to the flood matters, did you, and that the bonds were prepared and executed for
611 the purpose of preserving the rights of the railroad company, if they had any, was that it? A. That was it substantially. The situation is this: there were mutual claims growing out of the flood, or as a consequence of the flood. The cattle were on pasture in Kansas and it was desired to move them to some other state, one of the Northern states. It was obvious that the cattle could not or ought not to remain here while these controversies were being settled, and it was deemed advisable to execute the bond and let the cattle go forward and let the bond stand in place of the cattle, so to speak.

Q. I believe you stated that it was on Sunday that you made the trip down to the West Bottoms with Mr. Allen? A. Yes sir.

Q. Did that trip have anything to do with your duties as attorney or assistant solicitor for the Santa Fe Railway Company? A. Not in the least.

Q. Just went out of curiosity to see the flood, did you? A. I went as everybody else in Kansas City did—to see the progress of the flood.

Q. Where did you go first—where did you first strike the West Bottoms on that day? A. We went down 5th street—we drove down 5th street and turned in west on the street immediately north of Union Avenue (which I believe is St. Louis avenue), and drove westwardly until we were stopped by the water, and the driver refused to go any further.

Q. About where was that? A. That was north of and some distance to the west of the Union Depot.

Q. Where did you go then? A. We turned back and went down Union avenue to about the Union depot and saw the water in Union Avenue, something to the west of
612 the Union Depot, perhaps opposite the express offices, and we turned around and—

Q. (Interrupting) The express office that you speak of is immediately west of the Union Depot and next to it? A. Yes sir.

Q. What time of the day was it when you were there? A. I would say it was approximately ten or eleven o'clock.

Q. Now, where did you go from the Union Depot? A. Then we went around on 12th street and started west on 12th street under the viaduct, and drove as far west on 12th street as the railroad tracks, where the driver stopped and refused to go any further.

Q. What railroad tracks do you refer to? A. The railroad tracks running into and out of the Union Depot.

Q. The tracks that run under the 12th street viaduct? A. Yes sir.

Q. You did not get farther west than the west end of the 12th street viaduct at that time? A. No sir, we were unable to cross the railroad tracks that run under the 12th street viaduct.

Q. Now, you may state whether or not the water was rising rapidly at that time? A. It was rising very rapidly, that was the reason why the driver would not proceed.

Q. Was the rise so rapid at that time that it was perceptible to the eye by sitting in the carriage and watching it for a few minutes? A. It was. As it happened, we waited there some little time.

Q. About how long? A. Probably a half hour, and the rise of the water was perceptible.

Q. This was while you were in the vicinity of the 12th street viaduct was it, that you waited there and saw the water rise? A. Yes sir, we were almost under the
613 viaduct.

Q. Where did you go from that place? A. We drove around to the east end of the Allen Avenue viaduct. It was Mr. Allen's idea that we could cross over that viaduct and perhaps in some way get to the Stock Yards.

Q. Was the Allen Avenue viaduct completed at that time, or what was its condition? A. There are two approaches to the viaduct on the east side. The south approach was completed; the other approach, known as the Allen Avenue approach, was not completed; that is the flooring was not in.

Q. You could not drive on the viaduct from where you were, then? A. No sir.

Q. What was the condition of the flood as seen from where you were, at the Allen Avenue viaduct? A. Well, the Bottoms were covered. It is my recollection that there was a Frisco switch engine trying to do some work in the yards, but the water was up pretty high on it.

Q. The Frisco yards where that engine was at work are next to the bluffs, are they not? A. Yes sir, and I remember that some mules were being brought over from the stock yards, under or at the side of the Allen Avenue viaduct, and that they could walk through the water without difficulty, except that at one place near where they were taken out the water was deep and I think some of them had to swim.

Q. How far from the Allen Avenue viaduct are the stock yards, where you understood the cattle in question were then located? A. Well, the stock yards are, I should say, four or five blocks from the west end of the Allen Avenue viaduct.

Q. And the stock yards are located nearer the river
614 than the Allen Avenue viaduct? A. Yes sir.

Q. You may state whether or not the river bottoms appeared to be flooded from bluff to bluff, so far as you could see, from where you were at the Allen Avenue viaduct? A. It is my recollection that they were at that time. I know that I am positive they were later in the day, if not then.

S. W. MOORE.

615 Direct Examination

By Mr. Botsford:

Q. Please give your name, residence and profession? A. Gardiner Lathrop, Kansas City, Missouri; attorney at law.

Q. State whether you are the attorney and general solicitor of the Atchison, Topeka & Santa Fe Railway Company, and if so, for what territory? A. I am the attorney for the Atchison, Topeka & Santa Fe Railway Company, not the general solicitor, but the solicitor for the states of Missouri and Iowa.

Q. Did you hold that position in 1903? A. I did.

Q. Do you remember of the so called flood of 1903 at Kansas City and in the Kaw river? A. I do.

Q. When was your attention, as attorney or solicitor of the Santa Fe Railway Company, first called to the bunches of cattle in controversy in these cases? A. It was not until some time after the flood had abated. I cannot remember the exact date. I was not here personally during the prevalence of the flood, having had occasion to go to St. Paul, Minnesota, in attendance upon the United States Circuit Court of Appeals just before the flood had reached its height here, and not returning until the worst was over.

Q. Do you remember about what time in June, 1903 when you returned? A. Yes sir, it was on or about the 4th day of June.

Q. State whether you were then consulted with reference to these bunches of cattle by the officers of your company?

A. I cannot tell whether it was at that time or some time soon afterwards, but I was consulted in regard to those bunches of cattle after my return.

Q. By either Mr. Titus or Mr. Combs, the general
616 live stock agent? A. By Mr. Combs.

Q. Do you remember, Mr. Lathrop, of having a meeting at the office of Mr. R. E. Ball on this floor in this building, respecting the matters of controversy between these plaintiffs and the railroad company—the Santa Fe Railway Company? A. Yes sir, I remember that I was present at such an interview or conference.

Q. Do you remember about what time that was? A. I do not.

Q. How long after your return? A. I can't tell you. The agreement that was entered into on or about that time would fix the date—if there was any such agreement in writing—I don't recall now.

Q. Did we arrive at the agreement which you desired to be made at that time? A. No sir, we did not, but the result of the conference, or of more than one conference perhaps, was that the cattle were sent out West somewhere I remember,—to Emporia,—prior to being shipped North.

Q. That is, the company took the cattle out to Emporia, or near Emporia, in Lyon County, Kansas? A. I don't remember exactly under what terms, but my understanding was that they went under some agreement which was not to alter or prejudice the rights of the parties as they stood at and prior to the time of the flood.

Q. Let me refresh your memory, Mr. Lathrop, by asking you if the company, through you as its solicitor, and Mr. Combs as the live stock agent, did not desire plaintiffs to take the cattle off of the hands of the company here and the plaintiffs themselves ship the cattle the balance of the route to the Dakotas, and if that was declined—that request—on the part of the plaintiffs, and then following that, if Mr. Combs did not at that meeting announce that the [that
617 the] company would take the cattle out to pasture in Lyon County, Kansas? A. I remember this, that we had wanted that the plaintiffs in these cases should take the cattle off of our hands and take charge of them, and ship them to destination, and take care of them until ready to ship, and that offer was declined; and I do know that either at that interview, or following, Mr. Combs made some arrangement with your people. My impression is that that arrangement was made after I left, under which the cattle were to be shipped out without affecting the rights of either party.

Q. That is to say, the plaintiffs gave their consent that the cattle should be shipped out,—that is the way you under-

stood it? A. I understood it was a mutual understanding that they should be so shipped.

Q. When you were brought into that conference or that meeting by Mr. Combs, were you acting for the company? A. Yes sir, that is I was acting for the company, and Mr. Combs and I went there together, and I think the arrangement was made, perhaps, between Mr. Combs and your client and Mr. Ball's.

Q. The Minnesota & Dakota Cattle Company at that time was represented by Mr. Ball and the other plaintiffs by our firm? A. Yes sir. Exactly what the terms of that arrangement were I do not know, because that, as I recall, was made by Mr. Combs, my own insistence being that the cattle be taken off the company's hands by your client and let the matter of damages be settled afterwards by an investigation or, if necessary, as the result of a law suit.

Q. Now, what was your understanding at that time were the claims of the plaintiffs respecting these bunches of cattle, stated generally and in your own way? A. I don't know what you mean?

618 Q. Were the plaintiffs claiming damages, which they claimed to have suffered, growing out of the flood here? A. Yes sir, that is my understanding that the claim was based on the flood.

Q. For the cattle that died and the residue of the herds that were damaged? A. Yes sir, I think so.

Q. Those were the claims being made at the time? A. I think so, or perhaps in addition to the way in which the company had handled the cattle.

Q. The claim was made that the company was liable for these injuries to the cattle? A. Yes sir, that was the claim; otherwise I should not have been there.

Q. Now, Mr. Lathrop, state whether at that time the company had drawn Mr. Hurd, the Kansas solicitor of the railroad company, into these matters in any way? A. Not that I recall.

Q. You were the attorney that they consulted in reference to these matters? A. I was the attorney that Mr. Combs consulted. Whether Mr. Hurd or the general solicitor's office had been consulted, I do not know. They might have consulted Mr. Hurd and might have consulted the general solicitor and the matter not have been brought to my attention at that time.

Q. But so far as you know, either now or heretofore, the legal part of the negotiations, so far as your company was concerned, was through you, and Mr. Hurd was not, so far as you know, brought into it in any way. A. Of my per-

sonal knowledge at that time I have no information as to who was consulted, if anybody, other than myself.

619 Q. I suppose it was your habit at that time, and since, when consulted by either Mr. Titus or Mr. Combs, the general live stock agent or the assistant live stock agent, —you respond to their request for advice when they make any call on you as representing the legal department of the company? A. Yes sir.

Q. Do you remember, subsequent to that time, the time of the shipment of the cattle out to these pastures in Lyon County, that certain bonds were made by these plaintiffs? A. I remember the facts, but when the matter was finally closed I was obliged to leave town and the matter was turned over to my partner and assistant in railroad matters, Mr. Moore, so that at the time the bonds were actually signed, were drawn up or agreed on, he handled that matter and I did not.

Q. Now, where did that idea of giving those bonds originate,—was that with you or Mr. Combs or with both of you, or how? A. I can't tell.

Q. Did it originate on your side, or with Mr. Ball and myself? A. That I can't tell definitely as to whether or not the bond suggestion came up during our earliest conferences, or when it arose.

Q. At that time, now, at the time of the giving of those bonds, the plaintiffs on the one hand claimed damages that we have been talking about, and on the other hand the railroad company claiming that the plaintiffs should pay the usual charges for carrying the cattle to South Dakota, and also the Stock Yards charges in this city, and also further charges for pasturage,—that is the fact? A. Yes sir.

Q. And now, what was your idea in taking these bonds— What was the purpose of it? A. Well, the purpose

620 was to protect the company against any outlay it might be called upon to make on account of these shipments of cattle, and to reimburse the company for the various sums that were called for and covered by the bonds.

Q. Well, I will ask you further, whether the purpose was not to leave the whole matter of controversy between these parties to be determined in litigation? A. I think that is true.

Q. And that you would have the bonds in lieu of the cattle as surety for these charges, in the event the litigation should be successful? A. I was just going to say that the bonds themselves show what they were intended to cover in that regard, and as I recall them, they [specifically] covered in a general way substantially what you outline in your question,

but before the bonds were agreed to there was a good deal of conference back and forth in regard to the form of the bonds. I think that I drew a form of bond, and that either you or Mr. Ball, or both of you objected to it and made new suggestions, and that finally when the matter was turned over to Mr. Moore and an agreement was finally reached after several conferences with me and possibly more than one with him, that the terms as finally agreed upon represented what both parties were willing to do in that regard.

Q. About how many interviews did you have, first and last, as representing your company, with either Mr. Ball or myself in these several matters about which you have testified? A. Well, as I recall it, some three or four—possibly not more than three. I think that you may not have
621 been present at all of them, but either you or Mr. Ball, I know, was down at my office on one occasion, and my remembrance is that Senator Young, your partner, was with him there [there]; and then I think I had two interviews at Mr. Ball's office at which either you or some of your partners or perhaps you and some of your other partners were present.

Q. During which month, Mr. Lathrop, according to your best recollection, did those several interviews take place? A. I can't tell you. They were all prior to the date of the execution of the bonds. My recollection is that they were all during the month of June, but they may have run into the month of July. I think the bonds were dated before the end of June.

Q. Then these interviews, according to your best recollection, all took place in the months of June and July, 1903? A. That is my recollection and impression. I am sure that so far as I am concerned that they all occurred prior to the execution of the bonds, because that practically ended negotiations up to that time so far as the law department was concerned.

Q. And the bonds were delivered and executed to your company before the cattle were forwarded from the pasture in Lyon County, Kansas? A. That I have no personal knowledge of.

Cross-Examination

By Mr. Angevine:

Q. Whatever agreement in regard to the claims and rights of the parties to these actions were reduced to writing and incorporated in the bonds that you have spoken of, were they? A. Yes sir.

Q. And you had no agreement with the plaintiffs in these cases in regards to the rights of the parties growing out of the handling of the cattle except such as were incorporated in

the bonds? A. No sir. The whole object of the nego-
622 tiations, so far as I was concerned in representing the company, was to preserve the status quo as to the rights of both parties, and in the meantime the parties on both sides make the damages as light as possible. And as the result of all the negotiations backwards and forwards the final agreement under which the cattle were disposed of here was reduced to writing and embodied in the terms of the bonds that were executed between the parties.

GARDINER LATHROP.

623 By the Court: The plaintiffs having rested proceed with your defense.

At the proper time, in the judgment of the court, I will hear you on the legal propositions involved in the case. But at this time, in view of the testimony in the case, and in view of the fact of a cross-petition in the case, I will hear you upon these legal propositions on the conclusion of all of the testimony.

By Mr. Angevine: Let the record show, that defendant files a demurrer to the evidence in this case, and asks to be heard upon the demurrer, and I would like to have what the court says taken down and save an exception.

By the Court: In the present condition of the record in the case, on trial, owing to the fact that there is a cross petition in the case, which will necessitate additional evidence, and in the interests of time, the court will hear argument upon the legal propositions involved in the case at the conclusion of all of the testimony, and upon the requests for instructions in the case.

By Mr. Angevine: The defendant excepts to the ruling of the court, and in so far, as the ruling, based on the fact that there is a counter claim filed in one case, will say to the court there is a stipulation on file in the record to that counter claim, that the evidence as to the amount of that counter claim was agreed upon, and the only question involved is a question of liability, which depends upon the liability of the first branch of the case; so that, as far as it is based upon that proposition, the defendant thinks there is nothing to deter the court or prevent a ruling at this time.

624 By the Court: That may be the judgment of counsel for defendants, but the court may be of a different conclusion as to the law of the case, and is at this time; proceed.

By Mr. Ball: I see that Mr. Allen has just entered the room, the witness we desired to call before finally resting Plaintiffs' Case, which I have indicated. I wish to ask one or two questions.

By the Court: It will set aside the orders in this case; the court will not take the time at this time to do it; proceed with the defendant's case.

And thereupon the Defendant in order to maintain the issues upon its part, offered and introduced evidence in order as follows, to-wit:

625 Mr. S. M. Clay, sworn, testified on behalf of the defendant as follows on,

Direct Examination.

By the Court: In the interest of time, the court desires to make a suggestion to counsel; it was suggested heretofore by the court, that counsel might be prepared to stipulate that the flood in the Kaw valley, which has been shown required the cattle in controversy, to be placed in the viaducts, was in its nature such that under the law it would constitute what is known in law, As the Act of God.

I would like to ask counsel, if they desire to so stipulate at this time?

Mr. Botsford: We could not, we think the proposition shows there was no necessity for taking these cattle in the viaducts.

By the Court: I am merely speaking of the flood itself; whether counsel are prepared to stipulate in the record it was such a flood as would in contemplation of the law, constitute what is known as The Act of God.

By Mr. Botsford: I think it was an unprecedented flood, as in Mr. Ball's petition, and in mine also, it is stated.

We have endeavored to shorten the trial all along.

By the Court: The question is now, whether counsel on each side will consent to such a stipulation.

Mr. Angevine: Probably it would be improper for us to suggest.

By the Court: I will take care of you if counsel for plaintiff announce—

By Mr. Ball: The proof shows already that there was an unprecedented flood; that there was an extraordinary rise even Sunday morning, and that it was coming on from early in May and reached its climax at Kansas City at a
626 certain time, and Mr. Connor the weather bureau man shows the amount of the rise each day here; we have no deposition to dispute that or the effect of it; I do not know what terms of stipulation the court suggests.

It was an unprecedented flood unquestionably and what it did, there is no doubt about that; I say there is no issue about what it was, that I can see.

Mr. Botsford: I do not know that I can add anything to what Brother Ball has said. We aver in the petition that it was an unprecedented flood and that it was coming on from the time, anterior to the arrival of these cattle at Wellington and Strong City; that it had been growing; that is a general proposition of the petition.

While the flood continued and became in the end an unprecedented flood, perhaps not without absolute precedent, but it was an unusual flood, it was the duty of the defendant to have taken notice of the flood. They knew that the flood without diminution was coming on, that is the theory of the petition. And to call upon us to make a stipulation as to one fact in the case, without getting the benefit of other stipulations as to facts which are also conceded as that fact, I do not think it would be right, in view of all of the circumstances of the case. Of course, it would not make, or be a comprehensive agreed statement of the facts covering the whole case; I would be very glad to join in doing that, in order to save your Honor labor and save work in the case, but to stipulate as to one fact—

By the Court: Very well, counsel not being willing to enter into the stipulation, whatever is said will not be regarded by the jury at all in any way; I will suggest your defense in this case be very brief and clear cut, and that you expedite matters, by simply going right into the
627 merits of your defense so it may not consume too much time.

Q. By Mr. Angevine: What is your name? A. S. M. Clay.

Q. Where do you live? A. Strong City, Kansas.

Q. What is your business? A. Common every day laborer.

Q. How long have you lived at Strong City? A. 25 years.

Q. Were you in Strong City the latter part of May and the fore part of June, 1903? A. Yes sir.

Q. Were you engaged on the 27th or 28th days of May, 1903, in feeding any stock in the feeding yards of the Santa Fe railway company at Strong City? A. Yes sir.

Q. Did you keep a record of the cars of stock fed by you at that time? A. I did.

Q. Did you assist in unloading those cattle? A. I did, yes sir.

Q. You may produce the record, if you have it with you? A. I have the stock record here which we kept of unloading and loading.

Q. Had you been engaged in that business prior to that time? A. I was at the yards for two or three years.

Q. And your business was to unload and feed and reload the stock was it? A. Yes sir, under the agent's instructions.

Q. Who assisted you in that work, if any one? A. I had seven and eight men there with me; I had my brother, and my son, and a fellow by name of Fish, H. C. Williams, and Ferry and Jarret, and Rowe.

628 Q. I will ask you to turn to the record of May 28th, 1903, and state whether or not you unloaded on that day a train load of stock into the yards at Strong City? A. I unloaded two trains.

Q. I will call your attention to the record on the page which is open before you there—the book is not paged is it? A. No sir.

Q. Now you may state whether you made that record there? A. Yes sir, I made this record.

Q. Did you make it at the time of the transaction? A. I made it at the time it was unloaded when it came into the yard at the depot.

Q. Is that the record which is entered of that transaction? A. Yes sir.

Q. Now you may read to the jury the initials of the car and number of each car and the number of cattle in each car of that train which you then unloaded.

Mr. Ball: May I see that before you read it.

Mr. Angevine: Certainly. (Hands it to Mr. Ball.)

Q. By Mr. Angevine: Under date of May 28th, 1903, please read the record found on the pages, two pages open before you? A. A T car 53220 39 head.

Q. That is 39 head of what? A. Cattle.

Q. The next one? A. A T car, 53131, 39 head of cattle. One cripple in that car; A T 15476 39 head of cattle; P V 2360 39 head; P V car 3192 39 head; 2013 40 head, one dead. P V 5142 39 head; S J V 60054 40 head, 4 C 93, 39 head; 1602, 39 head; A T 5436 39 head; A. T. 54134 39 head; S J V 33979 39 head; same initials 60055 39 head; A T 34304 39 head; P V 52524 39 head; 4 c1194, 39 head, 3439 39 head; 4 c525 39 head; 4 c2906 39 head.

Q. Does your record show at what time that train arrived? A. Arrived on extra 2:10 A. M. May 28th.

629 Q. Does your record also show the time that that train was loaded out? A. Left on the 29th—Yes sir.

Q. What time was it? A. It left on the 29th, May 12:50.

Q. 12:50? A. P. M.

Q. Is that the first train of stock which came into Strong City yards and unloaded up to May 28th? A. The last train.

Mr. Ball: May 29th when? A. May 28th, left May 29th. 12:50 p m.

Q. Mr. Angevine: You may state now whether that was the first or the second train which came into Strong City on that day. A. It was the second train.

Q. Turn to the record of the first train which came into the yard on that day? A. Well I got that dated the 27th the first train and the second train also.

Q. The second train also you say? A. Yes sir. The first train got here—

Q. I am speaking of two trains which were in there in the yards during the flood or that were kept there; there were two trains put together and went out there as one train, was there not? A. Yes sir, when they went out, they went out as one train.

Q. Where is the record of that train which was put with this one, the record which you have read? A. That got in the yard at 12:40 the 27th.

Q. On the night of the 27th? A. Yes sir.

Q. That would be the morning of the 28th? Would it? A. Yes sir.

Q. After midnight is it not of the 27th? A. Yes sir.

Q. That is the train is it not the record of which you have just read? A. Yes sir.

Plaintiffs object to the questions as leading.

By the Court: I think so.

630 Q. Now you may read the record of this train which arrived at 12:40 a. m. on the morning of the 28th of May—May 27th?

Objected to by plaintiffs as there is no evidence any train arrived 12:40 a. m. morning of the 28th.

Q. By Mr. Angevine: Did you say 12:10 or 2:40? A. They got in the yard at the depot at 2:10 and 12:10, at the stock yards at 2:40 we got hold of them.

Q. Now you may read the record of that train? A. That is the train brought in by extra McMahan at 12:10 a. m.

Q. Number of the cars? A. P V 83—this record here has no account of the head; it was raining too bad and could not do anything with it.

Q. You found the number of cattle right what you have? A. The first car had 38, and I supposed all of them 38, I don't know whether they had or not.

Q. You have one marked 37? A. Yes one 37.

Q. Read what you have there. A. Read the number which came in the yards?

Q. Yes read the car initials and number of the car? A. P V 8038 38; St 30804, Hx 5004; Hx 4666; P V 5361; P V 5076; P V 5072; Hx 4320, 37 head in that car. A T 5308; A T 3382; P V 5048; St 143; Kx 4404; A T 5339; A T 53804; A T 5857; P V 5043; A T 3332; A T 52041; A T 4661.

Q. Does your record show at what time that train was loaded out and left Strong City, if so what was it? A. It was loaded out at ten thirty p m. and unloaded again on account of B & M washout on May 28th fed 200 pounds hay; crew out next Shaler 12:50 p. m.

Q. That is the train you say was consolidated with the one the record of which you have just read? and went out?

631 A. Yes sir.

Q. Was there room in the stock yards for two stock trains to stand at the chutes at the same time to be loaded or unloaded? A. Load twenty cars at a time.

Q. So when one train was loaded another train would have to wait if there was two trains there? A. Yes sir waited generally.

Q. And you could only load or unload one at a time.

Objected to by the plaintiffs as leading.

By the court: It is leading.

Q. What was the condition of the yards at the time these cattle were loaded out and started on their [journer]? A. In bad shape.

Q. On account of the water and mud? A. And rain all the time.

Q. State whether or not there was water in the yards? A. There was water in the yards; at the south end of the yards.

Q. Was the yards located on high land or low? A. It is kind of in a hollow the south part of the yard about half of the yard.

Q. Do you know Mr. Frost one of the parties here, this gentleman here did you see him at Strong City at the time these two trains were there? A. I know I saw him there; I don't know whether I saw him that morning or not; I know his face.

Q. You may state whether or not you saw Mr. Frost at the time you were loading out these cattle? A. I could not exactly tell whether he was there or not, there was three or four fellows there with the stock.

Q. Three or four fellows with the stock? A. Yes sir.

Q. Now you may state whether or not there was one
632 of them on the fence directing the matter of loading them? A. Yes sir, there was a fellow on the fence hallooing 'better get these cattle out down here they will drown'; I was at the north end of the yards when that train came in first.

Q. Was that man one of the men who came in with the stock train? A. Yes sir, one of the shippers with the stock I could not say how he looked like, or who he was; because I was down at the other end of the yards and I heard him halloo.

Q. Now you may state to the court and jury how those cattle were fed or how much they were fed while they were there? A. They were fed two bales to a cow all the time, from the time they ordered them fed and how much, every time they wanted and they always got it.

Q. Got just what? A. Done according to the shippers' orders, what they ordered they got, whether one bale, or two or three bales.

Q. You fed just what they asked you to feed? did you? A. Yes sir.

Cross-Examination.

Q. By Mr. Ball: You were in charge of the crew at Strong City? A. I was not really in charge, I was just working with nem.

Q. Who was in charge? A. The station agent he had me to look to see that.

Q. Under the station agent you directed these other men assisting in this matter? A. Yes sir.

Q. And your business was when cattle came in there and unloaded to see they got feed and water such as was required? A. Yes sir.

Q. And unload and load them for that purpose? A. Yes sir.

633 Q. In whose employ were you in this crew? A. Santa Fe's employ.

Q. When did the first train come in there of these cattle, look at your record and see? A. Got in here 12:10.

Q. 12:10 when? A. A. M.

Q. What day? A. 27th.

Q. 27th or 28th? A. 27th.

Q. At 12:10 o'clock on May 27th the first train came in, is that right; that night or day time? A. It was a. m.

Q. 12:10 a. m. on the 27th? A. Yes sir.

Q. Is that what your record shows? A. It is what it says here.

Q. That is right [now] doubt? A. It [just] be, yes sir.

Q. Showing that the first train came in there at 12 o'clock a. m. A. Yes sir.

Q. How many cars were in that train? A. 20 I believe or 21.

Q. State can't you? A. 21.

Q. 21 cars? A. Yes sir.

Q. In that train? A. Yes sir.

Q. Now they were unloaded in the yards? A. Yes sir.

Q. Now what time did that train finally leave Strong City? A. That train left on the 29th; 12:50.

Q. What time on the 29th? A. 12:50 p. m.

Q. 12:50 p. m. on the 29th? A. Yes sir.

Q. That is the last you saw of it? A. That is the last I saw of it.

Q. Now between 12:10 a. m. on the 27th and 12:50 p. m. on the 29th when they left there where were the cattle?
634 A. I don't know they must have been in the yard at Strong City.

Q. Were they in the yard? A. I don't know.

Q. Were they loaded up and unloaded after they left the stock yard? A. I did not see them any more.

Q. Between the time, Mr. Clay, when they came in there on the morning of the 27th and when they left there at 12:50 on the 29th, where were the cattle? A. They were in the yards.

Q. Were they unloaded afterward, loaded and unloaded at all? A. They were unloaded once or twice I believe.

Q. They were unloaded once or twice? A. Yes sir.

Q. Loaded up and unloaded back in the pens? A. Yes sir.

Q. And they finally left there at 12:50 on the 29th? A. Yes sir.

Q. What was the second train and what time did the second train of those cattle come in there? A. The second train of cattle for in there 2:10 a. m.

Q. What day? A. 27th.

Q. The second train? A. That was the 28th the second.

Q. 2:10 a. m. A. Yes sir.

Q. Look at your record and be correct? A. 2:10 by extra Fiske.

Q. On the 27th? A. On the 28th, yes sir.

Q. That was about twenty-four hours after the first train got in there was it? A. Yes sir pretty close to it.

Q. 2:10 a. m. on the 28th; when did that train finally leave Strong City? A. This train left the 29th at 12:50.

Q. Did they go with the first train? A. Yes sir.

Q. That one train? A. Yes sir.

Q. How many cars in that train? A. 20 cars.

635 Q. 20 cars so that when they left there they made a train of 41 cars? A. Yes sir.

Q. Now what was done with those cattle in the interim between the time they came in there at 2:10 on the 28th and when they left at 12:50 on the 29th? A. They were unloaded in the yards in the pens.

Q. Were they loaded or reloaded or loaded and unloaded at all in the interim? A. This train was not reloaded only one time.

Q. Just the second train? A. Not reloaded, no sir.

Q. The first time they were reloaded on the morning of the 28th when were they loaded out at 12:50 on the 29th? A. Yes sir.

Q. When was the next train in there? A. That is all the trains we had at that time.

Q. You did not have but two trains stop at Strong City? A. That is all them dates.

Q. Any other date?

By Mr. Angevine: Objected to by defendant as incompetent, irrelevant and immaterial.

Objection sustained; plaintiffs then and there duly excepting.

Mr. Ball: I understand the court rules that I cannot inquire about any other cattle at Strong City.

By the Court: No inquiry except as made by defendant.

Q. By Mr. Bell: Under whose orders did you and your crew there load and unload these cattle? A. We got our orders from the agent.

Q. From the station agent? A. He sent the crew out there to load them when they got out there.

Q. He determined when you gentlemen loaded and unloaded? A. Yes sir.

636 Q. And that was not determined by the shippers in charge of the cattle? A. I suppose that the shippers—

Q. Never mind now what you supposed—your orders came from the station agent in this respect? A. Yes sir or from the yard master brought the train up.

Q. Who did he get his from? A. From the dispatcher or agent.

Redirect Examination

By Mr. Angevine:

Q. Now I understood you to say when I asked you about it that this first train came in there during the night of May 27th and 28th and after midnight that night at 12:40 a. m. you say in answer to Mr. Ball's question that it came in there early in the morning of the 27th, now which is correct?

By Mr. Ball: The plaintiffs object to the counsel's statement of what he understood, as being immaterial, because as the question now is, it is leading and suggest to the witness, and the witness can tell and has told when the train came in and went out.

By the Court: Can you tell from your record just when this train came in? A. Yes sir, I guess I could.

Q. Was it in the day time or in the night time? A. It was in the night time.

Q. Look at your record and see when it was? A. The record here is 12:10 when it got in.

Q. 12:10 when? A. A. M.

Q. What day? A. 27th.

By Mr. Angevine: I understood him to answer my question first it was the morning of the 28th. This is the first train.

first it was the morning of the 28th. This is the first train.

637 This first train I asked you about can you tell whether those trains came in there and were unloaded one soon after the other or not, or was there an interval of about twenty-four hours between them.

By Mr Ball: Objected to by the plaintiffs as incompetent and leading.

By the Court: It is leading.

By Mr Angevine: I think the witness is mistaken; I want to find it out.

By the Court: Let the witness state what he knows about the matter, what his record shows.

Witness: We were just through unloading this first train when we made a run and started for town and we got down town and there was another train in the yard there.

Q. And that train was the second train? A. Yes sir. What you call the second train supposed to be coming from the east somewhere they were headed east and the- hallooed to us to come back and load them.

Mr Ball. We object to that.

Q. Now you say that the second train is the train that had come in from the east somewhere but was headed east was it.

By Mr Ball: Objected to by plaintiffs as leading.

By the Court: Let the witness explain what he means.

Q. Explain how it was about that second train. A. The second train was not intended to stop at Strong City at all

and it ran right by and got flagged to stop somewhere east of Strong City and turned back to unload. I suppose on account of washout, I don't know where they came from.

Objected to by plaintiffs—sustained.

Q. Now how soon after the first train came in and was unloaded did this second train came in from the east? A.
638 I do not know just how long it took us to go into town.

Q. How far was it from where you unloaded to town? A. About [hlaf] a mile.

Q. How soon after you finished unloading the first train did you start in? A. About thirty minutes.

Q. And how soon after you got to town were you called to unload this other train? A. Just as soon as we hit the town they were right there waiting for us to come in on the track.

Q. Now did the two trains come in during the same night? A. Yes sir.

Q. So that there was not an interval of twenty-four hours between them? A. No sir.

Mr. Angevine: Now I offer in evidence and read from the way bill introduced in evidence one mark, I want to read the initial and numbers of the cars of the way bill which was introduced in evidence by the plaintiff, in connection with this witness's testimony; car initial H I X; car number 4666; transferred into initial 4 c number 1194; just the initial of the car and number corresponding on the cars in that second train.

J. M. Clay—sworn testified on behalf of the defendant as follows on:

Direct Examination.

Q. What is your name? A. J M Clay.

Q. Where do you live? A. Strong City.

Q. What is your business? A. Fire insurance agent.

Q. Are you a brother of the witness just left the
639 stand? A. Yes sir.

Q. Were you with him during the night of the 27th of May and 28th 1903 in loading and unloading the cars at Strong City? A. I was.

Q. And you heard his testimony as to the unloading and the two train loads of cattle during that night? A. I did.

Q. Did you assist in unloading those? A. I did.

Q. Do you remember about what time the first train load of those cattle arrived at Strong City? A. Well, we had been having cattle all through that week.

Q. These two trains he spoke of? A. Those two trains one arrived about 2:10, that is the last train; the first train about 12:40 in the yard.

Q. The first train arrived about what time? A. 12:40.

Q. In the morning? A. In the morning.

Q. And how soon after it arrived was it unloaded. A. I would judge about thirty or forty minutes afterward.

Q. How long after did the second train arrive. A. The second train—unloaded and fed that first train and came to town and the second train backed in,—the crew wanted something to eat, the first train crew wanted to eat before they go out; we were there ready to unload as soon as the train crew got something to eat.

Q. The train crew of the second train stopped to eat something? A. Yes sir back in town probably thirty or forty minutes.

Q. What time was it when they got to the yards? A. About forty minutes after they arrived.

Q. Did those two trains arrive at Strong City dur-
640 ing the same night.

By Mr Ball: Objected to by plaintiffs as leading. Objection overruled.

A. Yes sir.

Q. That is you knew of the arrival of the two trains that night? Did you assist in feeding those cattle? A. I did.

Q. State to the jury how they were fed and what they were fed? A. Well, we fed those cattle according to orders, the men with the cattle—

By Mr Ball: We object to the witness stating what they generally do—it is not responsive to the question he was asked—

Mr Angevine: We will withdraw the question.

Q. Did you hear any orders there from the person in charge of the cattle as to the feeding of those cattle. A. As to how much to a car.

Q. Yes? A. Some of them two and some of them three bales.

Q. I am asking you about these particular cattle; did you hear any directions given to the person in charge of those cattle as to how much they should be fed.

By the Court: Answer that yes or no.

A. I know the orders was given as to the amount.

Q. Did you hear any orders? A. I did.

Q. Now you may state whether or not they were fed the amount which was their ordered? A. I think so.

By Mr Ball: We object to that answer, if he knows whether they were or not.

By the Court: It will be sustained.

Defendant then and there duly excepting.

Q. You may state whether or not the person there in charge of the cattle made any complaint about the in-
641 sufficiency of the [of the] feed or the quantity or quality of the feed given them? A. Nobody heard complaint mentioned.

Q. State whether or not you assisted in loading the cattle out when they were finally loaded out? A. I did.

Q. How many cars can be loaded or unloaded at that stock yard at one time? A. About 23 cars; that is you mean the capacity of the yards.

Q. Yes the capacity of the yards? A. Had sixty cars in the yard.

Q. How many can be loaded or unloaded at one time; the capacity of the yards for loading and unloading at one time. A. Two cars at a time loaded.

Q. Now what is the capacity of the track from which you loaded or unloaded, how many cars can be run in there at a time. A. About 23 cars.

Q. That is a limited capacity is it? A. Yes sir.

Q. Are you acquainted with Mr. Frost here one of these parties here? A. I am not acquainted with him.

Q. You recognize him do you? A. I recognize the person all right as being there during that time. I saw him there during feeding time.

Q. Did you see him on the fence at the time you finally loaded those cattle out? A. Well, I don't know whether it was the fence or car there was several people on the cars; I don't know who it was, I supposed at the time—attention was called to the cattle —

Objected to by plaintiffs; sustained.

Q. You may state whether or not the people there on the cars or on the fence were people with the trains of cattle and in charge of them? A. Yes sir.

Q. Now what if any directions or instructions did
642 they give in regard to loading.

By Mr. Ball: Objected to by the plaintiffs, unless he says he gave instructions.

By the Court: He has stated these were the parties in charge of the cattle I do not know whether any orders were given.

Q. Did you hear either of those parties say anything in regard to hurrying up loading and get the cattle out of the water? A. Yes sir.

Q. What was it, was said? A. Hurry up and get them out of the water, the water is coming up on them.

Q. How were those yards located with reference to the creek which empties into the Cottonwood river near Strong City whether they were in the creek bottoms or not. A. Yes sir partly, Fox creek winding around.

Q. Where was the water coming from coming into the yards at that time? A. The creek was full of water and the Cottonwood rose and backed up from the Cottonwood river.

Cross-Examination.

Q. By Mr. Ball: In whose employ were you at this time? A. Santa Fe.

Q. In what capacity? A. Simply as a stock man load and unload cattle.

Q. At Strong City? A. Yes sir.

Q. Did you keep any record personally of the date of arrival and leaving of these trains? A. No sir.

Q. You were helping in the matter of loading and unloading and feeding cattle? A. Yes sir.

Q. Now you were down there at 12:10 o'clock when this train came in? A. I surely saw the train yes sir.

643 Q. That is what I asked you, were you there? A. Yes sir.

Q. You were there at 2:10 o'clock on the morning of the 27th? A. Yes sir.

Q. Was there a train came in there then? A. If a train came in at that time I was there.

Q. I am not asking you if it came in; were you there at 2:10 o'clock on the morning of the 27th.

By Mr. Angevine: Objected to by defendant as incompetent, irrelevant and immaterial and not proper cross-examination.

Objection overruled, defendant duly excepting.

Q. Mr. Ball: Were you there at 2:10 o'clock on the morning of the 27th of May? A. I think it was, the record shows I was [thete] morning of the 27th 12:40.

Q. I am not asking you what the record shows; do you know whether you were there at 2:10 o'clock on the morning of the 27th of May? A. Yes sir.

Q. You were there? A. If the train was there.

Q. Was the train there then? A. Have to rely on the record as far as that goes.

Q. Would you have to rely on the record? A. If there was a train there unloaded I was there.

Q. We were trying to get at what you recollect? A. You were trying to get at yes or no, I depend on the record.

Q. Would you remember whether you were there at 2:10 c'clock on the morning of the 27th or not? A. No sir not as to dates.

Q. Were you there 2:40? A. I can't give it as to the date.

Q. You don't know whether that was the 27th or
644 28th or 26th? A. The train recorded in there 12:40 on the 27th a. m.

Q. In the morning? A. Yes sir.

Q. That is the time it came in according to the record? A. Yes sir.

Q. Not at 2:10? A. Not on the 27th.

Q. What was this train on the 27th at 2:10? A. On the 28th.

Q. Was there one 12:10 on the 27th? A. I can't say.

Q. You don't know whether there was or not? A. No sir.

Q. You do not know of your own knowledge independent of the record from which your brother testified as to the time of going out of these trains? A. I think the trains went out that is on the 29th loaded and out of the yard, out of the stock yard about ten thirty a. m. left the yards, that is the depot yards 12:50.

Q. Ten thirty a. m. A. Loaded out of the stock yards.

Q. So they did not leave 12:50? A. Yes sir, that is at the depot at that time but the cattle had been loaded about 10:30, and taken to the yards, to the depot yards and out of there.

Q. How many trains went out that day the 29th? A. I think they were consolidated into one train of 41 cars.

Q. How many others went out at that time that day?

By Mr. Angevine: Objected to by defendant as incompetent, irrelevant and immaterial. He was only asked about two trains.

Objection overruled; defendant duly excepting.

Q. How many trains went out there that day 29th of these cattle going east; one there of 40 cars, was there any other? A. Took out 40 cars, two trains came in and going out as one.

Q. I asked you if there were any others went out?
645 A. No sir.
Q. No other trains went out?

By Mr. Angevine: Objected to by defendant as not proper cross-examination.

Objection overruled; defendant duly excepting.

Q. You say there was none others except those 41 cars went out on the 29th? A. That is all, sir.

Q. During the interval these cattle remained there, after what you have testified, were you present when they were loaded unloaded, and reloaded? A. Yes sir, I was.

Q. How many times did that happen? A. It happened twice.

Redirect Examination.

Q. How many trains of cattle were in Strong City during the 28th of May 1903? A. Two.

Q. Just two; did they come in during the same night? A. Well one train might have come in early in the evening.

Q. You have stated about one train coming in about two hours after another, something like that; I want to know if they both came in during the same night. A. If my memory serves me right a train came in about six or a little after in the evening and the time we got that unloaded and fed and came to town about ten or 11 o'clock; this other train, it had gone through down east and came back.

Q. Now you say there was only two trains of cattle were there during the 28th is that right? A. That is all.

Q. Now can you tell when each of those trains came in there? A. I think the first train came in there at six in the evening and the other came in about 2:10 next morning, that is after midnight.

Q. But it was both during the same night was it as far as your recollection is? A. Yes sir.

646 R. L. Clay sworn testified on behalf of the defendant as follows on:

Direct Examination.

By Mr. Angevine:

Q. What is your name? A. R. L. Clay.

Q. Where do you live? A. Strong City.

Q. Are you related to the witness who has just testified? A. Yes sir.

Q. What relation? A. Nephew.

Q. Were you at Strong City during the 28th of May, 1903? A. Yes sir.

Q. You heard the testimony of the two previous witnesses in regard to the unloading and feeding of the train load, second train load of cattle did you? A. Yes sir.

Q. Did you assist in doing that work? A. Yes sir.

Q. On what day did those cattle come into Strong City, if you remember? A. Why I think they came in on the 27th one of them.

[A.] You think one of them came in on the 27th? A. Yes sir.

Q. What time? A. Well I could not say I never kept the books myself.

Q. How long after you unloaded the first train before the second train came in—how long was it? A. I could not say, I was up in town; we were up in town, we got in the other train was waiting for us.

Q. When you were unloading the first train the second train was waiting for you? A. Yes sir.

Objected to by plaintiffs as leading—overruled.

Q. Do you know which way that second train came into Strong City there at the time it was standing there? A.
647 No sir.

Q. Was there more than two trains of cattle kept in Strong City during the 28th? A. No sir.

Q. You may state whether or not they went out as one train or two trains? A. Went out as one train.

Cross-examination waived.

F. C. Fox sworn testified on behalf of the defendant as follows on

Direct Examination.

Q. What is your name? A. F. C. Fox.

Q. Where do you live? A. Newton, Kansas.

Q. What is your business? A. Div. Supt. Santa Fe.

Q. How long have you been division superintendent of the Santa Fe? A. Five years.

Q. Where is the eastern limit of your division? A. West end of the Emporia yards.

Q. Where is the western limit of your division? A. West end of the Newton yard.

Q. Where is your office? A. At Newton, Kansas.

Q. Is Strong City in your division? A. Yes sir.

Q. Do you [kwwp] in your office of have kept a record of the movement of all trains running over your division? A. Yes sir.

Q. Does that record give the hour and the minute of the arrival and departure of every train at the various stations? A. It will of telegraph stations.

Q. That is kept for the purpose of the movement of the various trains and the safety of the trains and cars, is it? A. Yes sir.

Q. Have you with you a record of the movement of
648 trains on the 27th and 28th days of May, 1903? A. Yes sir.

Q. You have the train sheets with you, have you? A. Yes sir.

Q. Will you refer to your train sheet and give us the history of the movement of the train P V symbol 129, giving the time of the departure of that train from Wellington first? A. P V 129 left Wellington at 7:55 p. m. May 27th, 1903.

Q. How many cars were in that train? A. 20 cars.

Q. Destination given? A Evarts, South Dakota.

Q. You may give the record of that train at Strong City? the time of the arrival? A. That train arrived at Strong City 1:11 a. m. 28th.

Q. Now you may give the time of the arrival of that train at Saffordsville? A. 1:28 a. m. 28th.

Q. Where is Saffordsville in reference to Strong City? A. Eight miles east of Strong City.

Q. Now you may give the next movement of that train? A. Left Saffordsville west bound, 1:43 a. m. 28th.

Q. What is the next record to that train? A. Arrived at Strong City 2:08 a. m. 28th.

Q. Now you may give the record of the train P V 130 symbol covering the same? A. P V 130.

Q. How many cars in the train? A. 21 cars; left Wellington 6 p m. May 26th 1903.

Q. Arrival at Strong City? A. Arrived at Strong City 12:10 a. m. May 27th.

Q. Now you may give the record of those two trains out of Strong City? A. They departed 12:50 p. m. May 29th.

Q. As one or two trains? A. As one train of 41 cars.

Q. What is the time of the arrival of that train at Emporia? A. 1:45 p. m. same date.

Q. That is the end of your division, as far as your record goes? A. Yes sir.

649 Q. Can you state Mr. Fox why those cattle were held at Strong City during the time that they staid there. A. They were held upon instructions from the general superintendent.

Q. In regard to the conditions of the roads? A. His instructions stated that it was on account of high water and washout troubles on the C B & Q.

Cross-Examination.

Q. By Mr. Ball: Mr. Fox when were the records from which you have testified made? A. The records are made at the time of the departure of the trains and at the time of the trains passing various stations.

Q. And these records which you have testified to are so made? A. Yes sir.

Q. If no objection, I will ask you to state from the record the movement of the other train, over his division, the other two trains?

By Mr. Angevine: Objected to by defendant as not proper cross-examination; as incompetent, irrelevant and immaterial.

By the Court: I will allow you to go ahead; overruled; defendant then and there duly excepting.

Q. Mr. Ball: There were two other of these cattle trains you have testified to, composed, the first of 20 cars and the second 21 cars, which as I understand you, left Strong City May 29th at 12:50 as one train; now have you the record of the other two trains, these cattle trains which came from the south and passed over your division about those same dates? A. I can't say.

Q. Are they not on your records, on your map? A.
650 I have no means of identifying the other trains.

Q. Any trains destined to Evarts, South Dakota, will that help you identify them? A. I would not be able to tell whose cattle they were or whose trains they were; I can tell you whether any other trains on these sheets destined to that point.

Q. If there were any other on those sheets came in on the 27th or the 28th of May, do you find any in the record, Evarts, South Dakota cattle, other than these two trains of 20 and 21 cars, about which you have testified that came in any where from the 26th to the 29th over your division? A. There was a train of stock for Evarts consisting of 22 cars left Wellington at 9:25 p. m. on the 26th.

Q. What is your designation of that train? A. P V 121.

Q. P V 121, that left Wellington when? A. 9:25 p. m. May 26th.

Q. When did it get to Wellington? A. I have no means of knowing the record don't show.

Q. You have no record of that? A. No sir.

Q. 22 cars that was? A. Yes sir.

Q. And left Wellington 9:25 p. m. May 26th; when did it get to Strong City? A. I have not the main line sheet for that, this sheet simply runs to Florence.

Q. Was that on your division? A. Yes sir.

Q. Is not there a record of that train at Strong City as well as these other two you told about? A. The record for the 27th or rather the sheet for the 27th is not here.

Q. What time did it arrive at Florence? A. 2:10 a. m. 27th.

Q. Where is Florence with reference to Strong City?
651 A. 25 miles west of Strong City.

Q. And got there when? A. 2:10 a. m. 27th.

Q. That is the last you have of that train? A. Yes sir.

Q. Now is there any other train? A. Train of 21 cars.

Q. Give the designation of that train? A. P V 127.

Q. When did that train leave Wellington? A. Left Wellington 1:40 P. M. 26th.

Q. When did it get to Strong City? A. Arrived at Strong City 7:05 p. m.

Q. It arrived at Strong City 7:05 p m. What day? A. 26th.

Q. When did it leave Strong City? A. I have no record of it here; I have no record of that.

Q. You have no record when it left Strong City. A. No sir.

Q. Is that the last record you have here? A. That is the last record I have here.

Q. You state on your third P V 121, 22 cars, it arrived at Florence 25 miles west of Strong City at 2:10 a. m. 27th, that was the last record you have of that? A. Yes sir.

Q. How long a run is it from Florence to Strong City that 25 miles? A. About an hour.

Q. I want to ask you if there was any other train other than these four you have mentioned that your records show destined to Evarts? A. I do not find any other on these sheets.

Q. You do not find any more except four you have testified to? A. Yes sir.

By Mr. Angevine: You have have not complete trains sheets here ~~of~~ all trains ran over your division during those
652 days have you? A. The sheets are complete for the districts which they cover, but there is a separate sheet for each dispatching district and the complete sheets for each day for the entire division are not here.

Q. You were simply asked to bring sheets which would show the handling of the two trains which were detained at Strong City when you were sent for to come here. A. Yes sir.

Q. And you did not know the other records would be called for? A. No sir.

Q. And for that reason the other sheets are not here? A. Yes sir.

Q. That is the reason of it? A. Yes sir.

Mr. Ball: You were not asked to bring any other sheets about any other trains than these two?

Mr. Angevine: No sir. Simply on the 29th and on the 30th is all I asked about.

James H. Garside, sworn, testified on behalf of the defendant as follows on

Direct Examination.

Q. What is your name? A. James H. Garside.

Q. Where do you reside? A. Atchison, Kansas.

Q. What is your business? A. Agent of the Atchison Topeka & Santa Fe Ry. Co.

Q. At what place? A. Atchison, Kansas.

Q. How long have you been agent for the defendant railway company at Atchison, Kansas? A. Since August 1891.

653 Q. You may state what pens or facilities the defendant railroad company has at Atchison for loading stock or did have at that time? A. We had no pens at that time.

Q. You may state whether or not the Burlington road had pens at Atchison, at that time, if so what extent or capacity? A. The Burlington have no pens or stock yards at Atchison.

Q. Are you acquainted with L. H. Munson at Atchison? A. Yes sir.

Q. What connection has he with the Burlington road? A. He is the agent for the Burlington system.

Q. At Atchison? A. Yes sir.

Q. You may state whether or not on May 26th, 1903, you received from L. H. Perkins, or H. E. Perkins,—withdraw that question.

Q. Are you acquainted with Mr. H. E. Perkins or do you know him? A. No sir not personally.

Q. Do you know who he is? A. Yes sir.

Q. Who is he? A. Superintendent.

Q. Of what? A. K. C. St. Joe & C. B.

Q. That is part of the Burlington system? A. Yes sir.

Q. Where is his office? A. St. Joe, Mo.

Q. Now state whether or not on May 27th, 1903, you received from him through L. H. Munson, a telegram in reference to the handling of some stock? A. I did.

Q. I will ask you if that is the telegram which you then received (handing telegram to witness) A. Yes sir, that is the original telegram.

Q. How did you receive that? A. I received it over the wires operating between the depots.

Q. Between what depots? A. The Burlington and Santa Fe.

654 Q. You are as well the operator for the Santa Fe? A. I am the agent not the operator.

Q. And who is the operator there; withdraw that; I will ask you if this is the original telegram which you received there at that time? A. Yes sir.

Mr. Angevine: I will offer it in evidence.

We now offer this telegram in evidence and will have it marked as exhibit number 13, Atchison Topeka & Santa Fe telegram.

Q. Will you read that, give the time of receiving and forwarding. A. This is a message, reads received from A sender, W receiver, 26 22 a. m.

Q. What day A. 27th May 1903, J. H. Garside Atchison, see following from A. T. Perkins, signed L. H. Munson, St. Joe 27th; then as repeated to E. A. Austin; P. K. which means Topeka, please notify A. T. & S. F. that on account of washouts we cannot accept at Atchison the 20 cars Evarts stock reported to arrive Atchison 10:30 a. m. and the 22 cars reported to arrive at Atchison about noon; will advise later about the third train A. T. Perkins. Have put at bottom notation to that message, have asked when probable time they can take stock have received no answer yet. J. H. Garside. This was transmitted from our office at 6:56 a. m. of the 27th of May, 1903.

Q. To whom was it transmitted? A. E. A. Austin, Topeka, Kas.

Q. That message was received by you from the Burlington and by you transmitted to E. A. Austin, Topeka? A. Yes sir, train master at Topeka.

Q. What does the letter mean A you have read there? A. That is the initial of the operator and sender is W; I can't designate the names, but these are the names of the sender and receiver.

655 Q. I show you another telegram and I will ask you if you sent that telegram there shown? A. Yes sir; it is a message sent by W, it is dated Atchison, Kansas, May 26th, 1903, E. A. Austin, Topeka.

Q. Well never mind don't [ready] it, you sent that telegram to E. A. Austin? A. Yes sir from Atchison station.

Mr. Angevine: We will offer this in evidence now.

Telegram—Atchison, 5 26 1903, 8:30 P. M. to E. A. Austin, Burlington wants advise of the 20 cars of stock as soon as practicable; signed J. H. Garside.

Q. That is your name? A. Yes sir, Jas. H. Garside.

Q. Now I will show you another telegram dated, Topeka 5/26 signed E. A. Austin, to J. H. Garside; and I will ask you if you received that telegram from Mr. Austin? A. Yes sir, that is the original telegram.

Q. Is the time of receiving and sending that telegram marked? A. Yes sir.

Q. What is the time? A. 8:50 p. m. May 26, 1903.

Mr. Angevine: I will read this also:

Topeka 5; 26/03 to J. H. G.; the 20 cars Evarts stock reported reach Atchison 1 K a. m. will not now reach Atchison before 4 K a. m. and possibly later will advise definitely as soon as possible; signed E. A. A.

Q. What does K mean in that telegram K a. m. 4 o'clock a. m. A. Yes sir.

Q. I now show you another telegram from E. A. Austin to J. H. Garside, dated Topeka, 5/26/03, I will ask you if that is a telegram you received from Mr. Austin? A. Yes sir. The column here of the time received don't show. That is not marked time of receipt and it says sender.

Q. Sent 10:08 P. M. A. The hour is 10:08 P. M. sender, dated Topeka, May 26th, 1903, E. A. Austin.

656 Mr. Angevine: I will read this; under the head received from P. K. C. W. sender, 10:08 p. m. Topeka, 5/26/03; J. H. Garside, Atchison, will have no stock for Evarts to night first train now reach Atchison to-morrow p. m. two other trains in sight, will advise as soon as possible; signed, E. A. A.

Mr. Botsford: What is the hour of that?

Mr. Angevine: 10:08 p. m. I suppose it is intended for, it is under the head of column marked sent.

Q. What do the letters P. K. C. W. in these telegram refer to? A. P. K. refers to Topeka and C. W. I judge has reference to the initials of the operator.

Mr. Angevine: I now show you telegram from E. A. Austin to J. H. Garside dated Topeka, 5, 27, 03, 2:50 A. M. and ask you if that is a telegram received by you from Mr. Austin? A. Yes sir.

Mr. Angevine: I will offer it in evidence.

Topeka; 5; 27, 03; 2:50 a. m.

Twenty cars of stock Evarts S. D. via Q. reach Atchison about one p m. cattle reloaded Strong City 6 a. m. signed E. A. A.

Q. I now show you a telegram signed E. A. A. directed to J. H. G. Atchison, dated Topeka, May 27th, 1903, and ask you if that is a message which you received from Mr. Austin? A. Yes sir, that is a joint message from Mr. Austin on the 27th.

Q. What do you mean by a joint message? A. Addressed to J. H. Garside agent at Atchison and Mr. Perkins St. Joseph, Missouri.

Q. That is a joint message sent by Mr. Austin to you and the Burlington? A. Yes sir, states to Garside and Perkins.

Mr. Angevine: We now offer this in evidence—Topeka, May 27th, 1903; time sent 6:20 a. m. 5:45 a. m. received 6:10 a. m.. Now I will ask you if the time 6:10 is the time received by you. A. Received from Topeka.

657 Q. And by you forwarded on to Mr. Perkins at 6:20? A. Yes sir.

Q. To J. H. Garside, Atchison, Kansas sent to A. T. Perkins, St. Joe, Topeka, 5-29-190 5:45 a. m. J. O'Byrne with first train 22 cars Evart stock now reach Atchison 11 a. m. second train 20 cars Evart stock reloading 6 a. m., reach Atchison about 2 p. m. third train now feeding at Wellington and will re-load sometimes this a. m. and will not reach Atchison before 10 p. m. Signed, E. A. A. The next one is the message which you have read as having been received and read? A. Yes sir.

Q. I now show you message from E A A to J H G dated Topeka, 5/27/1903 and will ask you if that is a message which you received from Mr. Austin. A. Yes sir I identify that.

Topeka, 5/27/03 8:25 a. m. it is marked time received 8:25 A. M. sent 8:30 a. m., what does this time refer to? A. 8:25 refers to a. m., May 27th, 1903, time receipted at Topeka, and 8:30 is when we transmitted it to another line.

Q. To what connecting line? A. To the Burlington.

Q. You repeated it over to the Burlington at 8:30 a. m. A. Yes sir.

Q. To whom did you repeat that message? A. L. H. Munson, agent Burlington system.

Q. At Atchison, Kansas? A. Yes sir.

Q. Reading—Topeka, 5, 27, 1903, time received 8:25 a. m., time sent 8:30 a. m., to J. H. Garside, your wire this a. m. regarding washout on Burlington; will hold what stock is

now in yard at Ellington and Strong City for Evarts will turn one train 22 cars back from Burlington to Emporia to unload. Advise us promptly when we may reload this stock; signed, E. A. A.

I now call your attention to telegram dated 5/27/1903, A. T. Perkins, to J. A. Garside; and ask you if that is
658 a message received by you at that time? A. Yes sir, this is a message received at the station by me.

Q. St. Joe 5/27/1903; now I have some doubt about these dates; it is Perkins to Garside; Time written, 8:20 a. m. time received 9:15 a. m. What do those times refer to? A. Time received is the time it was received at Atchison and forwarded to Topeka.

Q. From Topeka or St. Joe? A. St. Joe I should say.

Q. St. Joe, 5/27, 1903, written 8:20 a. m. Time received, 9:15 a. m. J. H. Garside on account washout we cannot accept stock. Suggest you take the Evarts stock to St. Joseph where it can be taken care of and when our line is open we will accept the stock at St. Joe and take it forward; signed A. T. Perkins

I now call your attention to telegram J. H. Garside to E. A. Austin, 5 27, 1903; and ask you if that is a telegram sent by you to Mr. Austin? A. Yes sir, it is.

Q. Is the time sending marked on that? A. It is sent at 9:31 a. m. May 27th, 1903.

Q. From Atchison? A. Yes sir from Atchison, Kansas.

Q. 5/27, 1903, 9:31 a. m. To E. A. A. Topeka; see following filed at St. Joe before yours received saying stock will be turned back and held. J. H. Garside.

I see two other words, or parts of words below there what do they mean, if anything? A. There is two characters there p. m. to p. m. I do not understand, joined together, I can't read that part.

Q. They are after the signature? A. Yes it is after the signature.

Q. And then below those two characters is the signature again, is it? A. Yes sir.

Q. Now I will call your attention to a telegram E. A. Austin, to J. H. Garside, dated 5/27, 1903; I will ask you if that is a telegram received by you from Mr. Austin?
659 A. Yes sir.

Q. Dated Topeka, 5, 27, 1903, 9:25 a. m. 10:55 a. m. 11 a. m. Please notify the Burlington that we now have six trains Evarts stock in sight for them all told, will hold in pens until advised they can handle unless we get diversion to some other road; signed, E. A. Austin.

What do the two [date] of receiving and sending refer to there? A. 9:52 is the hour received at Atchison station,

May 27th, 1903, and 10:55 repeating same message to the Burlington.

Q. At the time 10:55 a. m. same date? A. Yes sir.

Q. This message was repeated to the Burlington at 10:55? A. Yes sir.

Q. I now call your attention to message of J. H. Garside —A. T. Perkins to J. H. Garside, 5, 27, 1903, and I will ask you if you received that message from Mr. Perkins at that time? A. Yes sir.

Q. What is the message written below there? A. It is the same message we made answer to Mr. Austin, to the effect of the message stated above.

Q. You repeated it to Mr. Austin? A. Yes sir.

Q. At the time? A. Yes sir.

Q. St. Joe, 5, 27, 1903, 3:43 p. m., to J. H. Garside. We are now open for stock and other business as usual signed A. T. Perkins. And the repeating of the message to Mr. Austin is as follows: Atchison, 5, 27, 1903, E. A. A. Topeka —Burlington now advise open for all business, please give figures on the six stock trains, signed, J. H. G.

I notice at the bottom of that is 4:02 p. m. what does that mean? A. That is repeating it at 4:02 p. m. on the 27th.

Q. Now I will call your attention to telegram of
660 E A A to J H Garside dated Topeka, 5, 27, 1903; I will ask you if that is a message which you then received from Mr. Austin? A. Yes sir.

Q. Topeka, 5, 27, 1903; 10:25 p. m., Time sent 10:28 p. m. First train of Evart stock reloaded this p. m. should reach Atchison about 4 a. m. Second train 20 cars reloaded this p. m. should reach Atchison about 8 a. m. Third train of 20 cars reloaded at 7 p. m. should reach Atchison about 8:30 a. m. On account of high water we may be unable to handle this stock over the Atchison line in which case it will be about two hours later. Signed E A A.

10:25 p. m. and at 10:28 p. m. what do those mean? A. 10:25 p. m. is the date forwarded from Topeka to Atchison and 10.28 p. m. is repeating same to Burlington system.

Q. You repeated that to the Burlington system at 10:28 p. m. did you? A. Yes sir.

Q. I now call your attention to a telegram dated St. Joe, 5, 28, 1903, signed A. T. Perkins, and directed to yourself, and ask you if you received that message from Perkins at that time? A. Yes sir, that is the original message.

Q. St. Joe, 5, 28, 1903, Time sent 1:01 a. m. Time received one o'clock a. m., St. Joe, 5, 28, 1903; to J H G, Atchison; we cannot now accept Evarts stock; our line washed out again will notify you when we can transmit stock, signed, A T Perkins.

I now show you telegram from J E Hurley, to H G Clark, Atchison, and ask you if that telegram was received at that time and transmitted by you to Mr. Clark? A. Yes sir. Received 12:45 a. m. May 28th, 1903, transmitted at 10:56.

661 Q. To H G Clark? A. Yes sir, Missouri Pacific.

Q. Who is H. G Clark? A. Supt. Missouri Pacific, at Atchison.

Q. I will read the telegram—Topeka, 5, 28, 1903—10:45 time received a m. time forwarded 10:50 a m. to H G Clark Atchison; We have three trains of stock for Evarts, S D via Burlington which latter line cannot accept account washouts, are you in position to accept it—signed J E Hurley. I now show you telegram signed H G Clark, to J E Hurley and ask you if that message was received by you from H G Clark and forwarded to Mr Hurley? A. Yes sir, message received here at 11:44 a m. May 28, 1903 and was repeated to H G Clark 11:51 a m.

Q. Repeated to Mr Hurley? A. Yes sir. from H G Clark.

Mr. Angevine: Reading—Atchison 5, 28, 1903—11:40 a m. received you state? A. Yes sir.

Q. —continuing—Forwarded 11:44 a m J E Hurley, Topeka; This line is open, how many cars of stock are there for Evarts, when and how many cars will you deliver at a time, assume you will deliver at Atchison and stock to be delivered to C M & C P at Omaha, signed H G Clark. I now show you telegram from J C Hurley, to H G Clark and ask you if that telegram was received by you from Mr Hurley and repeated to Mr Clark? A. It was received 2:22 p m. May 28, 1903, repeated to Mr J E Hurley at 2:35 p m. same date; Topeka, 5, 28, 1903. received 2:22 p m. forwarded 2:35 p m. to H G Clark, Atchison, we will deliver stock to you at Kansas City will advise number of cars and how they will arrive later—signed J E Hurley.

Mr Ball: Witness stated that was repeated to
662 Hurley? he means Clark?—Witness: Yes sir.

Q. Then signed by Hurley? A. Yes sir repeated to Mr H G Clark Supt Mo Pac.

Q. I now show you telegram from H G Clark to J E Hurley, 5, 28, 1903, and ask you if that is a message sent from Clark and repeated to Hurley? A. Yes sir that is a message received from Clark and repeated to Hurley; received 7:36 p m. May 28, and repeated at 7:44 p m. Atchison, 5, 28, 1903; received 7:36 p m. repeated 7:44 p m. to J E Hurley Topeka, Kansas; Will accept the 42 cars of stock at Kansas City for Sioux City and Evarts, S D. with the distinct under-

standing your line will accept all responsibility and pay any claims that may arise by reason of delay due to high water, our line is threatened by high water but desire to accommodate you if possible and think will get through, but cannot accept responsibility for delays. Stock will not move unless above accepted; answer quick. Signed—H G Clark.

Mr Botsford: I want to call attention on the stipulated copy there was endorsed in Mr Hurd's office that telegram received 7:36 a m. There is some mistake there somewhere. Here it is Mr Angevine.

Mr Angevine: That is a memorandum I gave you that was not on the telegram. I don't know where I got it, I must have got it from the wrong telegram; what is the original 7:30 p m. filed.

Q. I will ask you if that is the original telegram in the condition in which it was when it was received and repeated? A. That is, yes sir.

Mr Botsford: I do not know as it makes any difference I simply want to call your attention to it as we go along.

Mr Angevine: This witness says this is the original telegram and we will submit it to the court; there is no evidence here that it has been changed; the witness says it is in the same condition. Any objection to marking that.

663

Mr Botsford: No I do not want to change that; there has been no discrepancies so far between them.

Q. Mr Angevine: I will now show you telegram from J E Hurley to H G Clark, and ask you if that is a telegram received by you from Mr Hurley and repeated by you to Mr Clark? A. Yes sir.

Q. At what time was that sent to Mr Clark? A. It was sent to Atchison 8:05 p m. and repeated at 8:17 p m.

Q. Repeated to Mr Clark? A. Repeated to Mr Clark.

Q. At 8:17 p m.? A. Yes sir.

Topeka, May 28, 1903, received 8:05 p m. repeated 8:17 p m. H G Clark, Atchison: the stock goes to you on revenue basis is not detoured, therefore cannot accept any responsibility; we loaded it on your previous acceptance and have it in transit will you protect at Kansas City; answer quick? signed J E Hurley.

[—] I now show you telegram from H G Clark to J E Hurley, and will ask you if that telegram was received by you from Mr Clark and repeated by you to Mr Hurley? A. Received 7:55 p m. and repeated at 7:58 p m. on May 28, 1903; that is the original message; Atchison, 5, 28, 1903; received

7:55 p m. repeated 7:58 p m. to J E Hurley, Topeka; cannot accept 100 additional cars stock at Kansas City until further advised; H G Clark.

Q. Now I will show you telegram from H G Clark to J E Hurley, and ask you if that telegram was received by you? A. Yes sir received 9:48 p m. and transmitted 9:53 p m. May 28, 1903. Atchison, 5, 28, 1903; received 9:48 p m. Repeated 9:53 p m. to J E Hurley, Topeka; will accept
664 the stock at Kansas City advise when you will deliver the 100 car loads. H G Clark.

Cross Examination.

Q. By Mr Ball: I believe you stated [you stated] you were there about twelve years at Atchison? A. I was there as agent since 1891.

Q. You were agent since 1891? A. Yes sir.

Q. And cattle coming there that had been loaded and fed, and loaded out from Strong City or Wellington passing over your line and thence transported by another line north of Atchison would not been loaded and fed at Atchison, would they? A. No sir; they would go on beyond in the same cars or by connecting carriers.

Mr Angevine: Defendants objects to this as not proper cross examination; Overruled; defendant duly excepting.

Q. Mr. Ball: Is that right? A. It is correct as far as going out on a certain line.

Q. What line? A. K C St. J & C B.

Q. That is the Burlington? A. Yes sir.

Q. Was it correct in regard to the Missouri Pacific?

By Mr Angevine: Objected to by defendant as incompetent irrelevant and immaterial.

By the Court: Objection overruled, defendant then and there duly excepting.

A. The Missouri Pacific has a stock yard but they would not protect that many cars of stock.

Q. The Missouri Pacific have stock yards? A. Yes sir.

Q. At Atchison? A. Yes sir.

Q. Where they transfer cattle from your line be-
665 yond cars in which they were brought in on your line to cars which they handle out of Atchison? A. Yes sir.

Q. And do you know whether the Missouri Pacific got ready to receive these Evarts, South Dakota cattle at Atchison? A. I do not.

Q. You do not know? A. No sir.

Q. Do you know whether Friday night there was any preparation there, did you have any advise from the Missouri Pacific people to make any preparation to take any of these Evarts, South Dakota cattle [oyt] of there on Friday night the 29th?

By Mr. Angevine: Objected to by the defendant as not proper cross examination.

Objection overruled; defendant duly excepting.

A. None whatever.

Q. You knew nothing about that? A. None whatever. No.

Q. Do you know anything about the shipment of these other than except what is indicated in these telegrams? A. Only what is named in the messages.

Q. That is the only information you had and the only kind of communication you had with either Topeka or the Burlington or the Missouri Pacific? A. That is all.

Q. As I understand you, you simply testify as transmitter of these telegrams which came into your office at the time and the hours you mention? A. Yes sir.

666 Mr. Ed Haven sworn testified on behalf of the defendant as follows on:

Direct Examination.

Q. What is your name? A. Ed. Haven.

Q. Where do you live? A. Kansas City, Kansas.

Q. How long have you lived in Kansas City, Kansas and in this vicinity? A. I have lived in this city 21 and in this vicinity about 37 years.

Q. What year did you first come to this vicinity? A. I first came to this vicinity in 1853, 50 years ago.

Q. You have been familiar with the Kaw river in this vicinity and the mouth of the Kaw river ever since that time? A. Off and on, yes sir.

Q. Were you away from here part of the time during that time? A. Yes sir.

Q. How much of the time were you away from here? A. For about 14 years.

Q. From what time? A. 1853 to 1867.

Q. From 1853 to 1867? A. Yes sir.

Q. And since 1867 you have resided here continuously? A. Yes sir here and in the neighborhood. Topeka and Westport, and Topeka and here.

K. Are you acquainted with the vicinity of Kansas City, Kansas stock yards in this city and Kansas City, Mo. A. Yes sir.

Q. The stock yards are located across the state line are they? A. Yes sir.

Q. Part on one side and part on the other? A. Yes sir.

Q. Was you acquainted with the condition of the river during the time you have lived here as to floods and other like matters? A. Yes sir rather familiar with it.

667 Q. How long have you been acquainted and familiar with the location where the stock yards are? A. Well, more particularly since 1883, although I have known the vicinity long before that, as early as 1853.

Q. You knew the vicinity before the stock yards were built? A. Yes sir.

Q. What was the condition when you first knew the vicinity whether it was covered with stock yards, timber, or what it was covered with? A. It was covered with timber when I first saw it.

Q. You knew the lay of the ground there in that vicinity? A. Yes sir.

Q. You know where the old bed of Turkey Creek was there that part of the river bottom? A. Yes sir.

Q. How was it from what was the bed of Turkey creek before its channel was changed has there ever been water on what is now the stock yards ground since you have known the Kaw until the flood of 1903? A. Yes sir I think there has been water on the low portions of it.

Q. Was it over the bottoms of the old bed of Turkey creek I mean? A. No sir, not that I know of unless it was one year when I was not here, I could not say, I was out west at that time, in 1881, I was not here I could not say as to that positively.

Q. You were not here in 1881? A. No sir.

Q. You don't know the flood condition of 1881? A. No sir.

Q. Was it over the bed of Turkey creek whatever? A. Yes sir.

Q. You know of no water being over the site of the stock yards during all of the time you have been familiar with the Kaw river? A. No sir, that ground was considerably higher, generally pretty high with the exception of Turkey creek, after Turkey creek washed out and the mouth of it changed

668 there was some low places.

Q. Turkey creek now empties into Kaw river above the stock yards? A. Yes sir.

Q. And the old bed or channel of Turkey creek ran through where the stock yards are now through the yards? A. Yes sir.

Q. Were you in Kansas City during the flood of 1903? A. Yes sir I was in Kansas City, Kansas.

Q. You saw the water did you? A. Yes sir.

Q. You may state if you can how much higher the water was during that flood than it ever had been before to your knowledge as near as you can tell. A. I could not say exactly because I do not remember to have seen the Kaw river out of its banks except in low places flooding the entire bottom as it did on that occasion.

Q. You say you never saw it out of its banks before that time except in low places? A. Yes sir except in low places.

Q. You are familiar with the Armourdale district of Kansas City, Kansas? A. Yes sir.

Q. Do you know how high the water rose over that part of the city during that flood? A. Well, yes, I know it rose over the entire portion all over Armourdale and to a considerable depth, but I could not say the exact depth.

Q. Do you know whether or not it got into the second stories of many of the residences in that district? A. Yes sir, I know it did.

Q. And into the second stories of the store buildings? A. I could not say as to that because I did not go down into the district until after the flood.

Q. Do you know how many people lived in the Armourdale district of Kansas City or the flood district of Kansas City, Kansas? A. Yes sir, I should suppose there
669 was, I think in the neighborhood of five or six thousand; six thousand at least lived in that district.

Q. In the Armourdale district? A. Yes sir.

Q. Then there was a district over on the east side of the Kaw river, which is in Kansas City, Kansas, is there not? A. Yes sir.

Q. What is called old Kansas City, Kansas? A. Yes sir.

Q. Do you know about how many people lived in that district? A. I could not say no sir, I could not tell even approximately.

Q. Thickly populated with residences? A. Yes sir, portions of it where the residences was, it was very thickly settled.

Q. State whether or not the packing houses of Kansas City, Kansas and Kansas City, Missouri, are located in what was then the flooded district? A. Yes sir, they are.

Q. Do you know whether there was any banks located in the Armourdale district? A. Yes sir.

Q. How many? A. Three, I think.

Q. State whether or not they were—

Objected to by the plaintiffs, there is no issue made of the location of the packing houses.

By the Court: I attempted this morning to get a stipulation covering this matter; proceed; overruled.

Q. You may state whether or not those banks were flooded and contents damaged or destroyed during this flood, if you know? A. I could not say as to the contents, I could only speak of the buildings seeing them after the flood.

Q. Did you see them shortly after the flood? A. Not immediately.

Q. How soon after the flood subsided did you go into
670 that district, Kansas City, Kansas? A. It was some months afterwards.

Q. You were not in until the streets were clear? A. No sir.

Q. Do you know about how many houses washed away entirely in that district during that flood? A. No sir, I could not say.

Q. Could you give an estimate about how many? If you do not know you need not give it, I think I can prove it by others? A. I know there was several hundred from what I saw afterward and making assessments in that district.

Q. You made assessments of the houses in that district? A. Yes sir.

Q. You know there was several hundred washed away entirely? A. Yes sir.

Q. Do you know about how many was washed from their foundations and lodged in other parts of the city? A. Very large number.

Q. Do you know how many bridges there was across the Kaw river within the limits of Kansas City, or from Argentine down? A. Yes sir.

Q. About how many? A. About 12 or 14.

Q. Argentine lies immediately west of Kansas City? A. Yes sir.

Q. Up the river? A. Yes sir west and south.

Q. What became of those bridges? A. They were all washed away but one.

Q. Which one was that? A. Missouri Pacific.

Q. Did you see that during the flood from the bluff? A. Yes sir.

Q. Did you see any locomotives on it while the water was up? A. Yes sir.

Q. How many? A. I can't say I saw them while the water was up and they were submerged and covered
671 with debris, but I saw them after saw the engines on the bridge after the flood subsided.

Q. You say those engines were covered during the height of the flood either by water or debris? A. Yes sir I was not near enough to tell, to see whether it was water altogether or simply driftwood.

Q. Now did you see those engines on the bridge after the water subsided and before they were removed? A. Yes sir.

Q. About how many was there of them as near as you could tell. A. I could not say I could not give the number, it extended from one side of the river to the other.

Q. Full length of the bridge? A. Full length of the bridge.

Q. Covered with locomotives? A. Yes sir.

Q. Do you know what they were put there for? A. I could not say of my own knowledge.

Q. Not of your own knowledge? A. No sir.

Q. Do you know what the [rpoert] was as published in the public press at the time they were put on there? A. They were put there for the purpose of saving the bridge.

Q. Holding the bridge down? A. Yes sir.

Q. You say they were entirely submerged during the height of the flood? A. Yes sir either by water or debris.

Q. Do you know whether the stores in the Armourdale district removed their goods or were they washed away and destroyed? A. I could not say positively except from report and what I saw afterward, there was not everything removed, I do not know how much of it was removed.

Q. Do you know how the people residing in that district were removed from the flooded district? A. They were taken out by boats, wagons and in every way they could get out.

672 Q. Is it not a fact that after the first few hours of the flood it was impossible to get in with a wagon or anything but a boat? A. I know that it was after the crest of the flood was reached, it was impossible to get in with a wagon.

Q. Was it not impossible long before the crest of the flood was reached to get in there with a wagon? A. I think possible some of the wagons went in there late as Saturday night.

Q. They went in as late as Saturday night? A. Yes sir, possibly.

Q. Do you know about that? A. No sir only from the people who had gone down there with wagons into some districts they had to go through water.

Mr. Ball: We object to the testimony except as to the personal knowledge of the witness.

Mr. Angevine: Yes, I am trying not to ask anything and the jury need not consider it as far as not shown to be within his own personal knowledge.

Q. You may state whether or not all of the packing houses of Kansas City, Kansas, and Kansas City, Missouri, were flooded to the depth of ten to twelve feet during that flood? A. They were.

Q. After the flood subsided could you see water marks on the sides of the buildings and stores? A. Yes sir.

Q. Did you go along James street soon after the flood subsided? A. Yes sir.

Q. How soon afterward? A. Within a few days, I could not say exactly, within I think during a week following the subsidence of the flood.

Q. Is James street the principal street connecting the city of Kansas City, Kansas, with Kansas City, Mo. A. James street and Central avenue.

673 Q. And James street until it connects with Central Avenue, then Central avenue from there to Kansas City, Mo.? A. Yes sir.

Q. Now about how far is it from the north end of James street, south to Central avenue, and then east to where Central avenues leaves the [rivver] bottoms, what would be the distance. [Q.] Do you mean beyond the state line or just to the state line?

Q. Beyond the state line to where Central avenue or 9th street as it is called, leaves the river bottoms? A. I should say it was the distance of a mile and a half or two miles, a mile and a half at least by the way those streets run.

Q. Are those streets built up solid with buildings all the way along there or practically so. A. They were along James street and along Central avenue and 9th street, yes sir.

Q. What character of buildings were they there, what were they used for? A. On James street, Central avenue and 9th street for business buildings mostly.

Q. Stores and shops? A. Yes sir, various kinds.

Q. State whether or not those were occupied or in use mostly before the flood? A. Yes sir, they were.

Q. You say you did go along soon after the flood subsided? A. Yes sir.

Q. In what condition did you find those buildings and shops at that time and stores? A. Many of them were entirely destroyed and none of them immediately after the flood were habitable.

Q. What became of the stocks of goods which was in them? A. They were ruined, many of them taken out and

674 piled up on the sidewalks and drying out, covered with mud.

Q. What was the condition of James street just north of the Armour packing plant, and between that and the Fowler plant? A. It was almost impassable for traffic.

Q. I will ask you to state if the street was not washed out? A. Yes sir it was in one place just north of the Armour

packing plant was washed out completely and had to [to] be refilled.

Q. That street was a graded street and paved street, was it not? A. Yes sir.

Q. And water mains and gas mains under that street, all along it? A. Yes sir.

Q. You may state whether or not those water and gas mains were broken and destroyed by that flood? A. I passed along there, I don't know whether I paid attention to see whether the water mains were destroyed or not, I know the street was washed out to a depth below them, but I did not see whether the gas mains were.

Q. Now immediately east of that street and just north of the Armour packing plant was a hole washed out; now you may state to the jury about the extent and the depth and size of that hole was washed out there by that flood?

By the Court: That place has been testified to by Mr. Hurley.

Mr. Angevine: No [sie].

Witness: It extended from James street to the tracks and crossed the tracks and the Great Western Railroad and the Metropolitan; it extended from James street northeasterly and crossed the Metropolitan [tracts].

Q. About how deep was that hole? A. I should say 20 or 25 feet.

Q. About how wide was it? A. It must have been
675 in some places two hundred feet wide.

Q. And about how long? A. It would be about the length of one say a little longer than one of our blocks; about three or four hundred feet at least.

Q. Before the flood was there any hole there? A. No, sir.

Q. The space was filled up with buildings? A. Yes sir covered with buildings.

Q. Those buildings were gone and this hole left in place? A. Yes sir.

Q. After the water subsided, did you see an iron safe, fire proof safe in the bottom of that hole which had been deposited there by the flood? A. I could not say; I could not say because when I first saw it the water was in it. I did not notice it.

Q. State whether or not there was another hole washed out along the north side of ninth street on this thoroughfare, you have spoken of? A. Yes sir there was.

Q. Was there buildings standing in that locality before the flood? A. There had been buildings there yes sir.

Q. Those were washed away? A. Those were washed away.

Q. About what was the extent of that hole? A. That was not so wide as the other and I could not say how far north it extended because I only saw it from 9th street; in the immediate neighborhood of 9th street extended north to the river.

Q. At the time you first went there along that street after the flood subsided, you may state whether you saw houses lodged in that street and along the edge of the street? A. Yes sir both streets James street or 9th street.

676 Q. Did you see freight cars lodged along there? A. Yes sir.

Q. What was the condition of Central avenue and 9th street as to being blocked with debris or otherwise when you first went over there? A. They were in such a way they were [blovked] so you had to pick your way through the street.

Q. Impossible to drive a team through the street? A. Yes sir.

Q. Did you stand on the bank of the river on Saturday or Sunday and watch the flood for any considerable length of time. A. No sir I did not. It was raining and I did not go there at all.

Q. You did not go there? A. No sir.

Q. Do you know of your own knowledge whether the Standard Oil company's tanks were washed from their foundation during that flood and some of them carried entirely down the river? A. No I could not say of my own knowledge.

Q. Did you see one of them after the flood standing back of the Fowler packing plant on a sand bar? A. I saw one down in there some where I could not describe the locality just now.

Q. Steel tank 30 or 40 feet high? A. Yes sir.

Q. Do you know where that tank was caught in the river. A. I could not say of my own knowledge.

Cross-Examination.

Q. By Mr. Ball: Do you know where the shipping division of the pens are of the stock yards? A. Yes sir.

Q. How far were those holes which you have mentioned as to being north of the Armour packing house along 9th
677 and Central from the stock yards? A. They were some distance north.

Q. How far north about? A. The one on James street I should think would be about a mile north.

Q. The other one? A. The other one would be probably about the same distance, little different direction.

By the Court: How many more witnesses have you on this branch of the case.

Mr. Angevine: We have quite a number.

By the Court: You will be limited to four more.

G. A. Roberts, sworn, testified on behalf of the defendant as follows, on

Direct Examination.

Q. By Mr. Angevine: What is your name? A. G. A. Roberts.

Q. What is your business? A. Local live stock agent of the Santa Fe.

Q. Where is your office? A. Live Stock Exchange Bldg in the basement.

Q. How long have you been the local live stock agent? A. Three years and a half.

Q. Was your office in that building during the flood of 1903? A. Yes sir.

Q. Immediately prior thereto? A. Yes sir.

Q. Do you know the custom of the various railroads doing business in Kansas City at the stock yards in Kansas City in regard to the shipment of stock through Kansas City that is where one roads brings in the stock to be delivered to another road, what is the custom as to delivery
678 through the stock yards?

By Mr. Ball: Objected to by the plaintiffs as incompetent, irrelevant and immaterial, and because the records already in show that these cattle were not shipped to Kansas City or not originally intended to be shipped through Kansas City and because the evidence in the case so far shows that—

By the Court: Do you know the custom? A. Yes sir, I do.

Q. What is the custom? A. For the road bringing in the stock to deliver it to the stock yards company with the way bill stub showing the final destination of the shipment.

Q. The way bill stub? A. Yes sir. In addition to that a verbal notice to the representative of the connecting line informing them that the stock was there at their disposal.

Q. Has it not been the custom and practice ever since you have been connected with the business? A. Yes sir.

Q. How long has that been? A. Three years and a half this last September.

Q. Were you at any time prior to the time that the cattle were driven down the viaduct during that flood, notified that

a train load of cattle, which is said to have been delivered to the Missouri Pacific road by the Santa Fe road, had been turned back into the stock yards by the Missouri Pacific road? A. Not to my own recollection.

Q. You had no knowledge of any kind of that fact? A. No sir, not that I can recall.

Q. Do you know of the conditions at and immediately prior to the rise of the water in the stock yards as they existed at and near Kansas City? A. Condition in
679 regard to what.

Q. Weather conditions? A. General conditions.

Q. At Kansas City and vicinity? A. I had a general idea of them, yes sir.

Q. On what floor of that exchange building was your office? A. In the basement.

Q. On the same floor with the other railroad offices? A. Yes sir.

Q. The stock agents of all of the roads have offices on that floor? A. Yes sir, at that time.

Q. What was the custom about notifying the agents of other roads of the arrival of stock; was there any formal notice? A. No, sir, just called them, just told them, and called them up over the 'phone, any way just so they knew it.

Q. You may state whether the road which was to receive this stock had notice of their being in the pens before the stock agent of the road delivering them knew it? A. They may have such notice.

Q. Is it or is it not the custom of the stock yards company to notify the agents of the different roads when they receive stock for them; what is the practice in that regard? A. The notice of the stock yards company is pasted in their records in a book accessible to the public.

Q. Is it the custom for the agent of the different roads to consult those records for the purpose of ascertaining the arrival of stock for them? A. Frequently is.

Q. Personally you had nothing to do with handling this stock, did you? A. No, sir, I did not.

Q. Did you have any connection whatever with it? A. Why a very little.

Q. In regard to receiving or unloading the stock?
680 A. No sir.

Q. If you had any connection of any sort? A. Inasmuch as the telephone service was broken I was sent by my superior to Mr. Sharp's office our superintendent of terminals, to ask him to arrange to furnish equipment for the connecting line.

Q. On what day was that? A. That was on Saturday the 30th of May.

Q. Now did you have any personal knowledge of one train of stock being delivered to the Missouri Pacific? A. No sir, no personal knowledge.

Q. You had no part in the deliver- of that? A. No sir.

Q. Of that train, if there was a train load delivered? A. No sir.

Q. And all the part which you took in the matter was being sent on an errand by one to the other; you say the telephone service was broken and destroyed?

Objected to by plaintiffs as incompetent, irrelevant and immaterial. Objection overruled.

Q. That was by reason of the telephone service being out of working order was it? A. Yes sir.

Q. Do you know why the telephone service was not working at that time? A. I do not.

Q. It is a fact that part of the telephones in that district were working and part were not working; do you know about that? A. I did not see any was working.

Q. Do you know whether the telephones which came to the part of the district where you were located came in an underground conduits? A. That I could not say not from personal knowledge.

Q. Is it your understand- that they are or are not?

681 Objected to by the plaintiffs as incompetent, irrelevant and immaterial.

By the Court: Objection sustained.

Cross Examination.

By Mr Ball:

Q. You say you are the local live stock agent of the Santa Fe? A. Yes sir.

Q. And were at the time of this flood came on? A. Yes sir.

Q. Did you know of the arrival of these trains in question here in this case, personally, I mean? A. From the usual sources.

Q. I am not talking about sources? A. I did not see the cars no sir.

Q. Didn't have anything to do with them? A. No sir.

Q. Either with their [respectibe] road or by or with any negotiations, with anyone to take them out? A. No sir.

Q. Who is your superior? A. Mr Eli Titus.

Q. He is the general live stock agent at Kansas City? A. Yes sir.

Q. And who is the assistant general live stock agent. A. Mr Wm A Coombs.

Q. Who is Mr Brown? A. He is the chief clerk, Mr S S Brown.

Q. Now do you know a man by the name of or was known as Jasper in connection with the live stock office there? A. Yes sir.

Who is he?

Mr Angevine: Objected to as not proper cross examination.

By the Court: Objection sustained.

682 Mr Ball: Mr Angevine asked him in direct examination about the general live stock office.

By the Court: Objection sustained; plaintiffs then and there duly excepting.

Q. When these trains were brought in by the Santa Fe or any other trains which come in of through cattle not destined for the Kansas City market there would be way bills for those trains would there not? A. Yes sir.

Q. And what office of your company would they first go to—where there is coming into Kansas City, I am talking about through trains now, not destined ultimately for Kansas City which were going through? A. Are you speaking of way bills proper.

Q. Yes where would those be, the way bills first be. A. At Argentine.

Q. At the Argentine offices of the Santa Fe? A. Yes sir.

Q. In that case through cattle which were hauled in by your road, would they? A. No sir.

Q. They would be unloaded at Kansas City?

By Mr Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial, and calling for the conclusion of the witness.

By the Court: Objection overruled.

A. That would depend on circumstances.

Q. If they were through cattle would not necessitate their unloading? A. No sir.

Q. If they were through cattle what usually would be the case when they were unloaded at the stock yards, that is what would be the reason for unloading them ordi-

683 narily, if they [they] were through cattle? A. Why the ordinary case of unloading would be to feed and rest.

Q. Simply to feed and rest? A. Yes sir.

Q. Now if the cattle were fed at Strong City and Wellington before arrival at Kansas City, were through cattle, would

there usually be any necessity for unloading them at Kansas City at all.

By Mr Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial; and not proper cross-examination.

By the Court: Objection overruled.

A. I should say there would.

Q. In that case? A. Ordinarily.

Q. Why? A. On account of the time limit in which they could move without being unloaded for feed and rest.

Q. What is the time? A. 28 hours.

Q. Is it 28 hours from Strong City to Kansas City? A. It might not be from Strong City might by the Burington.

Q. How about from Strong City? A. It depends upon the,—

By Mr Angevine: Objected to by the defendant as incompetent irrelevant and immaterial.

By the Court: It might depend on the road going out on. Objection overruled.

Defendant then and there duly excepting.

Q. Ordinarily how long a run is it from Strong City to Kansas City? A. I am not prepared to state that, have to consult a time table.

Q. You do not know? A. No sir.

Q. If these cattle came in there noon Friday and got in here by Saturday morning how would it be then about unloading? A. I suppose that would altogether de-
684 pend on the length of time it would take them to reach the next feeding station beyond Kansas City.

Q. What would be done with those way bills which accompanied the cattle if they were unloaded? A. They would be sent over to Argentine to my office by messenger.

Q. To your office? A. Yes sir.

Q. Then what would you do with them? A. Turn them over to the connecting line; that is, provided they were through way-bills that is what you refer to?

Q. Yes? A. If they were through way bills.

Q. If these cattle were unloaded in the yards, they would be unloaded in the shipping pens. A. Yes sir they would be unloaded at the ordinary unloading chutes.

Q. If these cattle were unloaded in what is known as the shipping division, you know what that is? A. Yes sir.

Q. If these were unloaded in the shipping division and these way bills were sent over to your office by a messenger, now what would you do with them

By Mr Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial. Overruled.

A. Give them to the connecting line.

Q. Now were the way bills of these shipments that came in Friday evening and Saturday morning, Friday evening the 29th of May and Saturday morning the 30th, were they sent to your office? A. I do not remember.

Q. Did you deliver them to any connecting carrier? A. Not that I know of.

Q. You would know about it if they were delivered over to your office? A. I might and I might not.

685 Q. Who else would if you did not? A. Two other men in the office.

Q. Who are they? A. At the present time?

Q. No, then? A. Why Henry Jasper was one man he may have delivered them to the connecting line.

Q. Was Mr. Jasper the party that at that time handled these bills? A. He handled them.

Q. For your office? A. Yes sir.

Q. Is he still in the service of the company? A. Not to my knowledge.

Q. How long after that before he left it? A. I don't know.

Q. Do you know where he is now? A. No sir.

Q. Who is the other man? A. I don't remember who was there at the time.

Q. Do you have any recollection of having any of these way bills for these trains of cattle which I have mentioned? A. Yes sir.

Q. Where did you see them? A. Why in my office.

Q. When? A. After the flood.

Q. What time? A. I could not say what time.

Q. Well about how long after? A. After the water had subsided probably the 10th or 12th or somewhere along there, I don't know the date.

Q. That is when you saw them in your office? A. Yes sir.

Q. So that these way bills were not delivered to any connecting carrier at Kansas City, were they? A. Not that I know of, No sir.

Q. You found them there in your office after the flood went down? A. They were found there, yes sir.

686 Q. Now that being so the cattle represented by those way bills were in the yards under the control of the Santa Fe railroad company were they not by the custom of unloading cattle.

By Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial, and not proper cross-examination. Objection overruled.

A. I don't think they were.

Q. Could any other railroad unless you delivered those bills to the connecting carrier, or the carrier which was expected to take the cattle out without those bills, could they got them under the regular custom; could they have gotten the cattle? A. Yes sir.

Q. What road could have gotten them? A. Any road they were consigned in the care of.

Q. How would that road [no]? A. We had in the mean time delivered the way bill stub to the stock yard company covering the cattle.

Q. You had not delivered the way bills; as was the usual custom to do in this case? A. I answered I di dnot know we had.

Q. You found those way bills in your office after the flood went down? A. I did not.

Q. Didn't you say a moment ago you say there [there] the 10th or 12th of June? A. Yes sir.

Q. Somebody else found them while there when you saw them? A. Yes sir.

Q. They had not been delivered to any connecting carrier? A. Not that I know of.

Q. Did your road to your knowledge give any order on the stock yards company to turn them over to any connecting line? A. The question contemplates something out of the ordinary, I do not know how to answer it.

687 Q. You can answer, and say whether you know your road gave that stock yards company any order to take these cattle or not to any other line? A. We delivered with the cattle way bill stub showing the final destination.

Q. Who did that? A. The Santa Fe.

Q. Did you do it? A. No sir.

Q. How do you know they did it? A. From the stubs kept on file in the stock yards company records.

Q. Did you personally give them to them? A. No sir.

Q. Did you give them or did the stock yards company give them to any other carrier? A. I don't know. I do not know what the stock yards company did.

Q. Did any other company other than your road have any order or any way bills delivered to them so far as you know for these cattle? A. Nothing except the way bill stub we delivered, was delivered to the stock yards company.

Q. That is as soon as you put them in the yard wasn't it? A. Yes sir.

Q. That was not an order to deliver them to anybody? A. It could be so construed yes sir.

Q. That came in with any cattle, you knew that was simply the usual thing of giving them the stubs, of what cattle you unloaded, wasn't it? A. Yes sir.

Q. What I am asking you is, whether you knew of the delivering of any order to any connecting carrier through road than yours at the yards, of these cattle? A. I do not know what you mean by order.

688 Redirect Examination.

By Mr. Angevine:

Q. State whether it is the custom to give any other order to the stock yards company than the stubs as to direct the unloading of the cattle? A. No sir.

Q. Is it not the universal practice in bringing cattle into the stock yards that the stub is torn off of the way bill and handed to the stock yards company? with the cattle, and that is their order? A. It is the custom, yes sir.

Q. And is that the practice in handling cattle there? A. Yes sir.

Q. That stub from the way bill is the order to the stock yards company? A. Yes sir.

Q. Now wasn't it the practice among the live stock agents at the stock yards where cattle are coming in on one road and consigned to the other to get the way bills from one office to the other, is it always the custom for the company delivering the cattle to take the way bills over to the other office or does the other office call for it when they get ready to take them out? A. Both done.

Q. Is there any uniform custom about that? A. No sir.

Q. If the receiving road gets ready to take them out before the delivering road delivers the way bills, they call for them do they? A. Yes sir.

Q. Was there any call made for those way bills to your knowledge? A. Not to my knowledge.

By the Court: Suppose a train load of cattle comes into Kansas City to go out over some other line or road, a through shipment, in such case are the cattle unloaded at Kan-
689 sas City and loaded into the cars of the other road or are they carried through in the cars of the road bringing them in? A. If they were unloaded at all they would be reloaded in the equipment of the company which takes them out.

Q. In this case had it not been necessary for the cattle to be unloaded for the purpose of feeding at Kansas City, if they

came into Kansas City in cars of the Santa Fe, or its connecting line, would going out over the Missouri Pacific or the Burlington, would they go out in the cars of the Missouri Pacific or the Burlington? A. If they had been unloaded.

Q. If a through shipment not stopped for feeding or water? A. They would go out in the cars of that they came in naturally.

Q. If unloaded for any purpose they would go out in the cars of the connecting line; after the cattle are unloaded by a railway company in the stock yards at Kansas City, does the railroad company control the amount of feed and water, or how they are to be fed, that is I mean under the usual custom? A. No sir.

By Mr. Ball: Where are these way bills which you say you saw in your office after this subsidence of the flood? A. I do not know.

Q. What became of them? A. I do not know.

Q. I will ask you to look at these way bills, and state whether they are part of the ones which you spoke of having seen in your office? A. I think they are.

Q. Look at those and see if they are part of one ones which you remember of having seen in your office after the subsidence of the flood? A. I should say they were.

Q. Now these bills show shipments by way of Atchison, do they not.

690 By Mr. Angevine: Objected to by defendant as not the best evidence.

By the Court: Objection sustained; plaintiffs then and there duly excepting.

Q. Well is there anything in these bills there from either side of them which indicates that the cattle covered by them were coming by Kansas City?

By Mr. Angevine: Objected to by defendant as not the best evidence; the bills have been read to the jury.

By the Court: Objection sustained.

Q. Mr. Ball: You answered that the stubbs delivered to the stock yards company were designed to indicate the connecting carrier which was to take out the cattle covered by the bills of lading of which these were the stubs, is that right? A. Yes sir.

Q. Is there any thing about these bills would indicate what connecting carrier would under the custom there carry these cattle out of Kansas City.

By Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial and not the best evidence, and not proper cross-examination.

By the Court: Objection sustained; plaintiffs then and there duly excepting.

By Mr. Angevine: Is it not the usual practice in making through shipments from a distance over your road to Kansas City and there delivering cattle to another road to unload them and allow the connecting carrier to load them in their own equipment at Kansas City. A. Yes sir.

Q. Is that the usual and customary practice? A. Yes sir.

Mr. Ball: I simply want to ask one question; that is where they are consigned through Kansas City? A. Yes sir.

691 D. Farley, sworn, testified on behalf of the defendant as follows on

Direct Examination

By Mr. Angevine:

Q. What is your name? A. D. Farley.

Q. And what is your business? A. I am chief clerk of the local office of the A. T & S F, Kansas City, Mo.

Q. That is the local office? A. Yes sir.

Q. Not the ticket office? A. No sir local freight office.

Q. You may state whether or not the train load of 20 cars of cattle in controversy here was received in Kansas City, on Saturday morning, May 30th and delivered to the Missouri Pacific railway company about 6:35 that day and receipted for by them? A. Yes sir.

Q. Have you that receipt? A. Yes sir.

Q. Produce it (hands paper) Is this the receipt given by the Missouri Pacific road for that train load of cattle? A. Yes sir.

By Mr. Ball: That is leading, and should ask for the knowledge of the witness and what was done if he knows.

By the Court: He has the receipt there it will show for itself.

Q. By Mr. Angevine: Is that receipt signed and made out in the usual way of receipting for train loads of cattle by the Missouri Pacific road to your road? The Santa Fe? A. Yes sir.

Q. Was this receipt returned to you in the usual course of business of that shipment? A. Yes sir.

Mr. Angevine: I will offer it in evidence.

Q. Who is Mr. Isit who signs that receipt? A. He is the agent for the Missouri Pacific here, in Kansas City.

Q. Freight agent? A. Yes sir.

692 Q. Is he the person who ordinarily and usually signs receipts for the delivery of stock? A. His name is signed to that by the clerks in his office.

Q. That is the usual way of receipting for them? A. Yes sir.

Mr. Angevine: Reading the receipt Cars delivered by the Atchison Topeka & Santa Fe Railway Company to the Missouri Pacific at 6:35 a m. Engine number 2281, foreman Coppel, K C. station 5, 30, 03. initials; first initial A T No. 53535 A T loaded or empty X. What does the X mark indicate in the column? A. The X mark in that column indicates the car is loaded.

Mr. Angevine: continuing—P V No. 5081 stock X mark after each one; marks in the next column is check and each one is checked so I won't repeat it again, and also in the column marked loaded or empty, there is a check mark for each one, and I will read the heading of this check mark.

At the top of the column all of them have a check mark is a cross, and immediately below it is the word 'loaded' and then immediately above that is a dash and [wrods] below that 'empty'.

The dash means empty and the X mark loaded? A. Yes sir.

Mr. Angevine: continuing—P V Number 5080, kind stock. And under the column stock each one is dittoed. 4 P V 5064 5 A T 53473; 6 S N S 312; 7 A T 52605, 8 A T 53759; 9 A T 53428; 10 A T 53964; 11 P V N E 5009; 12 P V N E 5005; 13 S J V 60030; 14 P V N E 5099; 15 A T 52155; 16 A T 53962; 17 A T 53150; 18 A T 54411; 19 13500; 20 P V N E 5212; 21 S N S 1409. Certified correct H. W. Sharp. The A. T. & S. F. Ry. Co. Certified correct R. E. Isitt. Ry Co.

Mr. Ball: We object to the offer of the receipt for the reason it is not shown it is a receipt of the Missouri Pacific Railway company, this witness does not testify it is signed by

693 the agent of the company; there is no testimony showing that it pertains to any of these cattle at all, or that the cattle were in fact ever delivered to the Missouri Pacific.

By Mr. Angevine: We cannot introduce all of our testimony at once.

By the Court: Objection overruled; plaintiffs then and there duly excepting.

By the Court: Is that receipt signed?

Mr. Angevine: It is signed R. P. Isitt, who he says is the local freight agent of the Missouri Pacific at Kansas City and says this was signed in the usual and ordinary way

and returned to them in the usual course of business in the usual way.

[—] I understood you to say that? A. Yes sir.

Q. Mr. Farley have you checked this list over with the cars of stock brought into Kansas City on the morning of May 30th, and ascertain whether these cars are among those which were brought into Kansas City that morning, being the cars in question? A. I have not personally checked that, no sir.

Q. Will you check those over and return here when court meets again and state that fact? A. I will state to the court it is a very difficult matter to be checked up.

Q. Do you know of these being some of the cattle which were brought in of the shipment from Texas, to Evarts South Dakota of cattle which came in at that time.

Objected to by the plaintiffs, we think the witness ought to be advised whether he knows of his own knowledge what cattle they were.

By the Court: The question is whether he knows.

694 A. I could not testify from my own knowledge that those are the cattle in controversy.

Q. Are they part of the shipment which arrived in Kansas City at that time, those cattle being shipped from Texas to Evarts, South Dakota? A. They are.

Q. They are part of that shipment? A. Yes sir.

Q. Now did you have any notice of any kind that those cattle had been returned or turned over by the Missouri Pacific Railway Company to the stock yards company.

By Mr. Ball: Objected to by the plaintiffs for the reason it assumes that the Missouri Pacific had them turned over to them and that they had been returned; it assumes the custody of the cattle in the Missouri Pacific and turned back to the stock yards company, and of which there is no evidence.

By the Court: He may answer; the plaintiffs then and there duly excepting.

Q. Read the question—question read—in other words, did the Missouri Pacific Railway company notify you that they could not take those cattle out and turned them into the stock yards company. A. Not that I know of.

Q. You had no notice of that kind or any kind which you know of. A. No sir.

Cross-Examination.

Q. By Mr. Ball: You are the chief clerk in the freight office and were in May and June, 1903? A. Yes sir.

Q. And your duties are right there in the office? A. Yes sir.

Q. You are not out in the yards very much? A. No sir.

Q. And you do not personally see the freight? A. No sir.

695 Q. Now this paper which Judge Angevine has read to the court and jury contains figures of certain cars, are those car numbers which are on there? A. Yes sir.

Q. Now who made that out? A. Made out by the yard clerk.

Q. What yard clerk? A. His name is Evans.

Q. He made this? A. Yes sir.

Q. Yard clerk of the Santa Fe? A. Yes sir.

Q. Was that made out in your presence? A. No sir, it was not made out in my presence.

Q. Were you present when Mr. Isitt signed it? A. No sir.

Q. Where did you get it? A. I took that from the files that is our files in the office.

Q. That was sent in to you? A. Yes sir.

Q. Do you know where those cattle were when this was made out? A. No sir I can't say where they were when it was made out, supposed to be right there.

Q. Does that paper show the hour when it was made out? A. No sir, don't show the hour when these were made out.

Q. When received up there? A. 6:35 in the morning.

Q. Where were the cattle, do you know where the cattle were covered by these cars? A. Supposd to be right there, that is supposed to be made out at the time of the delivery to the Missouri Pacific and came along with them.

Q. Now I did not ask you for what you supposed; I ask you if you knew where the cattle was when this was made out? A. I told you I did not.

Q. They might have been in the shipping division of the stock yards? A. Personally I do not know where they were.

Q. You do not know whether they were in the division or in the cars when this was made out? A. I do not

696 know anything about that no sir.

Q. You do not know whether the Missouri Pacific ever had the cattle in their charge or not? A. They would not have signed that receipt unless they had received those cars.

Q. What is that? A. I know they would not have signed that receipt unless they got the cars.

Q. How do you know that? A. It is not the custom for them to give a receipt for something they do not get.

Q. You are just stating in your judgment, what they would or would not do or have done? A. I am speaking from what the custom is, telling you what the custom is.

Q. You do not know of your own knowledge whether the Missouri Pacific had the cattle or not, if he did sign this? A. No sir.

Q. Do you know Mr. Isitt's signature? A. No sir.

Q. Do you know who did sign it? A. Mr. Isitt told me.

Q. Did he sign that personally? A. No sir.

Q. Well never mind now what he told you; do you know he signed it? A. No sir.

Q. So you do not know of your own [personaly] knowledge who put his name on the bottom of that? A. No sir.

Mr. Ball: The plaintiffs move to strike out the testimony of this witness in reference to this receipt.

By the Court: Objection overruled; plaintiffs then and there duly excepting.

Mr. Ball: Do you know whether these cattle ever went into the stock yards or not? A. No sir.

Q. Do you know of your own knowledge what became of them if they did go in there? A. No sir.

Q. Do you know whether they were unloaded or not? A. No sir.

697 Q. There is nothing about this receipt to indicate whether they were or were not unloaded? A. No sir.

Redirect Examination.

Q. By Mr. Angevine: Did you have any other stock to deliver to the Missouri Pacific at that time than the stock in question in this suit? A. None that I know of, no sir.

Q. You say that receipt was returned to you in the usual course of business? A. Yes sir.

Q. In the customary way? A. Yes sir.

S. S. Brown, sworn, testified on behalf of the defendant as follows, on

Direct Examination.

Q. What is your name? A. S. S. Brown.

Q. What is your business? A. Chief clerk of the live stock department of the Santa Fe.

Q. How long have you been chief clerk of that department? A. Between thirteen and fourteen years.

Q. Is your office in the basement of the live stock exchange, where the witnesses have spoken of the offices being, are they? A. Yes sir.

Q. Are you acquainted with Mr. Stark? A. Yes sir.

Q. Who is he? A. He is chief clerk of the agent of the live stock department of the Missouri Pacific.

Q. Who is Mr. Downing? A. He is the local agent for the Missouri Pacific.

Q. At Kansas City? A. Yes sir.

698 Q. I will ask you if you had a conversation with one or both of those parties on Saturday morning, May 30th, 1903, in regard to the shipment of cattle in question, in this suit? A. I did.

Q. What was said by you to them or by them to you about the cattle being in the yards there for them?

By Mr. Ball: Objected to by the plaintiffs unless it is shown first that these parties were the proper parties, with the traffic department of the Missouri Pacific to make arrangement for the further shipment of the cattle.

By the Court: You better show what the custom was of dealing with this company.

Q. State if you know what the custom was in shipping cattle through Kansas City in regard to one road notifying the other road of the arrival of cattle in Kansas City? A. That pertains to the duty of the local agent, which I am not connected with.

Q. The local agent of the various lines? A. Yes sir.

Q. You say that Mr. Downing was the local agent for the Missouri Pacific ? A. Yes sir.

Q. Now you may state what Mr. Downing said to you about the cattle being in the yards there for them?

By Mr. Ball: Objected to by the plaintiffs, as it is not shown that Mr. Downing had any authority.

By the Court: Objection overruled; plaintiffs then and there duly excepting.

A. Either Mr. Stark or Mr. Downing came to me about nine o'clock Saturday morning.

Q. About what time? A. About nine, it might have been a little earlier than that, and stated we had a large shipment of cattle in the yards for Evarts, South Dakota, and that they would take them out if we would furn-

699 ish our equipment for them.

Q. Was that the first notice which you had of the cattle being there? A. Yes sir that is the first notice I had personally.

Q. What was the custom in shipping cattle through Kansas City, in regard to one road bringing them in and the other road taking them out, whether it was the custom for the road bringing them in to unload the cattle and the other company receiving them to load them in their own cars, or otherwise; what was the practice in that regard. A. As I stated before that is the local agent's duty, and while I know what the custom is where cattle are brought in and unloaded, that ends the duty of the delivering line.

Q. And the other carrier loads them into their own equipment and take them forward? A. Yes sir.

Q. That is the usual and customary practice? A. Yes sir.

Q. But you say this matter was not under your jurisdiction? A. No sir.

Q. Now you may state whether or not those agents of the Missouri Pacific Railroad Company, afterward and during that day gave you any notice about taking them out or not taking them out or said anything to you about it? A. They did.

Q. Who was it? A. It was either Mr. Stark or Mr. Downing, I do not remember which.

Q. About what time was that? A. That was about 11 or possibly between 11 and 12, about noon.

Q. What did they say then about taking them out? A. They said they could not take them under any consideration on account of the flood.

Q. On account of the flood? A. Yes sir.

700 Q. Said their track had gone under water; did they say where their track had gone under water? A. No sir.

Q. They could not take them out? A. They could not take them out, no.

Q. Do you know Mr. Steube, the gentleman who sits behind you there? A. I met him at the time of this shipment, of their being unloaded in Kansas City.

Q. Do you know Mr. Frost? A. I know him the same way.

Q. Do you know Mr. L. A. Allen? the stock yards man? A. I do.

Q. Did you see those persons at your office on the morning of May the 30th, 1903? A. I may state I saw Mr. Allen and Mr. Steube, I do not remember of seeing Mr. Frost at that time.

Q. What time was it when you first saw them? A. It was after nine o'clock.

Q. Did you have any conversation with any of them in regard to the shipment of these cattle getting them out of

Kansas City? A. Their visit was evidently in that connection I do not remember the conversation.

Q. You do not remember the conversation? A. No sir, it evidently was in connection with the shipment.

Q. You may state whether or not you stated to them or either of them during that forenoon that you were trying to get the cattle out over the Burlington road? A. I did not.

Q. You were not trying to get them out over the Burlington and had no talk about it? A. No sir.

Q. Did you have any authority to get them out over the Burlington, or have any talk with the Burlington people about the shipment of them? A. I had no authority and had no talk with the Burlington until later in the day.

701 Q. Did you at that time or at any time during that day [so] to Mr. Steube or any persons there that the reason those cattle had not been sent out or that any of them had not been sent out was because it was Saturday and there was not much doing there? A. No sir.

Q. You had no such conversation as that? A. No sir.

Q. So far as you knew the cattle were consigned to go out over the Missouri Pacific road from Kansas City, were they? A. I never knew how the cattle were consigned, I never saw the way bills.

Q. You never saw the way bills? A. No sir.

Q. Was it your understanding at the time you were discussing the cattle, with the Missouri Pacific agents that morning, that the cattle were to go out over their road.

By Mr Ball: Objected to by the plaintiffs; he says he never saw the cattle.

Objection sustained; defendant duly excepting.

Q. You say you had no authority to make any arrangement in regard to the diverting or changing the different contracts which had been made in the matter? A. No.

Cross Examination.

Q. By Mr Ball: You were assistant in Mr Titus' office? A. Yes sir.

Q. Were at this time? A. Yes sir.

Q. You had not control over these cattle after the Santa Fe brought them in had you? A. No sir.

Q. Who did have? A. I do not know that is a legal point.

Q. Who of your road, for your road, if your road had control of them, who did have, after they were brought in and unloaded? A. That would be more directly in the

702 jurisdiction of the local agent.

Q. Who was the local agent? A. Mr. Roberts.

Q. Is he an adjunct of Mr Titus 'office. A. Not directly, he is the local agent, Mr Titus is the general agent.

Q. Who is his superior—who is Mr Roberts' superior? A. The general freight agent; all general agents in fact are his superior.

Q. Mr Titus was? A. Yes sir.

Q. You were under Mr Titus? A. Yes sir.

Q. Now I believe you stated in answer to Judge Angevine's question that the custom was where cattle, I think I got it down correctly—where cattle are brought in, for the out going carrier, for them to load them in their own cars and furnish their own equipment in taking them out? Is that what you said? A. Yes where they are unloaded.

Q. Now that is where they are routed according to the way bills by some particular out-going carrier, is it not. A. I would not construe it that way, I would think any common carrier, any railroad going to take the cattle out would have to furnish their own equipment.

Q. What I mean is, the people who would be expected to take the cattle out would be those who in the absence of any other arrangement, who were named on the way bills, would they?

By Mr Angevine: Objected to as calling for the conclusion of the witness.

By the Court: Objection overruled; defendant duly excepting.

Q. Is not that right Mr Brown? A. I can't answer that directly.

Q. Why? A. Because there are so many different conditions; shipments are diverted sometimes.

703 Mr Angevine: I would like to have you read the last question and answer. (Which are read)

And thereupon the court adjourned until 10 o'clock A M. January 23rd, 1905.

January 23rd, 1905, 10 A. M. resumed.

Q. Mr. Ball: (Resuming Mr. Brown's testimony.) You were assistant in that office in 1903 were you? A. Yes sir.

Q. You know Mr Mullen of the Minnesota & Dakota Cattle Co. A. I met Mr Mullen during the time those cattle were here.

Q. You met him before that? A. I think I did, I would not be right positive.

Q. You don't know whether you met him? A. I would not say so positively now, I am under the impression I did.

Q. Is it not true that the shipping arrangements whatever they were, were made by your road through you personally before the cattle were shipped from Texas?

By Mr Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial and not proper cross-examination, and an attempt to contradict the terms of the written agreement. This is an attempt by parol evidence to change the contract.

By the Court: Yes, the contract is the best evidence.

Mr Ball: The contract shows nothing about the freight rate.

By the Court: I do not think it is proper; Objection sustained; plaintiffs then and there duly excepting.

Q. By Mr Ball: Mr Brown, didn't your road have an arrangement with the Burlington road and with the Chicago Milwaukee road for these shipments, for a cer-
704 tain division between your road for hauling to Atchison, the Burlington road for hauling from Atchison to Council Bluffs and the Milwaukee road for hauling from Council Bluffs to Evarts, South Dakota, in reference to these cattle?

By Mr Angevine: Objected to by the defendant as not proper cross examination; and as incompetent, irrelevant and immaterial.

By the Court: You mean by that any special arrangement other than the through rate which would apply to all connecting carriers; do you mean a special rate in this case?

Mr Ball: No sir, I mean that the rate of one hundred dollars per car from Bovina and from Kenna through, from these points to Evarts; I am asking whether there was any agreement between his road and these other two roads as to the division between them of that rate.

By the Court: You mean any special rule in this case or rule which would apply in all cases.

Mr Ball: I am asking him whether there was such an arrangement between him and the other two roads for a division of that rate.

By the Court: Find out whether there was any special arrangement in this particular case?

Mr Ball: Read the question?—question read.

A. All through rates are agreed upon between the various lines in interest and published tariff sheet.

Q. Will you answer the question, whether your road had such an arrangement with these other two roads.

Mr Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial, and not proper cross examination and calling for a conclusion of the witness, and not for any arrangement that this witness may have made or of which he had personal knowledge.

705 By the Court: I will sustain this objection.

Find out whether in this particular case there was any special arrangement other than the arrangement applied.

Q. By Mr. Ball: Do you know whether in the case of this shipment and the shipment of these cattle from Hereford and Kenna and Bovina, to Evarts, South Dakota, any arrangement between the Sant Fe railroad company and the Burlington and the Milwaukee and St. Paul, as to the division of these car rates between the three carriers?

By Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial, and not proper cross examination, and contrary to the ruling made by this court.

By the Court: You may answer, objection overruled.

A. Not that I know of.

Q. Under the general arrangement for the division of through rates, would apply to any certain proration to this shipment.

Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial, and not proper cross-examination.

By the Court: Objection overruled; defendant then and there duly excepting.

Q. Read the question—question read? A. Yes sir.

Q. Was that under the general rule, that a certain portion of that hundred dollars a car and $111 per car, would go to the Santa Fe railroad for hauling to Atchison, and a certain other portion to the Burlington for hauling from Atchison to Council Bluffs and a certain other portion of it go to the Milwaukee for hauling from Council Bluffs to Evarts?

By Mr. Angevine: Objected to by the defendant as not proper cross examination, and as incompetent, irrelevant and immaterial.

706 By the Court: Objection overruled; defendant then and there duly excepting.

A. Yes sir.

Q. When these cattle came into Kansas City over the Santa Fe road, they got to the end of the Santa Fe line that goes into Kansas City, didn't they? A. From the west, yes sir.

Q. And it was not contemplated that the Burlington should haul them from Kansas City to Council Bluffs for the same pro-rata of that division that they would have gotten for hauling them from Atchison to Council Bluffs?

By Mr. Angevine: Objected to by defendant as incompetent, irrelevant and immaterial, and not proper cross-examination, and not based on any testimony in this case, and because there is no testimony so far that there was any arrangement between the Burlington and the Atchison road to take them from Kansas City.

By the Court: Objection sustained.

Mr. Ball: The testimony is that the general rule of prorating rates applied to this case, that is in evidence, and Mr. Brown testified to that.

By the Court: It is not that; the general rule in the absence of any special arrangement about which he says he knows nothing as to the division of the rates would apply to this shipment.

Mr. Ball: I was asking him whether cattle coming into Kansas City under that rule, the Burlington would be required to haul them from Kansas City to Council Bluffs for the same proration that their road, that they would receive for [for] hauling them from Atchison to Council Bluffs.

Mr. Angevine: The objection is—

By the Court: I do not see anything more to object to.

The plaintiffs then and there duly excepting.

707 Q. By Mr. Ball: Is it not true, Mr. Brown, that the bringing of these cattle into Kansas City, instead of Atchison, disarranged the calculations of your road as to the proration of the freight rate with any other carrier that might take them.

By Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial, and not proper cross-examination, and as calling for a conclusion of the witness, and not for any statement of facts.

By the Court: Objection sustained, plaintiffs then and there duly excepting.

Q. Is it not true Mr. Brown that you knew, and that your office knew of the arrival of the first train of these cattle Friday evening about six o'clock? A. No sir.

Q. When did you know that they first came in? A. At nine o'clock Saturday morning, at about nine o'clock Saturday morning.

Q. The first train? A. Yes sir, all of them or any of them, I knew nothing of any of them until about nine o'clock Saturday morning.

Q. You knew nothing of any of them until, about nine o'clock Saturday morning? A. Yes sir.

Q. You did know about all of them being in here about nine o'clock Saturday morning? A. I don't know how many.

Q. You don't know how many? A. No sir.

Q. Mr. Steube of the Minnesota & Dakota Cattle company and Mr. Frost and Mr. Allen, with them, were they in your office repeatedly on that day, were they not? A. I do not know how often they were there before 12 o'clock, that
708 is Mr. Allen and Steube were, I do not remember the president, Mr. Frost.

Q. Well they were in there early that morning and saw you repeatedly several times did they not about getting these cattle out? A. As I say, I can't say how often they were there, they were there once I remember of.

Q. You do not remember whether they were there—how many times they were there? A. No sir.

Q. You do not recollect that? A. No sir.

Q. You do not deny that they were there a number of times for the purpose of seeing why you did not get these cattle out of here? A. No sir.

Mr. Ball: I want to make an offer to show, I don't know whether I should state it or put it in writing.

By the Court: You may state it.

Mr. Ball: The plaintiffs offer to show by the examination of Mr. Brown, that the defendant railroad company made the contract with the plaintiffs for through shipment from Kenna, New Mexico and Bovina, Texas and Hereford Texas, at a rate of $111 per car from Kenna, and $100 per car from Bovina and Hereford, Texas, that at the time of the shipments defendants had arranged with the Burlington system and with the Chicago and Milwaukee & St. Paul railway company, whereby the Burlington for a certain proportion of the rate would transport the shipments from Atchison, Kansas, to Council Bluffs, Iowa, and said Milwaukee railway, for a certain portion of the rate, thence transport the shipment to Evarts, South Dakota; that by bringing the cattle into Kansas City and the haul from Kansas City to Atchison, had not been calculated upon,
709 and disarranged, the through rate and its division between these carriers; that defendant held the cattle in the yards at Kansas City, and attempted on its part to arrive at some arrangement with some other carrier for the division of the rate at which it had already contracted to deliver the cattle

at Evarts; that defendant did not succeed in making such arrangement, and held the cattle in the yards at Kansas City until they were caught in the flood.

By Mr. Angevine: I object to the different sections of that as it comes up, there might possibly be some competent evidence in that and I do not like to object to a whole chapter at once; I would rather object to it as it comes up.

By the Court: The offer is made; proceed.

Mr. Angevine: I object to it as a whole, if it is offered as a whole; as incompetent, irrelevant and immaterial, and it does not ten- to prove any issue in this case, and is not proper cross-examination of this witness.

By Mr. Ball: I omitted a word in that; the purpose of the offer is not to show how much these people were to pay, that contract is not in dispute any longer if it ever was, but it is to show the circumstances surrounding this shipment, and bearing on the conduct of the defendant after the cattle got here at Kansas City.

By the Court: I would permit you to show the cause of the delay at Kansas City in the shipment by cross-examination of this witness, I think competent to prove, but aside from that the objection will be sustained.

Plaintiffs then and there duly excepting.

Mr. Ball: I will not try to conform in my further
710 examination as I understand to the court's ruling.

Now Mr. Brown under the general proration of rates such as these which existed at the time these cattle were in Kansas City, the haul from Kansas City to Council Bluffs by any railroad would not be the rate, or the same proration of freight as from Atchison to Council Bluffs, would it?

By Mr. Angevine: Objected to by defendant as incompetent, irrelevant and immaterial and not proper cross-examination.

Objection overruled, defendant duly excepting.

A. I would think not unless a special agreement was made between the two different lines.

Q. You know that under the general proration of rates between those points that the same allowance would not be for haul from Atchison to Council Bluffs as would be for the haul from Kansas City to Council Bluffs?

By Mr. Angevine: Objected to by defendant as incompetent irrelevant and immaterial and not proper cross-examination; this witness did not testify a word in making the rate and contract of shipment, he knew nothing about it as far

as his testimony shows; he did not participate in it, and there is no evidence in the record of his participating in making the contract or rates.

By the Court: Objection overruled, defendant then and there duly excepting.

A. That is a general rule.

Q. What is a general rule? A. That the rate from Kansas City would not apply as from Atchison.

Q. That is it would not be the same? A. No.

Q. So that if a shipment were made that was to go by the Burlington from Atchison to Council Bluffs, and that shipment came in here to Kansas City, there would have to
711 be some special arrangement with some other carrier to make that haul from Kansas City to Council Bluffs.

By Mr. Angevine: Objected to by defendant as not proper cross-examination; as incompetent, irrelevant and immaterial; and as calling for a conclusion of the witness.

By the Court: Objection overruled, defendant then and there duly excepting.

A. With some other carrier or with the Burlington.

Q. I mean some other carrier other than the Santa Fe? A. Yes sir.

Q. Now was there to your knowledge, your [personaly] knowledge, any such special arrangement between the Santa Fe and the Burlington or any other carrier for the haul from Kansas City to Council Bluffs of these cattle?

By Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial.

By the Court: [Objected] overruled; defendant excepting.

A. No sir.

By the Court: I understand you under the general rule cattle shipped from Texas points as these cattle were to Evarts, South Dakota, the freight rate would be divided if they went by Atchison between the companies carrying them with a certain ratio? A. Each line receives a certain proportion.

Q. If the cattle went by Kansas City under the general rule would they receive a certain ratio? A. Yes sir.

Q. In the absence of any agreement other than this? A. In the absence of any special agreement, yes sir.

Mr. Ball: The rate Mr. Brown, if the cattle came by way of Kansas City, the through rate, if they were originally intended to come by way of Kansas City, would be
712 more, would it not, than if they were to go by way of Atchison?

By Mr. Angevine: Objected to by defendant as incompetent, irrelevant and immaterial, and not proper cross-examination.

Objection overruled; defendant duly excepting.

A. I do not know.

Q. The mileage haul for that company by way of Kansas City would be quite considerably greater than it would be if they went by way of Atchison, would it not, from Hereford, and Bovina and Kenna to Evarts, the mileage haul would be greater if the cattle came through Kansas City, than if went by way of Atchison? A. Yes sir.

Q. And don't you know that in that case the rate to be prorated between these carriers would be different if the cattle were hauled through Kansas City than from what it would be if hauled through Atchison? A. The question of mileage does not always enter into a through rate.

Q. I was asking you Mr. Brown, if you do not know that the rate would be greater? A. No sir.

Objected to by the defendant.

By the Court: He said he did not know.

Q. Do you know whether it would or not? A. I do not know.

Redirect Examination.

Q. By Mr. Angevine: Did you have anything to do with making the rate governing the shipment of the cattle from points in Texas, to a point in Dakota, over the Santa Fe, and through rates, and was that entirely controlled by other parties. A. Entirely by other parties.

Q. You had nothing to do with establishing those rates whatever they are? A. No sir.

713 Q. Did you have anything whatever to do with making the rates or any part of the rates in this case? A. None.

Q. Did you have anything to do with making the rate, establishing the rate either originally or as changed by way of Kansas City? A. No.

Q. Did you have anything whatever to do with changing the rate in any respect? A. No.

Q. None of the negotiations or arrangements of any kind made through you about the rate by way of Kansas City or any other rate? A. No.

Q. And as a matter of fact, then you do not know whether any special rate was made in this case or not, do you? A. No sir.

Q. You don't know whether any special rate was made by way of Kansas City, do you? A. No sir.

Q. When do you say you first learned of the arrival of the cattle in Kansas City? A. About seven o'clock Saturday morning.

Q. From what source did you obtain that information? A. From the representative of the Missouri Pacific Railway.

Q. He told you the cattle was there for him, did he? A. Yes sir.

Q. Who was that representative? A. Mr. James Stark, or Mr. Jack Downing.

Q. Mr. Downing, I believe you stated on Saturday, was the freight agent of the Missouri Pacific, at Kansas City, did you? A. Yes sir.

Q. Who did you say Stark was? A. The chief clerk of the general live stock agent of the Missouri Pacific.

714 Q. There was some testimony on Saturday in regard to the request made to you or to your office or to the local live stock agent sometime during the forenoon of Saturday by the Missouri Pacific road for you to furnish equipment for the handling of these cattle; was that request made to you, if there was such a request? A. Yes sir.

Q. By whom was it made? A. By representative of the Missouri Pacific.

Q. By either Mr. Stark or Mr. Downing? A. Yes sir.

Q. About what time in the day was that request made? A. About nine o'clock.

Q. Was that during the first conversation you had with them? A. Yes sir.

Q. The same time you think he told you the stock was there for them? A. Yes sir.

Q. Immediately after that request was made did you send Mr. Roberts to Mr. Sharp's office with the message about them furnishing equipment? A. Yes sir.

Q. Did you have any authority to furnish equipment for carrying that stock? A. I did not.

Q. That matter had to be acted on by others, if acted on at all? A. Yes sir.

Q. About what time did you send him to Sharp's office? A. Between nine and ten if I remember correctly.

Q. Would Mr. Roberts have authority to make any such arrangement about furnishing equipment or letting your cars go off of your own road? A. Personally, no.

Q. That had to be done through other and different departments? A. Yes sir.

Q. Now Mr. Brown, if the way bills that have been shown in evidence or any of them were ever delivered to the Missouri Pacific Railway Company, do you know how they came back into the Santa Fe live stock agent's office in Kansas City?

715 By Mr. Ball: Objected to by the plaintiffs as it assumes that they were delivered and they came back.

Mr. Angevine: I say if they were, how did they get back?

By Mr. Ball: That is an assumption that they did get back; if the witness knows anything about the way bills he can testify.

By the Court: I think he better find out what he knows about the way bills.

Mr. Angevine: The only reason is to save time.

By the Court: Do you know whether these way bills were ever in the Missouri Pacific office? A. No sir, I do not.

Mr. Angevine: Do you know how they came to be in your office after the flood subsided? A. I do not.

Q. You do not know how they got there? A. No sir.

Q. Did you put them there on the desk where you stated they were found; I believe it was you stated? A. No sir.

Q. It was Mr. Roberts. You do not know how they got there? A. No sir.

Q. Do you know about, anything about any of the cattle being returned by the Missouri Pacific Railway company to the stock yards company during the day Saturday, May 30th.

By Mr. Ball: Objected to by the plaintiff as it assumes that the Missouri Pacific ever had any cattle, when there is no evidence that the cattle were ever in their possession.

By the Court: Do you know anything about the Missouri Pacific Railway receiving any of these cattle from the Santa Fe? A. No sir.

Mr. Angevine: I want to prove that by another witness. The purpose is to save calling this other witness.

716 By the Court: I do not think this man has any knowledge of it.

Mr. Angevine: Have you any knowledge of any cattle being returned by the Missouri Pacific to the stock yards or to your company during that day? A. No sir.

Q. When did you first ascertain that the cattle had been returned by the Missouri Pacific to the stock yards company just before the flood.

By Mr. Ball: Objected to by the plaintiffs as assuming that they were returned and the witness has already stated he did not know anything about it.

By the Court: I think so.

By Mr. Angevine: That will be all for the present, I want to recall you after a while.

Recross Examination.

By Mr. Ball: I believe you stated you did not make any arrangement or remember of having made any about the shipment of these cattle; did you say that? A. No sir, I think not.

By the Court: He said he had nothing to do with making the rate.

Mr. Ball: To refresh your recollection, is it not true, that sometime in April, prior to the shipment or before the shipment, at any rate, on the 25th of May the first shipment, is it not true, Mr. Mullen came to your office and with you personally arranged about through rates from Kenna and from Bovina, Texas, for the shipment of these cattle in anticipation of the shipment, that you told him that the rate was $100 per car from Bovina and $111 from Kenna and the route would be by Atchison, Topeka & Santa Fe to Atchison, by the Burlington from Atchison to Council
717 Bluffs, and by the Milwaukee from there to Evarts, and that you wrote down a memorandum of that on a piece of paper right in your office and tore it off on the side of the desk and gave it to him?

By Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial and an attempt to prove by parol testimony a contract different from the contract in writing and beside it is not proper cross-examination, for the witness did not testify on that point on direct examination but did testify on the stand, that he did not participate in making these rates, or rather they were made by other parties.

By the Court: I am going to allow him to answer this question; I apprehend the object is to show it was understood between the parties at the time these cattle were shipped that they should go by Atchison, Kansas; I take it there is no question about that at all.

Mr. Ball: But he has denied as I understand, I do not think he meant it.

By the Court: He may answer that question. Defendant duly excepting.

Q. Read the question—question read? A. It is possible that such is the case, I meet too many men to recall them all.

Q. Is it not your best recollection now, your memory being refreshed, by the details of that question, that that happened? A. I say it is possible.

Q. You do not remember whether it did or not? A. No sir.

Q. Now you stated that the first you heard of these cattle being in the yards, you learned from a representative of the Missouri Pacific? A. Yes sir.

Q. Who was that? A. Either Mr. James Stark, or Mr. Jack Downing.

718 Q. Why do you say it was either Mr. James Stark or Mr. Jack Downing—either one of them? A. Because both might bring such things to me.

Q. Now we were asking you what you recollect about it? A. I do not remember which one of them it was.

Q. If you remembered the fact, would you not remember the man who told you about it? A. Not necessarily.

Q. Was it Downing or Stark? A. I don't know.

Q. Where was it he told you about it? A. In our office.

Q. Do you remember of his being in there? A. I remember of one of them being in there?

Q. Which one? A. I don't know.

Q. You know them both well? A. Yes sir.

Q. Who is Stark and Downing? A. Mr. Stark is chief clerk of the general live stock agent of the Missouri Pacific.

Q. That is Mr. Douthitt? A. Yes sir.

Q. And who is Mr. Downing? A. He is the local live stock agent.

Q. He is connected with Mr. Douthitt's office also. A. He is the local agent, he is under Mr. Douthitt to a certain extent.

Q. He is subordinate to Mr. Douthitt? A. Yes sir.

Q. What time of day was it that either one of these men were in there? A. About nine o'clock Saturday morning.

Q. How do you recollect that fact? A. I do not recollect which one of the men was in, because it was shortly after I reached the office.

Q. You made no memorandum of it? A. No sir.

Q. Your office didn't know anything about this train coming in Friday night? A. No sir.

Q. Your night people brought it in? A. I suppose
719 so, but I would not necessarily know it.

By the Court: Is that all?

Mr. Ball: Yes sir.

Mr. Angevine: Whatever memoranda were made and kept in your office, were covered by the flood at that time were they? and destroyed? A. Yes sir.

John J. Sullivan, sworn. Testified on behalf of the defendant as follows on

Direct Examination

By Mr. Angevine:

Q. What is your name? A. John J. Sullivan.

Q. What was your business during the latter part of May and fore part of June, 1903? A. Night chief clerk of the Santa Fe.

Q. Working night for Mr. Sharp? A. Yes sir.

Q. Mr. Sharp is the superintendent at Kansas City, and you are the chief clerk? A. Yes sir.

Q. Are you now in the employ of the Santa Fe? A. No.

Q. How long since you ceased your connection with the company? A. January 19th.

Q. This year? A. Yes sir.

Q. What time in the evening did you go on duty in the latter part of May and the fore part of June, 1903? A. Six o'clock.

Q. In the evening? A. Yes sir.

Q. And at what time next morning, would you go off of duty? A. 7 a m.

720 Q. Your hours for working were from six o'clock in the evening until seven a. m. A. Yes sir.

Q. During those hours you were the chief night clerk? A. Yes sir.

Q. Do you remember of a train load of 20 cars of cattle delivered by the Santa Fe road to the Missouri Pacific road on the morning of May 30th, 1903, before you went of- of duty that morning? A. Yes sir.

Mr. Botsford: We object to that; it seems very objectionable to ask these questions leading right along on matters which are in controversy here.

We object to the question and answer on that ground and moved to strike it out.

Objection and motion overruled; plaintiffs then and there duly excepting.

Q. By Mr. Angevine: What business would you have to perform in connection with your transfer of that train of stock? A. Have to see that the bills were gotten over to the Missouri Pacific, and take and make those records.

Q. Would you make a record of that train? A. Those way bills.

Q. Would you make a record of the train containing the number of cars or have it done under your direction? A. It would be done under my direction.

Q. Was a record made of that train at that time? A. Yes sir.

Q. I will ask you to look at the two sheets I hand you, and ask you if that is the record of that train which was made out at your office at that time? A. Yes sir, this is the record of the way bills for this stock.

Q. In whose handwriting is that record? A. A young man by the name of Winthrop he was working there.

Q. Do you know where he is now? A. No sir, I do not.

Q. He is not working for the Santa Fe? A. No sir.

721 Q. Was this record made under your direction at that time? A. Yes sir.

Q. What is this record made for? A. That is the receipt the Missouri Pacific sends for the bills.

Q. Is this the record made at your office and sent over to the Missouri Pacific office with the bills? A. Yes sir.

Q. State whether or not you directed this record to be made and sent to the Missouri Pacific at that time? A. I did.

Q. Did you deliver the 20 way bills to this clerk Mr. Winthrop and direct him at that time to take the way bills and this record to the Missouri Pacific yard yourself?

Objected to by the plaintiffs as leading, putting the words in the mouth of the witness, one question after another.

Q. What did you do in reference to this record, which you have designated as a receipt and with the way bills at that time with the 20 way bills for the 20 cars of cattle. A. Sent them to the Missouri Pacific.

Q. To what office of the Missouri Pacific? A. To the yard office.

Q. You may state whether or not that is the office that such way bills and receipt were ordinarily sent to? A. Yes sir.

Q. I will ask you to examine the way bills which have been introduced in evidence, or the one which has been introduced in evidence and state if you made any notation or memorandum on those way bills before sending them to the Missouri Pacific office? A. Yes sir. Changing this right here.

Q. Show it to the jury, or state what the change was; I will select the one which is introduced in evidence; I will

ask you to examine way bill which is marked plaintiff's
722 exhibit number four, and state what notation you made upon that before sending it to the Missouri Pacific office? A. This routing here was changed, I scratched that Atchison and Kansas City St. Joe & Council Bluffs and put Kansas City and Missouri Pacific.

Q. Mo. P. is that in your handwriting? A. Yes sir.

Q. Was that notation and change made in all of the way bills before being sent to the Missouri Pacific offices? A. Yes sir.

By the Court: Let me see that way bill.

Mr. Angevine: The change which you made then was by striking out the word Atchison, and the words K. C. St. Joe & Council Bluffs and writing instead of Atchison, the letters K. C. and in the place of Kansas City St. Joe & Council Bluffs, the words, Mo. P.? A. Yes sir.

Q. What do the letters Mo. P. mean? A. Missouri Pacific.

Q. And what do the letters K. C. mean? A. Kansas City.

Q. Those letters and changes were made in all of the way bills before they were sent over? A. Yes sir.

Q. Were those way bills returned to your office? A. Not that I know of.

Q. Did you ever see them again until you saw them this morning? A. No sir.

Q. Was that record which you have designated as a receipt, ever returned to your office or the offices of which you are the clerk? A. I could not say as to that; was here by the stamp.

Q. It has been stamped in the usual course? A. Yes sir.

Q. Returned in the ordinary way was it? A. Yes sir.

Q. What was the customary way of returning these
723 receipts? A. Take and put the stamp on it or signing it or sign the agent's name, or stamp the agent's name on it, date, and return to the line from which you received the bill; in other words it is a receipt for bills.

Q. I will ask you if that stamp on each of these sheets, is the usual and ordinary stamp used by the Missouri Pacific railway company at that time in stamping receipts of that kind? A. I could not say as to that, that is not the regular stamp.

Q. It is not the regular stamp? A. No sir, the regular stamp has the agent's name on it.

Q. The regular stamp has the agents name on it? A. Yes sir, that is the passing stamp for the record of way bills, passing through the yards.

Q. You say this is a passing stamp? A. Yes sir.

Q. Of the Missouri Pacific? A. Yes sir.

Q. And this receipt which you forwarded with the way bills by the clerk? A. Yes sir.

Q. Did Mr. Winthrop bring it back to you at that time? A. No sir, they were not returned for probably a couple of days after, something of that kind.

Q. For what purpose was that kept by the company receiving them until such time as they returned them. A. It is supposed to be a receipt for the way bills.

Plaintiffs object to the supposition of the witness.

Q. Was that kept for the purpose of checking up and comparing with the way bills, making a record of them? A. Yes sir.

Q. And afterward returned in the usual course after record is made? A. Yes sir.

Q. Is that correct? A. Yes sir.

Mr. Angevine: I will now offer this in evidence.

Q. The two sheets make the one record or receipt for that one train do they? A. Yes sir.

724 Q. How are these receipts kept by the Santa Fe after they are returned? A. Kept on the file in the record room.

Q. In the record book bound together in a book and kept together in a file of such papers? A. Yes sir.

Q. Personally, I believe, you did not take this from the file? A. No sir.

Q. It was brought here this morning by somebody else? A. Yes sir.

Q. You have no access to the files now? A. No sir.

Mr. Ball: We object to that unnecessarily encumbering the record.

Mr. Angevine: I will ask you a little further about that; you say this receipt was made out and sent over with the way bills on the morning of the 30th of May, 1903, was it? A. Yes sir.

Q. Before you went off of duty? A. Yes sir.

Q. Within the next day or two there was a flood there which submerged the various offices there? A. Yes sir.

Q. Do you know whether the Missouri Pacific offices were flooded so that their office furniture and fixtures were destroyed? A. Yes sir and also part of our office.

Q. Do you know whether the stamp which they had used prior to that time was used by them after that flood, did you

see the same stamp on the way bills after the flood or was a new stamp used after that? A. I could not say as to that.

Q. You do not remember as to that? A. No sir.

By the Court: Do you know whether this rubber stamp of the Missouri Pacific was stamped upon here at the time it was sent over to the Missouri Pacific office? A. I could not say that.

Q. Was this stamp put on in your office? A. That
725 Missouri Pacific stamp, no sir.

By the Court: The objection will be overruled; plaintiffs then and there duly excepting.

Mr. Angevine: Was this Missouri Pacific stamp on these sheets when they were returned to your office? A. I did not see those returned, I have never seen them until this morning, just now.

Q. You never saw them from the time you delivered them to the clerk Winthrop to take them over there until this morning? A. No sir.

Q. I believe you stated in the usual course of business it would be two or three days before these receipts would be returned? A. Yes sir, probably a week.

Q. And if they got back during the night time while you were on duty, they would probably come to you, and if they came during the day time they would come to the day clerk, what would be the practice? A. Those came back in the mail, railroad business, of course, we clerks have nothing to do with opening the mail.

Mr. Angevine: Reading—

Weekly statement of inter-line way bills and local transfers for freight delivered to the Mo. P. Ry., at Kansas City, Missouri station, week ending May 30th, 1903, way bill date 5 26 series m number 180, car initials P V 5080, from name of station, Bovina, Texas, name of road P & N E, to name of station, Evarts, South Dakota, name of road Mo. P. consignee and destination, Minnesota and Dakota; description of freight, 38 steers weight 22000, freight 100;

I will ask you what this date in the first column refers to; does it refer to the date of the way bill. A. Yes sir, date of the way bill.

726 It is under the head of way bill, 5, 26, series m number 180, that refers to the description of the way bill the railroad number and series. Mr. Angevine continuing reading same date: Series m 181 A T 53535, ditto marks under the heading name of station from which the shipment and over which road, Evarts, S D & Minnesota M D, num-

ber of cattle 38, weight 22000, freight $100. The next is
3 the same date and is way bill 182 P V 5081, Bovina,
Texas, Evarts, South Dakota, Minnesota & Dakota, name of
road, Mo. P. 38 steers, weight 22000 pounds, freight $100;
4 5 26 series m 183, initial S W S, number 1409, name of sta-
tion Bovina, Texas, P V N E to Evarts, S. D. name of road
Mo. P. Minnesota & Dakota, 38 cattle weight 22000, $100
freight. Next the same date, way bill 184, initial S W S
5 number 312, Bovina, Texas, P & N E to Evarts, South
Dakota, name of road Mo. P., Minnesota & Dakota, number
of cattle 39, weight 22000, freight $100.

6 The next is the same date, way bill number 185, A T,
52605, Bovina, Texas, Evart South Dakota, Minnesota &
Dakota, 39 cattle, weight 22000, freight $100.

7 186 A T 53759, Bovina, Texas, P & N E, Evarts, S. D., Min-
nesota & Dakota cattle company, number of cattle 39,
8 weight 22000, freight $100; next number 187 A T 53428, Bo-
vina, Texas, Evarts South Dakota, Minnesota & Dakota
cattle company, 39 cattle, weight 22000, freight $100; next
9 way bill 188 initial P V number 5212, Bovina, Texas, P &
N E, Evarts, South Dakota, Minnesota & Dakota Cattle Com-
pany, and number of cattle 39, weight 22000, freight $100.

10 Way bill 189 A T, 53964, Bovina, Texas, Evarts South
Dakota, Minnesota & Dakota cattle company, 39 cattle
weight 22000, freight $100.

11 Way bill 190 P V 5009 from Bovina, Texas, to Evarts,
South Dakota, Minnesota & Dakota Cattle Company, num-
ber of cattle 39, weight 22000, freight $100.

12 Same date, way bill 191 car P V 5005, from Bovina,
727 Texas, to Evarts, South Dakota, Minn. & Dakota Cat-
tle Co. number of cattle 39, weight 22000, freight
$100.

13 Same date, way bill 192, S J V 60030 from Bovina, Texas,
to Evarts, South Dakota, Minnesota & Dakota Cattle Com-
pany, number of cattle 39, weight 22000, freight $100.

14 Same date 194, car initial P V 5099, station Bovina, Texas,
P & N E station Evarts, S. D. consignee, Minn. & Dakota
Cattle Co. number of steers, 39, weight 22000, freight $100.
(I see one matter I overlooked in reading the column of
name of the road, it is marked Mo. P which translated is
Missouri Pacific.)

15 The next one in order is 195, A T, 52655, Bovina, Texas,
Evarts, South Dakota, Mo. Pac. Minn. & Dak. Cattle Co., 39
steers, weight 22000, freight $100.

Next one is 9 Wellington, Kansas, to Evarts, S. D. over
16 Mo. P., Minn. & Dak. Cattle Co., under the head description
of freight is marked "feed" under heading of freight 81,
weight 16700.

Next one series m 112 car A T 53962, Kenna, N. M. Evarts, South Dakota by Mo. Pac. Minn. & Dak. Cattle Co., 38 cattle, 22000, freight $111.

Next same date, series m 113 A T number 53150 from Kenna, N. M. to Evarts S. D. Minn. & Dakota Cattle Co., 39 cattle, weight 22000, freight $111.

Next number 114 A T number car 54411 Bovina, Texas, P & N, Evarts, S. D. Mo. P. Minn. & Dak. Cat. Co., 39 cattle, weight 22000, freight $111.

The next is the same date No. 193 A T No. car 53473, Kenna, N. M., P N T to Evarts, S. D. Mo. P. Minn. & Dak. Cattle Co. steers 39, weight 22000, freight $100.

Same date way bill 179 car P V 5064, Kenna, N. M. Texas to Evarts, S. D. 38 cattle, weight 22000, freight $100.

728 Q. I notice at the bottom of these sheets is a printed form which I read: "send carbon copy to audit office and one to Mr. James Peabody, Chicago. Received the property covered by the way bills enumerated herein; agents must obtain receipt of agent of connecting line, on this form, for all freight delivered to connecting lines covered by interline way bills. Blank line for the agent's name and blank line for signature, and not filled out.

There are two stamps on here, one by the Missouri Pacific Ry. Co. freight office, June 30, 1903, passed, Kansas City, Mo. And the other is A T & S F Ry Co., local office July 4, 1903. Kansas City, Mo.

The same lettering and printing on the bottom of the other sheet and stamped on the face of it.

Can you explain this line which is marked C M & St Paul, 9 Wellington, Kansas, feed 11881? A. Yes that is feed bill, stock fed at Wellington, Kansas.

Q. That is not one of the cars to the train? A. No sir.

Q. And the same refers to that bill? A. Yes sir.

(The above having been marked defendant's exhibits 14a and 14b and as herein above copied, were read in evidence.)

By Mr. Ball: The plaintiffs move to strike out exhibits 14a and 14b, as being incompetent, irrelevant and immaterial, and does not tend to prove that these cattle were received by the Missouri Pacific Railway Company; and all of the testimony shows that all of these cattle were, including these cars mentioned, remained in the custody of the Santa Fe railroad company after conveying them to Emporia, and from there shipped.

By the Court: Objection overruled; plaintiffs then and there duly excepting.

729 Cross-Examination.

Q. I believe you stated you were night clerk, chief clerk in Mr. Sharp's office, of the Santa Fe at this time? A. Yes sir.

Q. That is in May and June 1903? A. Yes sir.

Q. Where were your offices? A. We were at 14th and Hickory.

Q. You were at 14th and Hickory? A. Yes sir.

Q. What were your office hours? A. Six p. m. to 7 a. m.

Q. That is in the office until 7 next morning? A. Yes sir.

Q. When did these way bills come into your office? A. I could not give you the exact time.

Q. What time on the morning of the 30th of May did you leave your office? A. 7 a. m.

Q. You arrived promptly I presume in there at your evening hour and left probably at the hour your time was up? A. Yes sir.

Q. How did these way bills issued at Bovina, Texas come to your office? A. They traveled with the cars.

Q. What is that? A. They travelled with the cars.

Q. Came with the train? A. Yes sir.

Q. Conductor bring them? A. He did not bring them to Kansas City.

Q. Where does he bring them to? A. That train was received at the south end of the yard.

Q. How is that? A. That train was received at the south end of the yard, and the switchman in charge of the crew brought the way bills to 12th street, that is 12th street near the depot yard office where they are delivered to the Missouri Pacific.

730 Q. What time was it that the switchman brought these bills? A. I could not say in regard to the time—as to the bringing in of the way bills, he delivered to the yard clerk and the yard clerk brought them to me.

Q. Do you remember that fact? A. No sir, I do not remember.

Q. You are just telling how it ordinarily would be? A. Yes sir.

Q. You do not remember of an instance of the bills being brought to you? A. I remember of them being brought into the office by the yard clerk.

Q. You remember that fact? A. Yes sir.

Q. Who was the yard clerk? A. Harry Evans.

Q. Your duties are entirely inside of the office? A. Yes sir, inside.

Q. And Evans brought these bills in what time in the morning, that morning, did he bring them in? A. I could not say as to the time.

Q. Before 7 a. m. A. It was before 7 a. m.

Q. It was before seven o'clock in the morning? A. Yes sir.

Q. You do not remember as to that? or how long? A. I could not say as to that.

Q. Was it dark or daylight? A. I could not say as to that.

Q. Do you remember of the fact of his bringing them in there? A. Yes sir.

Q. Now in whose hand writing is that where the [wrod] Atchison, is stricken out and K C above it, and K C St Joe & C B stricken out and Mo. P. below it. A. That is mine.

Q. You did that? A. Yes sir.

Q. At the time these bills came into your office then, that word, "Atchison" was not stricken out, and neither was "K C. St. Joe & Council Bluffs?" A. No sir.

731 Q. And you made that change after Evans brought them into you? A. Yes sir.

Q. What did you do it for? A. I could not say why I did it only we had instructions, had orders to deliver the cars and stock to the Missouri Pacific at Kansas City.

Q. You had orders? A. There was orders out, I could not say whether I had the orders, there was orders out, I had some authority to do that.

Q. Do you remember about it, is what I am getting at? A. Yes sir.

Q. Who told you to do that? A. I could not say who, whether it was the general superintendent or the freight auditor.

Q. You do not remember then who did tell you to do it? A. No sir, I do not remember who it was.

Q. In whose hand writing are 14a and 14b? A. Hurley Winthrop.

Q. Those two 14a and 14b are in the handwriting of Hurley Winthrop? A. Yes sir.

Q. Who is he? A. He was a clerk under me.

Q. When were they made? A. On that date.

Q. What time? A. I could not say.

Q. Before seven o'clock? A. Yes sir.

Q. How long before? A. I could not say.

Q. The cattle had not been unloaded as a matter of fact then? A. I do not know anything about the cattle; I had nothing to do with the cattle.

Q. You do not know when they got into the yards do you? A. No sir I do not.

Q. Was Winthrop a subordinate? A. Yes sir.

Q. He just checked these way bills and car numbers as shown by the way bills and entered them in this thing? A. Yes sir.

732 Q. And he did that some time before you left seven o'clock that Saturday morning? A. Yes sir.

Q. Don't you know where these cattle were at that time? A. No sir I had nothing to do with the cattle at all; all I am supposed is to hand these way bills to the Missouri Pacific.

Q. Where is Winthrop? A. I could not say.

Q. Look at this paper which I hand you (defendants exhibit number 15) market exhibit 15 and state if you know in whose hand writing that is?

Mr. Angevine: I did not have that paper marked any exhibit in this case, because I did not want it taken out of the files; it is a paper in the regular files and I prepared a copy here and will ask that it be marked, and used as an exhibit instead of this one.

Mr. Ball: That is all right.

[—] In whose hand writing is that? A. Mr. Evans.

Q. And he is the man you say brought in these yard bills? A. Yes sir.

Q. Do you know when he made that up? A. No sir.

Q. It says there at the top 6:35 a. m.? A. Yes sir that is the time, that is the yard clerk's handwriting.

Q. What yard clerk? A. The man signed Isitt's name.

Q. Isitt's never signed that? A. No sir.

Q. And Mr. Sharp did not sign it there? A. That is his representative.

Mr. Angevine: What explanation were you going to make there, Sharp not signing it? A. No sir not personally.

Mr. Ball: Is Sharp's signature on there? A. No sir not personally.

Q. Who put it there? A. Evans.

733 Q. Did Evans write that? A. Yes sir.

Q. Wrote Isitt's too? A. No sir I could not say whether he wrote it or not, he is not supposed to write it.

Q. Who wrote R P Isitt on there? A. I don't know.

Q. Might [—] funny business? A. Don't look like his handwriting.

Q. This says, does it not, 6:35 a. m. A. Yes sir.

Q. Those cattle were not in the yards at that time were they? A. I could not say anything about the cars of cattle or anything.

Q. Where did Evans get those car numbers? A. From the cars.

Q. Or the way bills? A. The cars.

Q. He got them from the cars? A. Yes sir.

Q. He did not have the way bills when he made this out? A. I do not know whether he had the way bills or not.

Q. How do you know where he got them? A. From the cars.

Q. How do you know, he did not have anything to do with the way bills? A. The way bills come over to me in a package like that or bunch and he is not supposed to handle the way bills at all, I don't know but what he may have got them.

Q. Now if you will just distinguish between what is supposition and what you know, we will get along faster;—do you know where he got these numbers. A. No sir, I could not say.

Q. So you do not know whether he got them from the cars or from the way bills? A. No sir or whether he got them from the conductor's report or where he got them.

Q. You do not know as a matter of fact whether the Missouri Pacific ever got any cattle which were in these cars? A. No sir.

Re-Direct Examination.

734 Q. By Mr Angevine: Mr Evans, whom you have spoken about, you say was the yard clerk in your yard was he? A. Yes sir.

Q. Where does the yard clerk get the numbers of the cars on which he makes a report or sheet like this?

Mr Ball: Objected to by the plaintiffs—he said he did not know where he got them.

Mr Angevine: What is the usual practice as to where he got them.

By the Court: Objection overruled.

A. Take them from the cars.

Q. The usual and customary practice is for the yard clerk to go along the train and take the numbers of the cars as he finds them there, is it.

Mr Ball: Objected to by the plaintiffs as leading; and we ask that the witness be allowed to testify instead of Mr Angevine.

By the Court: It is leading.

A. Witness: Yes sir.

Q. By Mr Angevine: Personally you did not know where he got these numbers? A. No sir.

Q. You do not know whether he got them in the usual and ordinary way or not? A. No sir.

Q. What is the usual and customary practice at your office about signing Mr Sharp's name to receipts of this kind, does he do it personally or does some clerk usually do it? A. Some clerk.

Q. Do you know in whose handwriting Mr Sharp's name is? A. Yes sir.

Q. Who wrote it? A. Harry Evans.

Q. That is his signature? A. Yes sir.

735 Q. Do you know Mr Isitt's signature? A. I know his personal signature.

Q. Is this his personal signature? A. No sir.

Q. What was the usual practice in receiving receipts, like receipts from other offices, were they signed personally or by some clerk usually?

By Mr Ball: Plaintiffs object to the testimony, as it shows that it is necessary for the agent to sign.

Objection overruled, plaintiffs then and there duly excepting.

Q. By Mr Angevine: Was that receipt signed in the way Mr Isitt's name was usually signed to such receipts? A. Yes sir it is signed.

Q. Do you know Mr Evans' handwriting? A. Yes sir.

Q. I will ask you if that signature R P Isitt is Mr Evans' handwriting? A. No sir it don't look like it.

Mr Angevine: I will ask and submit both of these signatures to the jury. (Shown to the jury)

[—] At what time did Hurley Winthrop go on duty and go off duty at the time you have spoken of. A. 6 p. m. and 7 a. m.

Q. His hours were the same as yours? A. Yes sir.

Re-Cross Examination.

Q. By Mr Ball: You stated Mr Sullivan, I believe, that you did not know who signed Mr Isitt's name? A. No sir.

Q. You do not know who usually did sign his name, do you? A. No sir.

Q. The stamps on exhibits 14a and 14b, A T & S F Ry. Co. local office, July 4th, 1903, Kansas City, Missouri, that

shows that these cars were still in the custody of the
736 Atchison Topeka & Santa Fe Railroad company, at that time does it not. A. I do not know where the cars were.

Q. That is what that stamp means is it not? A. No sir, that had nothing to do with the cars at all, that stamp is for the way bills on any cars.

Q. Is for the way bills? A. Yes sir.

Q. This Atchison Topeka & Santa Fe Railroad company, local office, July 4th, 1903, is what you put on the way bills has nothing to do with the cars.

Q. On what way bills. A. Couple of them there was.

Q. That stamp was put on there about a month after the time of the flood? A. That is what that stamp is used for.

Q. It was put on about a month afterwards? A. I do not know.

Q. That date there July 4th, was put on at that time, at that date wasn't it? A. Yes sir, I guess so.

Q. Usually it would be? A. Yes sir.

Q. That was usually put on the way bills? A. That stamp has no signification at all.

Q. What do you usually put in on there for? A. I could not say.

Q. Was it customary to put them on? A. No sir, these receipts, and bills to the Missouri Pacific, and the Missouri Pacific stamps it or signs it.

Q. The Missouri Pacific never had these cattle, you know it, do you not? A. I don't know nothing about the cattle.

Q. Do you know why that stamp of the Santa Fe was put on there July 4th? A. No sir.

Q. Was it customary to put that stamp in there? A. No sir, I could not say it was.

737 Q. You say you could not say it was? A. No sir.

Q. Could you say it was not? A. No sir, put all kind of stamps on there if you want to.

Redirect Examination.

By Mr. Angevine: That Santa Fe stamp simply shows the time it was returned to their office and filed, does it not? A. It should, yes sir.

Q. That is all it is used for, is it not?

Mr. Ball: Objected to by the plaintiffs as leading; and for the further reason that the witness said he did not know what it was for.

Objection overruled; plaintiffs then and there duly excepting.

Q. Mr. Angevine: Is the Santa Fe stamp on this and similar papers used for any other purpose, only for showing the time it is returned to their office. A. That is what that stamp is supposed, yes sir, that is just the assistant chief clerk's stamp.

Q. Now you have said before that the usual course would be to take this receipt for the way bills, with the way bills to the Missouri Pacific office and there leave them, and that after they got through checking them up, they would then return them by mail or railroad mail in the usual course of business to your office.

Mr. Ball: Objected to by the plaintiffs as leading and not proper redirect examination.

By the Court: It is leading.

Q. How many days would it usually be before this receipt would be returned to your office. A. In the usual line of business it would take about a week, or three days, or a week something like that.

738 Q. Three days to a week? A. Yes sir.

Q. Now if this receipt was sent by you to their office on Saturday morning, May 30th before seven o'clock and during that day and the next succeeding days a flood occurred in Kansas City which would submerge their office and keep it submerged for several days, would that receipt usually get back, would it get back to your office before the tenth day of June, considering the conditions which existed in Kansas City at that time and for a few days following.

Mr. Ball: Objected to by the plaintiffs as assuming an unusual state of conditions and then ask the witness what usually happens.

By the Court: Objection sustained.

Q. Mr. Angevine: If the practice was for these papers to be returned every three days after being sent over, a flood occurred there during the same day, it probably would not get back that day? A. No sir.

Q. Now what does this receipt purport to be, what is it for, for the cars or way bills? A. Way bills.

Q. Has nothing to do with the cars? A. No sir.

Q. Only way bills of the cars? A. Yes sir the other is receipt of the cars.

Q. No receipt is made and furnished for the cars is it? A. Yes sir.

Q. Do you make it out that receipt or is it made by somebody else? A. It is made by the yard clerk.

Q. You have nothing to do with that? A. No sir.

Q. This kind of a receipt is made for cars? A. Yes sir.

By the Court: You have testified as to the significance of the stamp of the Santa Fe Railway company on here, what is this stamp of the Missouri Pacific on here for. A. That should have been a stamp had the agent's name to it.

739 Q. What does this stamp on here now mean? A. That is a passing stamp.

Q. What does that mean? A. Record put on way bills when they pass through town, say a car from St. Louis going to Omaha they would stop here and put the passing stamp on it.

Q. How was this stamp out on here June 30, a month after the flood? A. I could not say.

Mr. Angevine: I will ask you if any receipts of that kind which were sent over, on Saturday, the 30th, were returned until after the flood subsided and after they got their offices in working order again. A. I could not say as to that.

Q. You do not know whether any of them were or not? A. No sir.

Q. About how long was it after May 30th, before the offices in the bottom, the river bottoms, were cleaned up and fit to do business in. A. The Missouri Pacific their yard office, the end of it was tore out by the flood and they were crippled for a month or so, I guess two months their local office was running all right.

Q. To whom do these receipts come, to the yard office or the local office for signature? A. I do not know how the Missouri Pacific handle them; we take the bills with that receipt to the yard office.

Q. You deliver these bills to the yard office you say? A. Yes sir.

Q. And they handle their own business in their own way? A. Yes sir.

Q. You say the end was torn out of that yard office? A. Yes sir.

Recross-Examination.

740 Mr. Ball: Mr. Sullivan, that freight office, June 30th that would mean the time when these were passed by the Missouri Pacific would it not that stamp? A. I don't know what the stamp is on there for; that stamp should not have been on there.

Q. And usually the signature of the Missouri Pacific agent should be on there? A. No sir, not the signature, stamp that agent's name.

Q. This generally must be done the receipt of the agent of the connecting line on this form for all freight delivered to the connecting line covered by inter-line way bills? A. Yes sir.

Q. That was your instruction and no such signature on here is there? A. Stamped there I suppose.

Q. This stamp of June 30th ought not to be on there? A. Not a correct stamp I don't know whether it ought to be on there or not.

By Mr. Angevine: What was the character of the stamp used prior to the flood?

By Mr. Ball: Objected to by the plaintiffs.

Objection sustained.

Mr. Ed Davis, sworn, testified on behalf of the defendant as follows on

Direct Examination.

Q. By Mr. Angevine: What is your name? A. Ed Davis.

Q. What is your business? A. Work for the stock yard company.

Q. In what capacity? A. Foreman of the Missouri Pacific side.

741 Q. Foreman in the Missouri Pacific side of the yards? A. Yes sir.

Q. Is there a foreman for each end of the yard? A. Foreman for each division.

Q. Which division embraced the Missouri Pacific end of the yard; which side of that yard is that? A. North.

Q. What are your duties in regard to receiving cattle into the yards? A. [A.] Take the car load and see that they are unloaded and yarded properly.

Q. Were you such foreman on the 30th day of May, 1903? A. Yes sir.

Q. How long had you been employed at the stock yards prior to that time? A. About sixteen years.

Q. In the same capacity? A. No sir, not in the same capacity.

Q. How long have you been foreman? A. Two years, that is of that division.

Q. You may state whether or not some time during the forenoon of May 30th, 1903, the Missouri Pacific Railway Company, set into the yards on the unloading track to be unloaded a train of twenty cars of stock from Texas, destined for Evarts, South Dakota? A. Yes sir twenty cars unloaded there.

Mr. Ball: The plaintiffs object to the testimony unless it is shown that it is these same cattle.

By the Court: I apprehend that will be done.

Q. You say that they were set in on the Missouri Pacific unloading tracks? A. Yes sir.

Q. Did you see them set in? A. Yes sir.

Q. What crew set them in there? A. Missouri Pacific crew.

Q. Was that on a track used exclusively by the Missouri Pacific? A. Yes sir.

Q. For the Missouri Pacific exclusively? A. Yes sir.

Q. They own the track? A. Yes sir.

742 Q. How many cars was there in that train? A. 20.

Q. You may state whether or not you unloaded that into the stock yards? A. Yes sir.

Q. At whose request? A. The Missouri Pacific.

Q. About what time of day was it? A. It was 9:25.

Q. In the forenoon? A. In the forenoon, a. m.

Q. What did you do with those cattle which you then unloaded? A. They were run over to the south side of the yard, what we call the shipping division.

Q. At whose request? A. I don't know who requested they be run over there, it is the only place we had to run them.

Q. Is that part of the yard where you put those cattle, lie south of the live stock exchange? A. Yes sir.

Q. How far from the live stock exchange was it. A. It is right across the alley.

Q. In what part of the yard did you unload these cattle? A. North part of the yard.

Q. How far from the live stock exchange? A. It must be nearly half a mile, quarter of a mile anyhow.

Q. How were they taken from the place where they were unloaded to the shipping pens? A. Driven.

Q. Are there passage ways or alleys through the stock yards? A. Yes sir.

Q. For the purpose of driving cattle? A. Yes sir.

Q. Did you drive them through one of those alleys. A. Drove them through the viaduct, there is an overhead viaduct and alleyways on the surface. We could not go underneath on account of the water.

Q. Underneath why? A. We have to run underneath the railroad yards with that tunnel.

743 Q. From the Missouri Pacific unloading station there is a through alleyway underneath? A. Yes underneath the railroad.

Q. That had water in it? A. Yes sir full of water.

Cross-Examination.

By Mr. Ball: You are foreman in the employ of the stock yards company, I understood you? A. Yes sir.

Q. These cattle were unloaded at the Missouri Pacific pens when? A. Missouri Pacific chutes.

Q. Who pulled the cars in there? A. The Missouri Pacific.

Q. How do you know? A. It is the only road sets cars in there I seen the Missouri Pacific switch engine, and the Missouri Pacific crew.

Q. What road did these cattle come in over? A. I understood they came in over the Santa Fe.

Q. Do you know? A. That is what the Missouri Pacific yard master told me.

Q. Who is he? A. Tom Tie was yardmaster then.

Q. Now when did he tell you they came in? A. It was a while before they set the cars in, it must have been eight o'clock somewhere along there or half past eight something like that.

Q. Up to that time they had not been unloaded? A. No sir.

Q. You were there when they were unloaded? A. Yes sir.

Q. Now when did you move them over to the shipping division? A. As soon as unloaded I suppose took me half an hour to get the train unloaded.

Q. Were they immediately taken when unloaded over to the shipping division? A. Yes sir.

744 Q. Who ordered that? A. I did.

Q. Why? A. That was about the only place we had to yard them, shipping stuff are supposed to go over there to the shipping division.

Q. Please cut out the supposed business; who ordered the cattle taken from where they were unloaded over to the shipping division? A. Nobody only myself.

Q. Why did you order them unloaded over there. A. The only place we had to yard them.

Q. Didn't they go into the pens when they got off of the car? A. No sir they went into the chutes.

Q. They went into the chutes? A. Yes sir.

Q. And you took them over to the shipping division without orders from anybody? A. Yes sir.

Q. Immediately on their coming off of the cars. A. As soon as they were unloaded.

Q. As soon as they were unloaded? A. Yes sir, got to make room to unload other stuff and can't leave them in the chutes.

Q. There were no pens there to receive them? A. No sir, there was pens there but there was water in them.

Q. There was water in them? A. Yes sir.

Q. You were not expecting the Missouri Pacific to reload the [the] cattle at that time?

Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial; and not proper cross-examination.

Objection overruled; defendant duly excepting.

A. I do not know anything about that, I don't know whether they loaded them out again or not, I suppose they would have done it if it had not been for the water.

Q. The water was in the pens at the point of unload-
745 ing Saturday morning was it up there? A. There was not in the chutes, part of the yards is lower where the cattle pens is, is low r than the chutes, there was water in the pens.

Q. There was water in the pens? A. Yes sir.

Q. When the cattle were unloaded at that time there you simply took them immediately over to the shipping division? A. Yes sir.

Q. Was that the last you saw of them? A. That was the last I saw of them.

Q. What time did you get them over there? A. It was ten o'clock may be little after, something like that, I don't know just exactly.

Q. Saturday morning? A. Yes sir.

Q. Do you know how many car loads there was? A. 20.

Q. Was there not 21? A. No sir.

Q. You had no orders from anybody about moving them back. A. Not after coming to the chutes we had to take care of them then.

Q. What was that for? A. After setting to the chutes we had to take care of them and get rid of them the best way we could.

Q. And you simply took them back to the shipping division? A. Yes sir.

Q. Do you know what cars they were? A. No sir.

Q. What the numbers of the cars were? A. No sir.

Q. Or to whom they belonged? A. No sir not now.

Q. How deep was the water in the pens at that time. A. It is pretty hard to gauge that, it was coming in all of the time may be a foot of water something like that.

Q. How long had it been in there? A. It started to come in along about seven o'clock in the morning.

746 Q. The morning of the 30th? A. Yes sir the morning of the 30th.

Q. Did the presence of the water make any difference in your action in unloading the cattle? A. Yes sir.

Q. What difference did it make? A. I wanted to get them on higher ground, if there was any.

Q. So on your own responsibility, in view of the presence of the water, in these Missouri Pacific pens, you took them over to the shipping division? A. Yes sir.

Q. Do you know whether these cattle were through cattle or whether they were destined for Kansas City? A. No sir, I knew they were through cattle.

Q. You did know that? A. Yes sir.

Q. Did you know where they were going to? A. No sir, I did not.

Q. You took them to the shipping division because they were through cattle, and because of this water? A. Yes sir because they were through cattle.

Q. And because of this water, is that right? A. Yes sir.

Redirect Examination.

By Mr. Angevine:

Q. Some of the pens at the north end of the yard in the vicinity of the Missouri Pacific tracks are lower than they are towards the live stock exchange, are they not? A. Yes sir.

Q. It is only a small part of the yards had water in it at that time? A. Very small part, yes sir. There is not a great deal of room over there.

Q. Is that yard which you have spoken of where the Missouri Pacific chutes are north of the Union Pacific and Missouri Pacific tracks? A. Yes sir.

Q. It is entirely away from the main part of the yards then? A. Yes sir.

747 Q. How wide are the Missouri Pacific and Union Pacific yards that intervened between the two parts of the stock yard. A. I expect one hundred feet, I guess it is two hundred feet.

Q. Is it near the east end of the Missouri Pacific bridge? A. Yes sir.

Q. And was it under those tracks that this tunnel was? A. Yes sir.

Q. Where you say there was water? A. Yes sir.

Q. Where does the viaduct overhead, the viaduct go outside, go over the tracks? A. Yes sir, over the tracks.

Q. Over the Union Pacific and Missouri Pacific? A. Yes sir Union Pacific and Missouri Pacific.

Q. What is the yardmaster's name, of the Missouri Pacific yard? A. Tom Tie.

Q. Is he still the yardmaster for the Missouri Pacific? A. Northwestern division now, I believe.

Q. Northwestern division of the Missouri Pacific? A. Yes sir.

Q. Running in and out of Kansas City? A. No sir stationed there as yardmaster.

Q. In the same vicinity? A. He is on the Wyandotte side it is the same as the Missouri Pacific, and he is on the Wyandotte.

Q. He is the man told you those cars were from the Santa Fee did he? A. Yes sir.

Q. And told you they were through cars? A. Yes sir.

Q. They were taking them out? A. Yes sir.

Q. And he told you that about eight thirty o'clock, you say? A. Yes sir about that.

Q. At about eight or eight thirty? A. Yes sir, right in there somewhere.

748 Q. Do you know whether or not the Missouri Pacific Railway placed a lot of their locomotives on their bridge across the Kaw river in the neighborhood of where you received these cattle during the flood? A. I knew they were on there, I do not know what time they put them on.

Q. About how many engines were placed on that bridge? A. Something about 17, something like that; I did not handle them myself.

Q. In that vicinity? A. Yes sir.

Q. When did you first notice those engines on that bridge? A. It must have been, it was after the high water.

Q. You saw them there as the water was subsiding did you? A. Yes sir.

Q. You did not see them put on there did you? A. No sir.

Q. State whether or not the number of engines which were on there extended from one end of the bridge to the other or not? A. Yes sir.

Q. Full length of the bridge? A. Yes sir.

Recross-Examination.

By Mr. Ball:

[—] Did you see these cars when they were pulled in there. A. When they were pulled into the chutes?

Q. Yes? A. Yes sir.

Q. You were there before they came in there? A. Yes sir.

Q. How long had you been there? A. I came to work at six thirty in the morning a m.

Q. You were there from six thirty that morning? A. Yes sir.

Q. You saw them pulled in there? A. Yes sir.

Q. The shipping division lies south and south east of the exchange building, does it? A. Yes sir mostly south, little bit east.

Q. It extended east over to Gennessee street? A. Bell street.

749 Q. Now that was the place which through cattle would be? A. There is where they are supposed to go the shipping division.

Q. Under the custom there through cattle which were not destined for Kansas City were supposed to be in those pens, is that right? A. Yes sir.

Q. And this way which you took these over there from the unloading chutes of the Missouri Pacific, that was north wasn't it? A. Yes sir.

Q. Those chutes north from the exchange building? A. Yes sir.

Q. Quite a distance? A. Yes sir.

Q. And the pens and yards of that part of the yards, is a good deal lower than the shipping division part? A. Yes sir.

Q. And you took them over in the usual way, between that part of the yards did you, shipping division? A. Yes sir.

Q. That was the ordinary way of transferring cattle over to the shipping division, was it not? A. Yes sir.

Q. Now if these cattle were to be loaded out on the Missouri Pacific line, where would they be loaded. A. Be loaded there where they unload.

Q. Right where they unload? A. Yes sir.

Q. Where you took them from when you took them there to the shipping division? A. Yes sir.

Q. In other words if the Missouri Pacific took those cattle out, it would have to under arrangement of the yards there get them at the same [pount] where they came off of the cars? A. In an ordinary time we would have to put them there.

Q. And if the Missouri Pacific took them out they would have to be loaded on the Missouri Pacific cars on the

750 same point where they came off? A. Yes sir.

Q. Where they were unloaded? A. Yes sir.

Q. And it was known to you and everybody there that the water was in those yards at the time, that they were unloaded?

By Mr. Angevine: Objected to by the defendant—the witness can testify what was known to him, but not everybody and we object to the question.

By the Court: That is true; let him say what he knows, about it.

Q. Mr. Ball: You knew that the Missouri Pacific pens at the very time these cattle were unloaded were not in a condition to receive the cattle, didn't you? A. Yes sir.

Q. And you knew that after that and at no time after that could they have been put in those pens and loaded on the Missouri Pacific cars at that place? A. Yes sir, they could have been loaded out that morning.

Q. What is that? A. The water did not get up in those [A. The water did not get in those] chutes until that evening—Saturday evening.

Q. How about the pens? A. The pens we could not say that very well.

Q. You were not permitted to leave them in the chutes? A. No sir.

Q. You took them over to the shipping division? because you were not permitted to leave them in the chutes, is that right? A. Yes sir.

Q. How about the Missouri Pacific tracks at that point? A. The Missouri Pacific was not under water at that time, that is the chute track was not.

Q. At the time they were unloaded? A. No sir.

Q. But there was not cars there to receive them when
751. they were unloaded from the Santa Fe cars, was there?
A. No cars.

Q. And the Missouri Pacific was not there to put them on to their cars at the time they were unloaded? A. No sir not as I know of.

Q. And you took them up to the shipping division as I understood you of your own motion and without any orders from anybody in that regard? A. Yes sir.

Q. Now did you know of the Missouri Pacific attempting to get an[d] engine through there over those tracks about noon? A. No sir.

Q. Did the water after the receipt of these cattle get high from the time of their receipt right along until the climax of the flood on Sunday? A. Yes sir.

Q. After the receipt of these cattle did the Missouri Pacific load any cattle out of those chutes.

By Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial.

Objection overruled, defendant duly excepting.

A. No sir I don't think it did.

Q. They could not get them? A. Not to the best of my recollection.

Q. They could not do it could they? A. Yes sir they could do it.

Q. With the water coming up in the pens? A. It was not in there in the pens, that is in the chutes.

Q. It was in the pens wasn't it? A. We did not have anything to do with the Pacific.

Q. You did not—you stated they could not hold the cattle in the chutes that was against the rules? A. Yes sir.

752 Q. So you do not mean to leave the impression that the facilities for the Missouri Pacific to load cattle, were open there after the time of the receipt of those cattle? A. Yes sir.

Q. It was? A. Yes sir.

Q. Any pens? A. We had pens there they could put them in.

Mr. Angevine: We object to that, the witness never said it was necessary to use those pens in loading or unloading; Mr. Ball persists in trying to have the witness say something he never said; the witness never said it was necessary to use the pens in loading or unloading.

Mr. Ball: I object to Mr. Angevine's statement that I am trying to have the witness say something he did not say;

By the Court: Proceed.

Mr. Angevine: State whether or not it is necessary to use the pens to load or unload cattle in the Missouri Pacific tracks. A. No sir.

Q. Are they loaded or unloaded directly from the cars into the chutes? A. Yes sir.

Q. And then they are driven any where you want to in the yards? A. Yes sir.

Q. And in loading cars is it necessary to use the pens at all? A. No those pens on the Missouri Pacific side.

Q. Are cattle loaded directly from the chutes into cars in loading them? A. Yes sir.

Q. It was not necessary to use those pens either in loading or unloading? A. No sir.

Q. I believe you stated the Missouri Pacific [tracts] were not under water at that time? A. No sir.

Q. Not until that evening some time you stated? A. Yes sir.

Q. Do you know of any other cattle in the yards there destined to go out over the Missouri Pacific that day
753 other than those which the yard master spoke to you about? A. No sir.

Q. That is all you knew of? A. That is all I knew anything about.

Q. All you knew about their destination to go out over the Missouri Pacific was what the yard master told you? A. Yes sir.

Q. Did the yardmaster tell you about there being any more cattle to go out over the Missouri Pacific than one train load; did you hear about those in the south end of the yard; he told you, said there was two trains.

Mr. Ball: Plaintiffs object to what the yardmaster said, as hearsay.

Objection sustained.

By Mr. Ball: Why didn't you load these cattle on the Missouri Pacific instead of taking them over to the shipping division? A. Never had any orders to load them.

Q. You did not have any? A. No sir.

Q. There individually? A. No sir.

Q. And you did not have any cars to load them in if you had had orders? A. We were not supposed to look after cars.

Q. I am asking you if there were any cars there to load them into? A. No sir.

Mr. Angevine: You never load Missouri Pacific cars until they request it, do you? A. No sir.

By the Court: At this time how long had you been there at the stock yards? A. You mean for the stock yard company about 16 years something like that.

Q. At the time these cattle were unloaded there, were you familiar with the condition of the yards there? A. Yes sir.

Q. At the time you took these cattle over and placed them in the shipping division, did you apprehend any
754 danger to those cattle at the time in the shipping yards? A. No sir, I did not.

Mr. Angevine: The end of the yards where you put the cattle were higher than the other end of the yards? A. Yes sir.

By the Court: He has testified to that.

Mr. Angevine: All right.

By the Court: Stand aside.

W. H. Hildebrand, sworn, testified on behalf of the defendant as follows, on

Direct Examination.

By Mr. Angevine:

Q. What is your name? A. W. H. Hildebrand.

Q. What is your business? A. Switchman.

Q. For what road? A. Santa Fe.

Q. How long have you been in the employ of the Santa Fe as a switchman? A. The past three years.

Q. Were you in their employ in that capacity in or on May 30th, 1903? A. Yes sir.

Q. Were you then yard foreman at that time? A. Yardmaster, yes sir.

Q. You were yardmaster? A. Yes sir.

Q. Did you as a part of your duties at that time have charge of the transferring of trains of cattle from the Santa Fe road to other roads? A. Yes sir.

Q. You may state whether or not on the morning of the 30th of May, 1903, you caused to be transferred a train load of 20 cars of cattle from the Santa Fe yards into the Missouri Pacific yards? A. Yes sir, I did.

755 Q. About what time of the morning was it? A. It was somewhere near six o'clock in the morning when I got the load of stock.

Q. Who was the switchforeman or foreman of the switching crew who handled that train? A. Coppell.

Q. Was it done under your orders? A. Yes sir.

Q. Where did you pick up that train of stock at that time? A. I got hold of the train of stock on one of the main lines between the south end of the Santa Fe yard and 12th street.

Q. Somewhere in the vicinity of the stock yards? A. Yes sir.

Q. And south of 12th street? A. South of 12 street.

Q. You say you got it on main line number one was it. A. Yes sir.

Q. Do you know how long that train of stock has been in the yards when you picked it up? A. It just came in, just got stopped when we got hold of it.

Q. The road engine taken off and you right on it? A. Yes sir.

Q. What would be the usual course in going from the place where you hooked on to that train to the Missouri Pacific delivery track, the track where you usually delivered cars to the Missouri Pacific, stock cars.

Mr. Ball: We object to the question until the witness be asked whether he knows about it.

By the Court: Answer the question.

Q. You would pull the stock through the depot up far enough to get over the [—] at the west end of the depot and then shove them west into the Missouri Pacific yards.

Q. The tracks where you picked up the cattle and from there on to the depot run in a north easterly direction? A. Yes sir.

Q. And then back in a westerly course on the Missouri Pacific track? A. Yes sir.

756 Q. Is [the] the usual and ordinary course to pursue in shoving cars on to the Missouri Pacific delivery track? A. Yes sir.

Q. Did you follow these cattle on toward that track? A. No further than 12th street.

Q. You left the train at 12th street? A. Yes sir.

Q. Left it in charge of whom? A. Mr. Coppell.

Cross-Examination.

By Mr. Ball: Where are the Missouri Pacific tracks with reference to 12th street? A. Northwest, north and west of 12th street.

Q. How far from where you left these cars? A. Direct across to the Missouri Pacific line which would be about three or four blocks.

Q. From the loading and unloading pens of the Missouri Pacific? A. No sir, I said direct to the Missouri Pacific line.

Q. What I am asking you was, how far it was from the pen where you left these cars to the loading and unloading pens of the Missouri Pacific in the stock yards? A. I don't know exactly how far that would be.

Q. By whose orders did you make this movement of this train? A. It was through the office, I do not remember exactly whether it was the city office or Argentine.

Q. What office? A. Santa Fe office.

Q. You do not know who gave the orders? A. No, sir. I am not positive now, I think it was Mr. Sullivan gave me the orders in regard to that stock.

Q. Who was Mr. Sullivan? A. He was the chief clerk there nights for the Santa Fe at that time.

Q. Under Mr. Sharp? A. Yes sir.

Q. Was that the Argentine office? A. No sir it
757 was the city office.

Q. The last that you knew of them or had to do with them was at 12th street? A. Yes sir.

Q. And the cars were then on the Frisco tracks? A. Union depot tracks.

Re-Direct Examination.

Q. By Mr Angevine: In going from where you found the cars to where they were to be delivered you passed over the

Santa Fe tracks to the union depot tracks? Did you? A. Yes sir.

Q. And then backed off of the union depot tracks on to the Missouri Pacific tracks, that way they were to be moved? A. I don't know who owns the track, between the depot and Missouri Pacific yard, I think likely, however, the Union Pacific owns it and controls it.

Q. How near were you to where the cars would be shoved west from the Union depot? A. About a block I should judge.

Q. You received them near the junction point? A. Yes sir.

A. S. Coppel—sworn testified on behalf of the defendant as follows on

Direct Examination.

Q. By Mr Angevine: What is your name? A. A S Coppel.

Q. What is your business? A. Switchman.

Q. For what company are you working? A. Santa Fe.

Q. How long have you been in the employ of the Santa Fe as a switchman? A. About two years and eight months.

Q. Were you in the employ of the Santa Fe as a switchman May 30th 1903? A. Yes sir.

Q. Were you foreman of the switching crew on that day? A. Yes sir.

758 Q. You may state whether or not on the morning of the 30th of May 1903, you took a string of 20 Santa Fe stock cars loaded with cattle from the yards south of 12th street and shoved it on the Misouri Pacific delivery tracks? A. Yes sir.

Q. In their yards? A. Yes sir.

Q. What time was it when you did that? A. About 6:30 I guess, something like that.

Q. 6:30 in the morning? A. Yes sir.

Q. Where was the track upon which you shoved that string of cars? A. I do not remember, I do not know the number of the track, I am not familiar with the numbers of these tracks, but it would be north of the stock yards and be east of the Kaw river.

Q. You had been accustomed to delivering cars loaded with cattle in that way, had you to the Missouri Pacific? A. Well very seldom we had cattle, but I made transfers of their box cars.

Q. Is that the track in which you usually set transfers. A. Yes sir, that is the tracks that we used for making their transfers on.

Q. That is the track on which you put these cattle? is it? A. Yes sir.

Q. Who opened the switches for you to get on to that track? A. Regular switch tender I suppose.

Q. For what Company? A. For the Missouri Pacific.

Q. The Santa Fe owned no tracks in there so far as you know? A. No sir.

Q. It was your switching crew opened the switches or somebody there attending to the switch? A. It was the man attending there to the switch.

759 Q. You put the train of stock on that track and left it there did you? A. Yes sir.

Cross Examination.

By Mr Ball:

Q. Where did you leave the cattle? A. On the transfer track, receiving track in the Missouri Pacific yards.

Q. Where is that? A. North of the stock yards and a little east of the Kaw river.

Q. Was it at their unloading chutes? A. No sir. It was not at the unloading chutes, there is no chutes there that I know of.

Q. Do you know where the pens, loading and unloading pens the Missouri Pacific used there. A. No sir I never was there.

Q. You do not know where they are? A. No sir.

Q. Where was it with reference to the stock yards exchange. A. It was in the Missouri Pacific yards was all I know about it.

Q. Where are they with reference to the exchange building? A. North of the exchange building.

Q. How far north? A. About six blocks I should judge, between six and seven blocks.

Q. Is that where you took this train? A. Yes sir.

Q. And by whose orders did you take it there? A. By the yardmaster.

Q. Who is he. A. W H Hildebrand.

Q. The gentleman just testified? A. Yes sir.

Q. You do not know where his orders came from? A. No sir.

Q. You do not know anything about where these cattle were going? A. No sir I had no information in regard to that.

760 G. A. Roberts—called testified on behalf of the defendants as follows on

Direct Examination.

Q. By Mr Angevine: You have testified before in this case? A. Yes sir.

Q. Mr. Roberts what position do you hold with the Santa Fe road? A. [Locale] live stock agent.

Q. You may state whether or not you knew before the flood came, that the Missouri Pacific Railway company, had unloaded a train load of cattle delivered to them into the yards and they were driven into the south end of the yards? A. I don't remember that I knew it, no sir.

Q. When did that fact first come to your knowledge.

Objected to by plaintiffs as assuming it is a fact.
Objection overruled.

A. I do not remember when it first came to my knowledge.

Q. You had no knowledge of it, you say until after the flood? A. No sir.

Q. Do you know whether or not the way bills for those twenty cars of cattle, or do you know when the way bills for those 20 cars of cattle were returned to the Santa Fe, if ever? A. No sir, I do not know.

Q. Did anybody bring them and deliver them to you? A. No sir not to me.

Q. And if they came into the Santa Fe office at the stock yard have you any knowledge how they came there? A. No sir, I have not.

Cross Examination.

By Mr Ball: [—] Do you know anything about this switching of this train of cattle over to the Missouri Pacific unloading chutes?—A. Not from personal knowledge.

761 Q. You do not know personally anything about it? A. No sir.

Q. You were the local live stock agent? A. Yes sir.

Q. You knew about this first train, these Evarts cattle coming in there Friday evening at six o'clock. A. I knew it Saturday, yes sir.

Q. Why didn't you people get that train out of here.

By Mr. Angevine: Objected to by the defendant as not proper cross-examination.
Objection overruled, defendant duly excepting.

A. I don't know.

Q. You knew about the other three trains coming in Friday morning about six or six thirty, didn't you? A. No sir.

Q. Saturday morning, I mean? A. I suppose I knew it in a general way, yes sir.

Q. Why didn't you get them out?

By Mr. Angevine: Objected to by defendant as incompetent, irrelevant and immaterial, and calling for a conclusion of the witness, and not cross-examination; the witness has not been asked anything about these other cattle.

Objection overruled; defendant duly excepting.

A. I might say we did not get them out because it was not our business to get them out; we had hauled them in, and it was up to the connecting line to get them out.

Q. You had no arrangement with anybody to take them out had you?

By the Court: Whether he had any arrangement.

By Mr. Ball: Your railroad to your knowledge, never had any arrangement with anybody to take them out?

By Mr. Angevine: Objected to by defendant as not cross-examination.

Objection overruled; defendant duly excepting.

762 Q. Do you know any arrangement your railroad had with anybody to take these cattle out? A. Why arrangement in a case of that kind, yes sir.

Q. I want my question to be clear; do you know of your own personal knowledge any arrangement your railroad had with any other railroad company to take these cattle out of here?

By Mr. Angevine: Objected to by defendant as not proper cross-examination.

Objection overruled; defendant duly excepting.

A. The arrangement that is always in effect.

Q. In regard to these cattle, do you know of any arrangement that they had, personally, do you know personally of any arrangement that they had.

By the Court: The question is whether you know personally about it, whether there was any arrangement. A. Why certainly, yes sir.

Q. You do know? A. Yes sir.

Q. Now who of your company made that arrangement on your side? A. The arrangement—

Q. Now just answer the question, who of your company made that arrangement?

Mr. Angevine: Objected to by defendant as not proper cross-examination, and assuming that some one person made that arrangement.

By the Court: Let him tell what he knows about it.

Q. Mr. Ball: Who of your company made that arrangement. A. No one in particular.

Q. No one in particular? Was there arrangements made by anybody in particular? A. The arrangement is already standing and still in effect.

Q. In reference to these cattle? A. All cattle.

Q. What road did you have it with? A. With the Mo. Pac. Ry.

763 Q. Did you have any with the Burlington?

Mr. Angevine: Objected to by defendant as not proper cross-examination. And as incompetent, irrelevant and immaterial.

By the Court: I think we have pursued this thing long enough. I extended the rule in regard to this witness some what on cross-examination.

Mr. Ball: Was there any different arrangement with the Missouri Pacific than any other carrier?

Mr. Angevine: Objected to as not cross-examination.

Objection sustained.

Plaintiff then and there duly excepting.

D. Farley called testified on behalf of the defendant as follows on

Direct Examination.

Q. By Mr. Angevine: When you were on the witness stand the other time, you were asked if you could check up that list of cars, referring to the list of cars and receipt of R. P. Isett about which you testified now state to the jury whether or not those cars are included in the shipment of the Minnesota & Dakota Cattle company, involved in this suit, have you looked over the record and checked up the matter to see? A. Yes sir.

Q. You may state to the jury whether or not those cars are included in that shipment of the Minnesota & Dakota Cattle company involved in this suit. A. All cars on this list except one.

Q. Which one is that? A. 13300 A. T.

Q. What do you say the number of that car is? A. 13300.

Q. Did you check over the Minnesota & Dakota Cattle company list to see if that car was included in that?

764 A. Yes sir.

Q. Is it included? A. No sir.

Q. Did you follow the bills through to see if that car had been transferred into any other car? A. I followed our records.

Q. Did you find it? A. No sir.

Q. Could you tell to a certainty whether that was one of the cars without having all of the way bills to see whether they had been transferred or not from one car to the other. A. I can from my records, yes sir.

Q. Your judgment is then that car number 13300 was not one of the original cars? A. Yes sir.

Q. How many cars in that list? A. 21.

Q. 13300 is not a stock car? A. No sir.

Q. What is it? A. A box car.

Q. 21 cars in that list was there? A. Yes sir.

Q. Those 20 are included in the shipment are they? A. Yes sir.

Q. In billing that it was marked B was it, instead of stock car, or did you discover that part of it. A. It is not on that list marked B it is a box car.

Q. You know that by the numbering? A. Yes sir.

Q. Are there any of your records you have examined aside from your knowledge of the numbering that show that? A. Yes sir.

Q. What is it? A. It is the yard clerk's list of cars delivered to the connecting line.

Q. Now I desire,—is this receipt one of the regular files of your office which is kept as part of your files and records? A. It is.

Q. Does it occur in the regular orders of business that time in these files? A. Yes sir.

765 Mr. Angevine: I ask now that they be allowed to retain this original and mark the copy we have furnished as the exhibit and the witness be allowed to take this, I suppose there will be no objection to that?

Mr. Botsford: Not at all.

Mr. Angevine: Any objection after the trial of my returning it?

Mr. Ball: No sir.

Mr. Angevine: Mr. Farley, I show you these sheets marked exhibit 14a and 14b, and will ask you where you found those papers? A. I found them in our files in the office.

Q. When? A. Yesterday I found them.

Q. You were requested to look through your files for papers pertaining to the transfer of those cattle? A. Yes sir.

Q. While doing so at that time, you found these papers? A. Yes.

Q. State whether or not you found them in the regular file of your office of that kind of business at the time spoken of last May and first of June 1903? A. Yes sir, I did.

Q. How are those files kept? A. They are bound in packages and filed in our record room according to the dates.

Q. How are they bound in the records. A. Each sheet is perforated and bound in packages and tied by a string through them similar to this package (showing). A. Yes sir, it was out of that package I took this.

Q. Is this a package of similar receipts and papers which is a part of the regular file of the Santa Fe road covering that time? A. Yes sir.

Q. And you say it is out of this package you took those sheets? A. Yes sir.

766 Q. Did you find them in this package in the usual order for business of that time? A. Yes sir.

Q. They are the regular files of your office covering that period and that transaction? A. They are.

Q. When did you first see those two sheets? A. Yesterday about noon.

Q. When you were searching through this file for them? A. Yes sir.

Q. I will call your attention to the Missouri Pacific stamp on there and ask you if, whether or not that is the usual stamp that was placed by the Missouri Pacific on papers returned to your office at the time those were stamped or purport to have been stamped. A. It was.

Q. Are there any of these other files show the stamp? A. Yes sir.

Q. I do not care to introduce this bill in evidence, I would like to call the attention of the witness or introduce one or two of them to show that was the usual custom; I will ask you to refer to some of these files of receipts from the Missouri Pacific road, and state whether or not it is the same stamp as this stamp? A. Yes sir it is the same except the date.

Objected to by the plaintiffs, it is not proper to prove what the files are in that way.

By Mr. Angevine: The only thing about it is to show that stamp which they received.

Mr. Ball: You have already asked him whether that was the stamp and he said it was.

By the Court: Yes, I think that is sufficient, unless you wish to offer it in evidence.

By Mr. Angevine: Did you find any other record pertaining to the unloading of that train of cars in your office dur-
767 ing your search? A. Only the yard clerk's card the same as that receipt there.

Q. Have you that here? A. No sir I did not bring it along with me.

Q. It is the same as that receipt is it? A. Yes sir.

Q. Did you have any knowledge of the return to the Santa Fe of the train load of stock delivered by the Santa Fe to the Missouri Pacific on the morning of the 30th until after the flood? A. I did not.

Q. Did you have any knowledge of the return of the way bills for that train of cars until after the flood? A. I did not.

Q. If these way bills were returned do you know how they got back into the Santa Fe office? A. I do not.

Y. If the cattle were turned into the stock yards, do you know anything about that transaction, or did you know until after the flood? A. I did not.

Cross-Examination.

By Mr. Ball:

[—] Now Mr. Farley, with what did you check in going over this receipt of the Missouri Pacific May 1903, I mean the 30th of May, 1903, you say you checked that over, what did you check with. A. With our records.

Q. In order to find out about these cars? A. Yes sir.

Q. You know now don't you that these cars were taken back by your railroad and that the cattle in fact were afterward transported by the Santa Fe out to Emporia along in June?

Objected to by the defendant as not proper cross-examination. Objection overruled.

A. No I do not know that.

Q. You do not know it? A. I did not check up the unloading of those cattle after they went into the stock yards.

Q. Well your records show what became of them, of
768 these cars of cattle? A. Mr. Roberts' office records will.

Q. His records may show that? A. Yes sir.

Q. His office is an adjunct to yours? A. Yes sir.

Q. So that you or Mr. Roberts, or your subordinates can find out what became of these cars of cattle which this Mis-

souri Pacific receipt represents? A. Mr. Roberts may be able to do that, yes sir.

Q. What is that? A. Mr. Roberts may be able to do that.

Q. You did not look to find out from the records what was done with those cattle? A. No sir.

Q. Do you say you do not know as a matter of fact the Santa Fe afterward took them out to Emporia? A. Personally I do not know that, no sir.

Q. What do you mean personally you do not know it? A. I have not seen any of the records to show that they went out there; I know from conversation that I have had that they went out there.

Q. Did you learn it from any of the Santa Fe officers, whether they were or not? A. Yes sir.

Q. From whom did you learn it? A. Mr. Roberts.

Q. Did you learn it from him that the Santa Fe did take them out to Emporia? A. Yes sir.

By the Court: I do not suppose that is a disputed matter in this case.

Mr. Angevine: Of course, we took all the cattle in the pens away.

By Mr. Ball: Then it seems to me that the testimony is material.

By the Court: I think not.

Mr. Ball: Do you know by whose orders these cattle were set in on the Missouri Pacific chutes at the unloading pens? A. I do not.

769 Q. Do you know by whose orders they were put back into the shipping division? A. I did not.

Mr. Angevine: We offer in evidence this stipulation.

By the Court: Is it filed in the case.

Mr. Angevine: It is.

"It is agreed in this case that the defendant was compelled to pay out, and did pay out on account of the plaintiffs' cattle at the stock yards of Kansas City, $2428.60, and at Emporia $2820.38, making a total of $5248.98, for feed and pasturage of said cattle which was the reasonable cost for feed and pasturage of said cattle. This fact is admitted without prejudice to the plaintiff's contention that it is not liable for said damages."

That is in the Minnesota & Dakota Cattle company case only.

The defendant thereupon read in evidence the depositions of H. P. Child and J. W. Hutchings, which are in words and figures as follows towit.

770 Stipulation.

It is stipulated and agreed that any objections which plaintiff or defendant in either case may desire to make at the trial, to any portion of these depositions, may be made with like effect as if made at the time of the taking of the depositions.

BOTSFORD, DEATHERAGE & YOUNG
for Empire State Cattle Co. et al.
R. E. BALL by D. D. Denham for
Minnesota & Dakota Cattle Company.
Attorneys for Plaintiffs.
A. A. HURD and T. H. REYNOLDS,
Attorney- for Defendant.

771 Direct Examination

By A. A. Hurd:

Q. Mr. Child, please state your name, age, residence and occupation? A. Harry P. Child; 56 years old; Kansas City, Mo.; General Supply Agent for the Kansas City Stock Yards, of Missouri.

Q. How long have you lived at Kansas City, Mo.? A. 35 years.

Q. How long have you held the position of Supply Agent for the Kansas City Stock Yards Co.? A. About two years. Prior to that I had been with the Company altogether, over thirty-three years, as Yard Master, Superintendent, and Asst. General Manager.

Q. In connection with your employment with the Stock Yards Co., at Kansas City, Mo., has it, or has it not, been your duty to look after flood matters, or to keep track of the condition of the rivers joining at Kansas City, Mo.? A. It has been my especial duty to get all possible information as to flood waters that might endanger the property.

Q. Were you in Kansas City, Mo., on the last days of May and the first days of June, 1903? A. I was.

Q. State what the condition of the rivers joining at Kansas City, Mo., was at that period? A. The Kansas river which runs through the Stock Yards, part of it being on each side of the river, was excessively high, from rains which had been intermittently and, at times, almost continuously, falling for the past two weeks, up in the headwaters of the rivers forming the Kansas river, and these waters culminated in the last days of May and the 1st of June reached the summit, after which they receded, and, I think, probably, in eight or nine days were within their banks again, but at their highest point the

772 waters were 13 and a half feet higher than they had been at any time in the history of the Yards, and had only reached that point once before—in 1881.

Q. You say the flood that reached 13 and a half feet was 13 and a half feet higher [then] it did in 1881? A. Yes sir.

Q. How as the flood of 1881 as compared with the floods previous to that time? A. The flood of 1881 was the highest in the records of the city, with the exception of the historical flood of 1844.

Q. There is no definite record of the flood of 1844, is there? A. I think it is practically accepted that it was just about the same as the 1903 flood. At the Stock Yards, we are satisfied, from the best data that we could obtain, that the floods reached a foot higher than in 1844, but the Missouri bridge is about a foot lower. That is due to the building of the city; the buildings in the West Bottoms acted as a dam to hold the water back as it came from the river over the entire Bottoms there, and made it higher than otherwise would have been possible. There was a ten and a half foot fall from the mouth of Turkey creek to the Missouri river bridge, in 1903.

Q. What effect did the flood of 1881 have upon the Stock Yards,—how high did the water rise in the Stock Yards in 1881, if at all? A. It came up into, oh, possibly half an acre of the Yards—an acre possibly, down near the Union Pacific bridge. At that time the Yards were much lower than they are now. Since then, we have, from time to time, filled and graded, and the 1881 water now would not come into any of the pens at all, and would not have done so last year.

773 Q. Was there ever at any time since the Stock Yards have been built, any flood in the rivers here which would endanger the lives of cattle placed in the Stock Yards? A. Not until last year.

Q. Not until last year. Was there ever any flood which would prevent cattle from being moved out of the Stock Yards, that had been placed therein, until last year—if so, when?

(Question repeated—adding)—loaded on and moved out of the Stock Yards, prior to last year? A. No sir.

Q. You say that it was one of your special duties to obtain all the information you could in regard to floods in the rivers at Kansas City? A. Yes sir.

Q. State now, whether from all the information you could obtain and did obtain, you considered that the lives of stock placed in the Stock Yards would have been endangered, up to the morning of the 30th of May, 1903?

Objected to by plaintiffs as incompetent, irrelevant and immaterial, and not shown himself competent to testify.

Objection overruled; plaintiffs duly excepting.

A. By special arrangement, I was receiving telegrams from Manhattan and Topeka, Kansas, daily, and had been for ten days previous; and on the 30th the reports were not alarming at all, as the water on that morning had just reached the 1881 record, which we did not consider dangerous in the Yards. On the 31st of May there had been a sharp rise which was not accounted for by the reports that I had received the day before, but which was ultimately explained by the enormous rains that had fallen, but which had not reached their greatest fall in the particular spots from which I was receiving messages, but were still within
774 the Kaw basin; and, on the 31st of May the water had come up into the Yards, to where there was probably half the Yards,—to three-fourths of them had water from one to four feet deep. At this time, the Superintendent ordered all the live stock that was in the yards to be put on the viaducts, which are about ten feet above the level of the yards, still thinking that it would only be for a day or two before the water would subside, and then they would go back into the pens; but, during the afternoon and night of the 31st of May and the morning of the 1st of June the water raised during the twenty-four hours, an additional nine feet, which was entirely phenomenal. The Stock Yards were entirely submerged, and the entire Bottoms, east and west of the river, clear to the bluffs,—the water being from five and six to fourteen feet deep.

Q. Please describe the manner in which the water rose in the Stock Yards, as to its rapidity, during the days of the 30th and 31st of May and the 1st of June,—as to whether it was gradual or very rapid, and sudden, at any portion of that time? A. During the 30th of May it arose about four feet; on the night of the 31st and the morning of the 1st of June, it rose the other nine feet; that was something that was unaccountable,—to have such a rapid rise on the top of such enormous spreads of water already before us.

Q. Were there any bridges crossing the river from the Stocks Yards prior to this flood of 1903,—near the Stock Yards? A. The Stock Yards Company had two bridges, and the various roailroads and wagon roads had, I think, about fourteen other bridges, all of which were washed out; there was only one bridge left after the flood—the Missouri Pacific Railway bridge.

Q. There were about sixteen washed out, out of the seventeen bridges? A. Yes.

775 Q. Had any of these previous floods in the river affected any of these bridges seriously? A. No

bridges were taken out before that time since the Yards were built, by high water.

Q. Had there, previous to the flood of May and June, 1903, ever been any water high enough to destroy any portion of the Yards,—wash them out? A. No sir.

Q. State if you recognize that picture as being a photograph of a portion of the yards after the flood? (Hands picture to the witness) A. Yes sir, I do.

Q. Is it a correct picture of the conditions of the portion of the yards that was affected? A. That shows the end of one of the viaducts, one cut in two and carried away, on which the cattle in question were put.

Q. That picture, I understood you to say, represents one of the viaduct into which the cattle were driven to prevent them from drowning? A. Yes, a portion of it is shown there.

Q. Mr. Child, we ask that you attach this photograph to your deposition, as a part of this deposition, and have the notary mark it Exhibit A.

Said photograph, so marked by the Notary, is attached to and made a part of this deposition.

We now offer the photograph in evidence and exhibit same to the jury.

Q. You say you have been with the Stock Yards Company about thirty-three years? A. A little over.

Q. Are you familiar with the customary manner of transacting live stock business through the yards, by the Stock Yards Company, and the various railroads that con-
776 nect therewith? A. Yes sir.

Q. State fully what the custom and practice has been and is, in relation to stock that is shipped into Kansas City by one railroad to be shipped out of the city by another railroad to its destination?

Objected to by plaintiffs as the witness has not shown himself competent to testify and as incompetent, irrelevant and immaterial.

Objection overruled; plaintiffs then and there duly excepting.

A. The Stock Yards Company acts as the agent of both companies, to the extent of receiving the stock at the platform, unloading it into the chutes, taking it to the proper pens, and feeding and watering it, in such quantities as the owners may designate; and, at the proper time for re-shipment, the connecting line, through its live stock agent, delivers the Stock Yards Company a written order to load this

stock on such trains as he may designate, which order is invariably accepted and acted upon and carried out.

Q. State whether or not in cases where shipments of live stock are made through Kansas City, and delivered by one railroad to the Stock Yards Company to be transported over another line of railroad from Kansas City to the ultimate destination, the delivering company has anything whatever to do with the stock after they have been turned over to the Stock Yards Company?

Objected to by plaintiffs on the ground that the witness has not shown himself competent to testify, and as incompetent, irrelevant and immaterial. And for the further reason that there is no evidence to show that these cattle were to be delivered to any particular company at this point.

Objection overruled; plaintiffs then and there duly excepting.

A. Nothing at all.

Q. Nothing at all? A. No.

777 Q. When turned over to the Stock Yards Company by the delivering company, the delivering company, so far as that car is concerned, ceases to have any control of it afterwards,—is that correct? A. The Stock Yards Company receives the stock and receives the charges and bills which are charged to the Stock Yards Company, and the Stock Yards Company pays the delivering road the charges, through freight charges, or whatever charges they bring, and the Stock Yards Company afterwards, puts these same charges on the receiving road,—if they are not paid by the owners in cash—and collects them at the terminus—the receiving road collects them at the terminus, and then reimburses the Stock Yards Company.

Q. Where cattle are fed by the Stock Yards Company in the Yards and cared for, and the owner does not pay the bill personally, in cash at the time, before the stock are delivered to the railroad company, or is to take the stock away from the Stock Yards, what is the custom with relation to those charges? A. They are delivered to the receiving railroad company, with the stock and are accepted by them.

Q. And paid by that railroad company, are they? A. Collected at the other end, and then paid by that railroad to the [to the] Stock Yards Company, the Stock Yards Company in the meantime having paid the delivering road.

Cross-Examination

By R. E. Ball:

Q. You said that it was your special duty to inquire into and keep informed in regard to the flood conditions? A. Yes sir.

Q. Was that on the occasion of this flood only, or was that also true of the flood in 1881? A. 1881, and every year, during the two or three months of the spring that high
778 waters are to be expected.

Q. You stated that you had special arrangements at some points, to report the flood conditions up the Kaw valley? A. Yes sir.

Q. You were acquainted, were you not, with the general scope of the Kaw river and its tributaries and water shed, and are now? A. Yes sir.

Q. Did you keep a record of those reports? A. Of the reports I got?

Q. Yes. A. Yes sir, I kept a record—I kept the telegrams; I got them by telegraph each day; I have those.

Q. You have no further—no book record of the data they furnished? A. No.

Q. Have you still those telegrams? A. Yes sir.

Q. You haven't them here with you? A. No. I came from the Court House.

Q. Would it be inconvenient for you to produce them, and let us examine them? A. Not at all.

Q. Would it be convenient to have them here by two o'clock, Mr. Child? A. I guess so.

Q. From how many points did you receive those telegrams or reports? A. Only two, Topeka and Manhattan, Kansas.

Q. You received from only two points? A. Yes sir.

Q. Topeka and Manhattan? A. Yes sir.

Q. Where is Manhattan? A. That is about two hundred miles from here, I think.

Q. It is on the Kaw river? A. Yes, on the Kaw, at the junction of the Big Blue with the Kaw.

Q. From whom did you receive the reports at Manhattan? A. The station agent of the Union Pacific Railroad.

Q. And from whom did you receive them at Topeka,
779 Kansas? A. The station agent of the Union Pacific there.

Q. How soon did you begin, with reference to the culmination of the flood, to get these reports? A. My impression is now, about ten days before May 30th.

Q. It would be somewhere about the 20th of May, then? A. Yes; the telegrams will show; I think I commenced them—

Q. Did you get them every day? A. Every day, I think.

Q. More than once a day? A. Sometimes two or three times; I didn't get them as often as I wanted to get them.

Q. What did those reports purport to give you—was it the exact stage of the water at those places? A. The rise and fall, as a rule, for the last twenty-four hours.

Q. What day of the week was the 30th of May, do you remember? A. The 30th was Saturday.

Q. And the 31st was, of course—was Sunday? A. Yes sir.

Q. These telegrams which you will produce, those will show exactly what these parties reported to you? A. Yes sir.

Q. They were from men in charge of the respective offices at those two places on the Union Pacific Railroad? A. Yes sir.

Q. Isn't it true, Mr. Child, that the flood reached its highest point on Sunday, the 31st of May? A. No sir, on Monday, the 1st of June.

Q. It was still higher on Monday, the 1st? A. On the morning of the 31st of May it was nine feet lower than it was on the morning of the 1st of June.

Q. Nine feet lower? A. And during the day it raised about four feet, as I remember, and the other five feet in the night.

Q. How high was it Sunday morning? A. At the Exchange Building it was, on our gauge, twenty-eight and a half feet.

Q. 28 and one half feet -bove low water? A. Yes.

780 Q. 28 and one half feet above low water mark? A. Yes.

Q. How high was it on Monday? A. 37 feet above low water mark.

Q. When did the water come into the Union Depot, and all over the Avenue, over all the Bottoms? A. It must have been in the afternoon of the 31st of May, at the Depot, that it came in, probably the night of the 31st; along about five or six o'clock, I presume it was two feet and a half or two feet deep in the Union Depot.

Q. Was it all over Union Avenue and up in the Union Depot by noon on Sunday, the 31st? A. I think so. Instead merely of being over it on the 1st, it was six or seven feet over it, and deeper some places.

Q. At that time it was over the Yards also, wasn't it, before noon Sunday? A. The Stock Yards?

Q. Yes. A. Yes.

Q. How deep was it over the Yards? A. Sunday?

Q. Yes. A. About—part of the Yards were out of the water, from that to four feet deep.

Q. Was the water up in the Exchange yet, on Sunday? A. Yes. The Exchange Building basement is about three feet lower than the most of the Yards.

Q. You say that the Superintendent ordered these cattle to be put up in the viaducts? A. Yes sir.

Q. At what time did he do that? You said on the 31st, I believe. What time of day? A. I do not believe I can answer that; they were not in my care.

Q. It was on the 31st, was it? A. Yes. The handling of the stock was not in my care; therefore, I didn't especially note the order.

781 Q. It was on the 31st? A. On the 31st.

Q. On Sunday? A. Yes sir.

Q. Did this four feet rise, you say— A. —came during the daylight of Sunday, and five foot in the night and the morning of Sunday.

Q. This four foot and nine foot rise amounted altogether to thirteen feet, or thirteen and a half feet, that occurred there? A. That dates from Saturday morning.

Q. From Saturday morning? A. Yes. Saturday morning it struck the 1881 level; it rose four feet during the next twenty-four hours—four feet during the daylight of Sunday, and five feet during Sunday night and Monday morning.

Q. You say that sharp rise on the 31st, that was Sunday, or was the four feet rise you refer to— A. It was sharper in the night—Sunday night.

Q. You say that the flood was cause- by the enormous rains within the watershed of the Kaw, but not in the vicinity of these two points from which you had been receiving reports? A. No, the reports, as I remember it, showed only a foot rise, or something of the kind on the 31st, at Manhattan —nothing at all that made us feel anxious.

Q. Where was the area located in which these enormous rains occurred? A. Further back west, and north.

Q. Further back than Manhattan? A. Yes; it was raining 200 miles back of that, from which we had no reports, because there was no signal stations or anything of the kind out there.

Q. How long did it take that rise to run from Manhattan to the mouth of the Kaw? A. Forty hours.

782 Q. When did this four and nine foot rise reach Manhattan? A. I don't know.

Q. When did it reach Topeka? A. I don't know.

Q. You got reports every day you could here? A. Reports on Sunday, but that was the last reports; then everything was washed out, no wires or anything else.

Q. How long would it take the rise to run from Topeka down the Kaw? A. About 20 hours.

Q. Did it get there twenty hours before it got to Kansas City? A. I suppose so.

Q. Didn't you get any report of its arrival at Topeka, Kansas? A. Nothing on that scale at all; I got no reports at all.

Q. It is not your idea that that thirteen feet of water came into the Kaw river this side of Toneka, is it? A. It was never very clearly shown where it came from; things were in such a chaotic condition, no reports or anything.

Q. As a matter of fact, you didn't get any report from either Manhattan or Topeka either, as to the four-foot or nine-foot rise? A. No sir.

Q. Do you know, Mr. Child, where that flood water came from? That is, I mean to say, whether it came from beyond Manhattan or from beyond Topeka? A. From reading since, I am satisfied that it came from beyond Manhattan.

Q. Beyond Manhattan. A. And Topeka, The Republican, Smoky Hill and Saline rivers.

Q. All during the latter half of May, and up to the time the crisis of the flood came, did it rain very heavily all over the Western country—it had, hadn't it? A. Yes sir.

783 But during those anxious days we were not getting reports—the Signal Service office here wasn't getting them. It seemed to be from places where there was no reports, either received or sent.

Q. Wire communication was open with Topeka all right? A. With these two other points, but they did not cover the area sufficiently to give us the necessary alarm.

Q. These rains, Mr. Child, up beyond Manhattan, in that Western region, and all down the Kaw valley, were almost constant, that had begun along about the middle of May? A. Yes, so it proved afterwards.

Q. And it rained here almost every day, and rained heavily? A. It didn't rain very heavy here many days.

Q. All that volume of water that you attribute this rise to, went into the Kaw river the other side of Manhattan and, necessarily, would have to pass Manhattan? A. Yes sir.

Q. And the same is true of Topeka? A. Yes sir.

Q. And there would be no trouble, if anybody was paying any attention to it, to know of such tremendous rises as those were, and the wires were open, so it could be reported, weren't they? A. Of course you understand that there was nothing after Sunday morning. This last nine feet—there were no reports after that; that rise just cleared everything out, and drowned out the railroad agents up there, and everything—yes, it washed away the tracks and wires and all.

Q. Up there at Topeka and Manhattan? A. Yes.

Q. News of that arrived here hours before that flood arrived here, didn't it? A. No. No news at all of it.

Q. You say there was no telegraphic communica-

784 tion at all with Manhattan after the heavy floods out there? A. Well, I have understood since that tele-

graphic communication was destroyed, but, during the day of Sunday we got no reports at all.

Q. I know; but, before Sunday—it took the flood forty hours to get to Kansas City from Manhattan? A. Yes, the day before. All I can do in that is to give you the reports I did get; there was nothing alarming in them. The telegrams will show for themselves in that.

Q. There was communication, was there not? A. Communication up to Sunday morning.

Q. (Continuing)—at Topeka, and it took the flood twenty hours to get here from Topeka? A. Yes sir.

A. I will correct this morning's evidence given by me, in this regard;—last year I had Lawrence and Topeka instead of Topeka and Manhattan. So that wherever Manhattan occurs there, substitute the name Lawrence.

Q. I understood, Mr. Child, that, in giving your testimony this morning, you were under an impression that the two points at which you [you] obtained reports from, were Manhattan and Topeka, Kansas; and you find now that you were mistaken in that, and that those two points were Lawrence and Topeka? A. Yes sir. I really didn't have that impression; but this year I have been dealing with Manhattan and Topeka, right straight along, and got those words or names in my head, instead of Lawrence, Kansas.

Q. The telegrams of which you spoke, you are not able to find? A. I am not able to find all of them; they are lost, except these two from Topeka, Kansas, each of which shows a six-inch rise on Sunday, the 31st.

Q. What is the hour of the sending of that first one to you? A. 3:47.

785 Q. The telegram is as follows:

"Topeka, Kansas. May 30th?

H. P. Child,
Kansas City, Mo.,
River rose six inches since noon.

T. B. Jennings."

Q. Received 3:47? A. Yes sir.

Said telegram read by counsel was, for the purpose of identification, marked R. C. A. 2. Last one, R. C. A. 3.

Q. The other is as follows:

"Topeka, Kansas, May 30th.

H. P. Child,
Kansas City, Mo.,
River risen six inches since 3 P. M.

T. B. Jennings."

8:10 P. M."

Q. The last one was received at 8:10 P. M.? A. Yes.

Q. You did not find any reports from Lawrence, on the 30th? A. None at all.

Q. Do you remember whether you received any other one of these reports from Jennings on that day? A. Not on that day, probably—yes, one in the morning, one came regularly each morning—supposed to, at 8 o'clock, and then others during the day, if I called for them. My impression now is that I got probably eight or ten from each of them.

Q. Did you get any information as to the stage of the river, from the United States Weather Bureau, of which Mr. Connor has charge of here? A. No, we called up
786 each day, concerning the Missouri, but it was not much of a factor, because not high at all, and the Signal office here keeps no record of the Kaw river.

Q. There is a weather bureau at Topeka, Kansas, is there? A. Yes, but they did not keep a record of the river.

Q. You are certain about that? A. None of these points west of here had any authority to—up to the present, to take the river readings.

Q. You don't know whether, as a matter of fact, that they did not take it at Topeka, do you? A. Yes, I guess I do; Mr. Connor,—that is hearsay—Connor told me they did not keep a record of it.

Q. But you never inquired of the Topeka office in regard to it? A. No.

Q. The rise in the Kaw river was continuous from about the middle of May to at least the climax, the 1st of June? A. Yes, it was continuous, but not uniform; it rose much more rapidly at one time than another.

Q. During all that period, this constant heavy rainy season, it continued, didn't it? A. Yes sir.

Q. You stated, in response to Mr. Hurd's question, of the custom of the Stock Yards Co., in reference to receiving from what you call a delivering company, and delivering to a connecting company, you said that your Stock Yards Co. acted as agent for both parties, in doing that? A. Yes.

Q. I believe you said that, customarily, the delivering company after turning over the cattle to the Stock Yards Co. had nothing further to do with them, in the matter of getting them to the connecting company, and that the
787 shipping them out was wholly in charge of the Stock Yards Co.? A. No, the connecting line, through their live stock agent, took the matter up, from our records, noting by the records that they were routed by their line, and the agent would make a memorandum of it, and, if the owner was not there to give the order—written order, the agent himself would give it upon the Stock Yards Co., on

blank forms which the Stock Yards Co. furnish, for the re-shipment over their line. Upon receipt of that order from that agent, the Stock Yards Co. would take the cattle from the pens and reload them.

Q. I believe you said that the Stock Yards Co., on receiving cattle from the delivering company, customarily paid all the charges and expenses, while they were in the hands of the Stock Yards Co., and that usually repaid to the Stock Yards Co., by the connecting line, and passed on to be discharged at the point of destination? A. The Stock Yards Co. paid the delivering road all charges that it had on its bills, when delivered to the Stock Yards Co. Then the Stock Yards charges for feed and care, with those charges were given to the receiving road, and forwarded as back charges. In the meantime, if settlement day, which is once a week, intervened before that money came back, the Stock Yards Co. repaid it to the road that delivered the stock, and got it—

Q. From the connecting road? A. Yes.

Q. Who was supposed to get it from the owner of the stock at destination? A. Yes.

Q. As I understand you to say, that was the general custom, the manner in which that transportation through—from one road to another, was conducted? A. The universal custom.

Q. Your company did not pay the Santa Fe Railroad Co. for the charges on this shipment of cattle that came
788 over the Santa Fe, these four trains of cattle, did you?

A. Of course, I cannot say absolutely in regard to that, but I have no question but what it did; I do not see why we should not.

Q. Didn't you re-deliver the cattle to the Santa Fe Railroad Company? A. Yes.

Q. In that instance, did you pay all its charges? A. We paid by collecting from the owner.

Q. Isn't it true that the Santa Fe Railroad Co. had to pay your Company all of the charges for the handling of these cattle while there in the Yards, and in the chutes, until your re-delivery to them? A. I will not say positively in regard to that; that was not in my department.

Q. If you don't know about it, that is all I want to ask you about it. A. It would be an exception of the rule if we did not, it would be an exception if we did not do it.

Q. It was an exception to re-deliver the cattle to the same people? A. Yes, an extraordinary case, of course.

Q. You know it is a fact that they did re-deliver them to the Santa Fe? A. Yes sir.

Q. But it was an exceptional case,—this was not, in that particular, done in accordance with the customary and ordinary way? A. I could not say as to that; it was not in my department.

Q. Having re-delivered to the Santa Fe, if you did re-deliver, would it be, in that case, customary for the road to whom you made the re-delivery, to pay the charges of your Yard Company that might be against cattle at the time of the re-delivery? A. Yes, the road would pay it, be-

789 cause, in that case, it would follow on the stock, the same as if it had gone by connecting line, and the Santa Fe would be supposed to have collected from the owner, when they delivered them back to him.

Q. And your company, the Stock Yards Company, would be supposed to collect from the Santa Fe, when you delivered to them? A. Yes.

Redirect Examination

By Mr. Hurd:

Q. You say that your reports that you received from Topeka, Kansas, on Saturday, May 30th, 1903, showed a rise of six inches after 12 o'clock up to about three, when the message was received? A. Yes.

Q. And that later on there was a further rise shown, about six inches, between that and eight o'clock at night on the 30th of May? A. Yes.

Q. What was the actual rise in the river at Kansas City, —the Kaw river—between the morning of the 30th of May and the morning of June 1st? A. About thirteen and one-half feet.

Q. How much? A. Thirteen and one-half feet.

Q. Thirteen and one-half feet. Did you believe, from your reports from your informants up the river, that the flood of 1903 would be greater than the flood of 1881, up to the time it actually did commence getting beyond that line? A. No sir; on the morning of the 30th of May I had an argument with several parties as to the probabilities; they thought it would be several feet higher, and I gave as my judgment it would not, perhaps, get over a foot higher than it was then. I claimed to be an expert, because I had watched it for thirty years before that; I didn't believe that it would go any higher than it did in 1881.

790 Q. In transferring cattle beyond Kansas City, from a railroad company in from the west to some other direction, north or east, to some other road north or east, is it or is it not, considered a delivery when they are turned over to the Stock yards Co., so far as the railroad bringing the cattle in are concerned—in other words, does the road which

brings the cattle in the Stock Yards have anything to do with them, or control over them, ordinarily, after they have been turned over to the Stock Yards Co., where they are to be transported beyond? A. It is my understanding that turning them over to the Stock Yards Company, closes the obligation of the delivering road.

Q. They—the delivering companies—have no further control over the cattle, then, afterwards, under ordinary circumstances, where the cattle are to be forwarded over another line? A. No sir.

H. P. CHILD.

791 Direct Examination

By A. A. Hurd.

Q. State your name, age, residence, and occupation? A. J. W. S. Hutchings; 43 years of age; residence, 215 Woodworth Ave., Kansas City, Mo.; occupation, Superintendent of the Stock Yards Company of Missouri.

Q. How long have you been Superintendent of the Stock Yards at Kansas City, Mo.? A. Since two years the 1st of last April.

Q. Were you Superintendent of the Stock Yards Co. in May and June 1903, at the time of the big flood? A. Yes sir.

Q. State, if you remember, when the river—at what time the river first rose so high as to get into the Stock Yards,—so as to become dangerous? A. It was on Sunday, May 31st.

Q. Do you remember of the shipment of cattle involved in these two suits, of the Empire State Cattle Company, and the Minnesota-Dakota Cattle Company, received over the Santa Fe line, about the 29th or 30th of May, 1903? A. Yes sir.

Q. State, if you know, what was done with the cattle when the water rose so as to make it dangerous in the Yards? A. We drove them up in the viaducts.

Q. Drove them up in the viaducts. A. Up overhead, yes.

Q. Did you personally have charge of that, or assist in the driving of them in there? A. Yes, I assisted in moving them up, the majority of them.

Q. What was the object in putting them up in the viaducts? A. Trying to save them from drowning.

Q. Trying to save them from drowning? A. Yes.

Q. State, if you know, whether there was anything else you could have done to have saved them from drowning, at that time? A. I don't believe there was.

792 Q. They were put into the viaducts by your orders, as Superintendent of the Stock Yards Company? A. Yes, we issued a General Order, to put all cattle possible up on the viaducts, with a view to saving them.

Q. You assisted personally in putting these cattle up, yourself, did you? A. Yes.

Q. How deep had the water become at the time you got through working with them yourself? A. I think there was about five feet of water; my horse swam out with me, at the north end of the Yards when I left.

Q. Are you familiar with the mode of handling cattle, in the United States, shipped through the various Stock Yards of the United States, where they are brought in to the large terminal city on one road to be transported out of there on some other railroad? A. Yes, to a certain extent, I am.

Q. How long have you been engaged in the Stock Yards business? A. About twenty-five years.

Q. At what points in that business, besides Kansas City? A. Sioux City, Iowa, and Chicago.

Q. Sioux City and Chicago. You may state, then, what is the custom in regard to the handling of cattle where they are brought into a terminal city by one railroad, on billing, to be forwarded over some other road to destination? A. We have a record in our receiving and shipping office that shows the consignor and consignee, and the final destination, and the information is gotten there, that [sourde], by the connecting line, and ordered out; an order is issued to the Stock Yards Co. to load the stock in so many cars at a certain time.

Q. State whether or not the railroad which brings
793 the stock in and turns it over to the Stock Yards Co., under ordinary conditions, has anything more to do with it, after it has been turned over to the Stock Yards Co.? A. I think that is practically the end of it.

Q. That ends their connection with it? A. Yes sir.

Q. State whether or not that it is considered a delivery, so far as the company bringing the stock is concerned? A. Yes sir.

Q. The Stock Yards Co. then takes charge of it, and handles it until turned over and loaded into cars of the forwarding company, is that correct? A. Yes sir.

Q. State, where the Stock Yards Co. at Kansas City receives shipments of cattle from a road coming into Kansas City, to be forwarded over some other railroad to destination, what the Stock Yards Co. ordinarily does with the stock, so far as locating it in the Yards is concerned? A. If I understand your meaning, as near as we can consistently, we place these cattle as near the railroad of the connecting line as possible.

Q. You place them in that portion of the Yards most convenient for the forwarding company to receive them, and load them up, so far as you can, practically? A. So far as we can, yes.

Q. If, then, cattle were received to be forwarded over the Missouri Pacific Railroad Co., you would put them in that portion of the Yards most convenient to be loaded out on the Missouri Pacific cars, would you? A. Yes sir.

Q. And, if they were going out over the Burlington line, you would put them in that portion of the Yard most convenient for that route? A. Yes.

Q. Are the Stock Yards absolutely level? Or, are
794 some portions of them lower than the others? A. Some portions are lower than the others.

Q. Would the water, then, rise up into the Stock Yards so as to prevent an engine getting into one portion of the Yards quicker than it would in some other portion? A. Yes, I presume it would; although I am not personally posted as to the elevation of the tracks.

Q. Might it be possible that one railroad company would not be able to get its engines into the place where it loads its stock, by reason of high water at a particular hour, when some other railroad company might be able to, at that portion of the Yards where they load their stock, at that same hour? A. I think it would be, yes.

Q. In the matter of expenses, of feeding and caring for cattle placed in the Stock Yards, what is the custom and practice throughout the United States, in the matter of collecting the charges by the Stock Yards Company? I want to know, do they collect them from the owner? A. Both ways.

Q. Both ways. A. Sometimes the owner is there and pays his bill; but, as a rule, the charges are advanced, given to the receiving line, who collects from the owner, and turns it back to the Stock Yards Company.

Q. Ordinarily, the receiving company pays the Stock Yards Co. for the charges, and collects the amount from the shipper at the destination? A. Yes sir, that is correct.

Q. Can you procure, and furnish, and attach to your deposition, as an exhibit, and make it a part thereof, a statement showing the time when these cattle in question,—these ship-
ments of the Minnesota-Dakota Cattle Co. and the Em-
795 pire State Cattle Co. were delivered to the Stock Yards Co. at Kansas City? A. Yes, I think I can get them for you. I now herewith present statements, giving the number of the cars and the date when the same were received by the Stock Yards Co. from the Santa Fe, and I attach them to my deposition, and ask that they be marked Exhibits B, C, D and E, respectively. (So marked)

Cross-Examination

By Mr. Ball:

Q. What time was it, Mr. Hutchings, that you ordered these cattle put up in the viaduct? A. The general order was issued on Saturday afternoon, to the effect that, should the water come into the Yards, put the cattle up in the viaduct, and save all you can.

Q. About what time in the afternoon was it issued? A. The most of those cattle were put up on the forenoon of Sunday.

Q. About what time was this order issued in the afternoon of Saturday? A. Oh, I am not positive, exactly; I think in the neighborhood of five o'clock, something like that.

Q. When did you begin putting the cattle up in the viaduct? A. A very few were put up by night, I mean on Saturday night; the big end of it was all done after six o'clock on Sunday morning.

Q. When did you finish putting them up? A. About, something after ten o'clock Sunday morning. I went out a little before eleven o'clock.

Q. You stated that you swam your horse, it must have been about five feet deep. A. In the north end of the Yards, a little lower there.

Q. Down in the vicinity of the Missouri Pacific? A. Yes.

796 Q. Would you call them Yards or "loading yards"? A. No sir.

Q. I believe, in answer to Mr. Hurd, you said it was customary for the delivering road, or the road from whom the Stock Yards Co. received and unloaded cattle, to give an order as to what road they were going to send them out by, and you made a record of what the receiving road will be? A. Yes sir.

Q. You would get that from the Santa Fe? A. Yes.

Q. From the railroad that delivered the cattle? A. Yes sir.

Q. Were those cattle, in this particular instance, delivered to the Stock Yards Co., for the purpose of being delivered to any other particular company? A. I believe they were; still, I am not positive.

Q. Would the records show as to that? A. Yes sir; they should show the final destination.

Q. Should show it,—would the bills designate it? A. I believe it would show the routing of that stock.

Q. How do you make that record? A. By what the stub-bill is.

Q. Instead of by some individual direction of some officer or agent? A. We make it from the stub-billing.

Q. In regard to this particular instance, these four trainloads of cattle, do you know whether the bills for the cattle, and the routing of the cattle, as shown by the bills, indicated any particular railroad? A. I do not know.

Q. Whether it was the Missouri Pacific or not? A. I don't know.

Q. Do you know whether the Missouri Pacific Co. gave an order for the cattle to be put down in the Yard adjacent to their loading place? A. I do not remember that they did.

Q. That is where they put them? A. Yes.

797 Q. Who has charge of these records? A. Mr. Norton, the shipping master.

Q. Where are the stub-bills, do you keep them? A. Yes sir.

Q. Would they be in Mr. Norton's possession, in his office? A. Those bills, I presume, would come under Mr. Pray, Chief Clerk in the Freight Office.

Q. The records of Mr. Norton would be in the Stock Yards office? A. Yes; Mr Norton is the shipping master, and has charge of the office.

Q. For your company? A. Yes, but either one can produce those stub-bills, if we have them.

Q. And show us the record you made of these shipments? A. Yes sir.

Mr. Botsgord: That is, the receipt of the cattle.

The Witness: Yes sir.

Q. There will be no objection to our seeing them? A. No. We have a large book that we call the Train Register, it shows the consignee, the consignor and the number of cattle.

Q. In this instance, these shipments did not go in the ordinary way, as you were telling Mr. Hurd awhile ago—they were taken out by the same railroad that brought them in, weren't they? A. Yes, I believe they were; I believe the Santa Fe took them out.

Q. In that kind of a case, the custom would be, would it not, for the Santa Fe to pay up all bills made on them while in there, and then take care of that themselves afterwards? A. Yes sir.

Q. You held them as agent for the Santa Fe Railroad Co., and delivered them back to the Santa Fe Railroad Co., and required them to pay your charges while they were in

798 your custody? A. Yes sir.

Q. So that, if the Santa Fe intended to deliver them to any connecting carrier, as a matter of fact, it was not done, and they were not handled in what you described as

the ordinary and customary way of putting cattle through your yard, from one road to another? A. No, it was out of the ordinary.

Re-Direct Examination.

By Mr. T. H. Reynolds:

Q. The billing shows the destination, does it not, Mr. Hutchings, in all such shipments? A. Yes sir.

Q. And your records are made up from the billings? A. From this bill we receive from the railroad company.

Q. And that was the case with the records of these train loads of cattle in question? A. I do not know; I have not examined the records to see.

Q. You don't know of any verbal instructions given by any officer of the Santa Fe in regard to these cattle, do you? A. I do not remember of any, no.

Q. But, so far as you know, your records in this case were made up just in the usual way, from the billings,—not from any verbal instructions? A. Yes, that is right.

Q. You said, I believe, that the cattle in this case, were taken out by the Santa Fe—you do not know the reason for that, do you, Mr. Hutchings? A. I don't remember that I was given the reason, no sir.

Q. Ordinarily, Mr. Hutchings, cattle coming in to the Yard, for shipment by a connecting carrier, would not be re-delivered to the carrier that brought them in? A. No sir.

799 Q. So far as you know, when these cattle were brought in, there was no intention indicated to you of the Santa Fe taking them back again. A. No sir.

Q. So that the re-delivery of the cattle to the Santa Fe, after the flood, so far as you know, was caused by the flood, and not by any intention that existed prior to that time? A. I presume so, yes sir.

Re-Cross Examination

By Mr. Ball:

Q. If I understood you correctly, Mr. Hutchings, as a matter of fact, you do not know,—I mean of your own knowledge,—anything about the circumstances or arrangements under and pursuant to which the Santa Fe did take the cattle back? A. No sir.

Q. You do not know, personally, do you, what the purpose was they had, originally, in delivering them to the Stock Yards Company? A. No, I [dod] not know, but I have an opinion.

UNLOADING CERTIFICATE.

THE KANSAS CITY STOCK YARDS COMPANY OF MISSOURI.
THE UNITED STATES QUARANTINE STOCK YARDS COMPANY.

RAILROAD. A. T. & S. Fe R. R. | TIME RECEIVED. 8:20 A. M. May 30, 1903

Car No.	Initial.	Cattle.	Calves.	Hogs.	Sheep.	Horses & Mules.	Crippled.	Dead.	Total.	Chute.	Consignor.	Consignee.
2013	SWS	38					1		39	10	M D C Co.	M D C Co. (Evarts, S. D.)
53529	AT	39							39	17	" " " "	" " " "
60053	SJV	39							39	18	" " " "	" " " "
54304	AT	38						1	39	19	" " " "	" " " "
5252	PV	39							39	20	" " " "	" " " "
1602	Hx	39							39	14	" " " "	" " " "
54466	AT	39							39	15	" " " "	" " " "
54104	" "	39							39	16	" " " "	" " " "
5241	PV	39							39	11	" " " "	" " " "
60054	SJV	38							38	12	" " " "	" " " "
93	4C	38							38	13	" " " "	" " " "
3192	SWS	39							39	9	" " " "	" " " "
53131	AT	37					1	1	39	6	" " " "	" " " "
53220	" "	40							40	5	" " " "	" " " "
15476	IMS	39							39	7-8	" " " "	" " " "
5360	NE	39							39	21	" " " "	" " " "
1194	4C	39							39	22	" " " "	" " " "
3435	SWS	38					1		39	23	" " " "	" " " "
525	4C	37					1		38	24	" " " "	" " " "
2396	4C	40							40			
									779			
							Less dead		2			
(20)									777			

This is to certify that the above is a correct copy of the Records.
J. W. S. HUTCHINGS, Supt.
By Richardson.

Kansas City, August 11, 1903.

Q. I mean that, aside from your opinion, or even any personal information, you have no personal knowledge of it? A. No sir, I have not.

Mr. Reynolds:

Q. All you know about that would be what your records show, and the orders you got following those records? A. Yes sir.

J. W. S. HUTCHINGS.

[801] **UNLOADING CERTIFICATE.**

THE KANSAS CITY STOCK YARDS COMPANY OF MISSOURI.
THE UNITED STATES QUARANTINE STOCK YARDS COMPANY.

The A. T. & S. F. Ry. Co.
Claim Department
Aug. 11, 1903.
Asst. Gen'l Live Stock Agt.
Kansas City, Mo.

RAILROAD. A. T. & S. Fe R. R.

TIME RECEIVED. 8:20 A. M. May 30, 1903.

Car No.	Initial.	Cattle.	Calves.	Hogs.	Sheep.	Horses & Mules.	Crippled.	Dead.	Total.	Chute.	Consignor.	Consignee.
												(C. L. Millett)
5043	PV	38							38	1:	W. H. Frost	(Evarts, S. D.)
53231	AT	38							38	2:	" " "	" "
52041	" "	38							38	3:	" " "	" "
1661	Hx	34							34	4:	" " "	" "
53439	AT	38							38	19:	" " "	" "
53804	" "	38							38	20:	" " "	" "
53927	" "	39							39	21:	" " "	" "
4454	Hx	38							38	18:	" " "	" "
143	SWS	38							38	11:	" " "	" "
5148	PV	38							38	16:	" " "	" "
5003	" "	38							38	5:	" " "	" "
53882	AT	38							38	15:	" " "	(P. H. Kellog) (Evarts, S. D.)
53908	" "	38							38	14:	" " "	" "
4320	Sts	39							39	13:	" " "	(Empire State C.Co) (Evarts, S. D.)
5070	PV	38							38	11:	" " "	(Empire State C Co. (Evarts, S. D.)
5361	" "	38							38	10:	" " "	" "
4666	Hx	39							39	9:	" " "	" "
5004	" "	38							38	8:	" " "	" "
3080	SWS	38							38	7:	" " "	" "
405	" " "	38							38	6:	" " "	" "
5272	PV	38							38	12:	" " "	Empire State C Co.
(21)								Total.....	797			

3–

This is to certify that the above is a correct copy of the Records.
Kansas City, August 11, 1903.

J. W. S. HUTCHINGS, Supt.
By Richardson.

UNLOADING CERTIFICATE.

THE KANSAS CITY STOCK YARDS COMPANY OF MISSOURI.
THE UNITED STATES QUARANTINE STOCK YARDS COMPANY.

RAILROAD.	TIME RECEIVED.
A. T. & S. Fe R. R.	3:15 P. M. May 29, 1903.

Car No.	Initial.	Cattle.	Calves.	Hogs.	Sheep.	Horses & Mules.	Crip-pled.	Dead.	Total.	Chute.	Consignor.	Consignee.
												(Minnesota Dakota)
53489	AT	39							39	97:	M D C Co.	(C. Co.)
54085	" "	38							38	98:	" " " "	" "
54316	" "	40							40	95:	" " " "	" "
3230	SWS	39							39	94:	" " " "	" "
52416	AT	39							39	96:	" " " "	" "
53200	" "	38							38	91:	" " " "	" "
53092	" "	39							39	92:	" " " "	" "
53225	" "	39							39	93:	" " " "	" "
2118	Hx	39							39	90:	" " " "	" "
2428	4C	38							38	89:	" " " "	" "
4794	Hx	38							38	88:	" " " "	" "
5189	PV	38							38	74:	" " " "	" "
52404	AT	38							38	75:	" " " "	" "
2030	4C	38							38	76:	" " " "	" "
53549	AT	40							40	73:	" " " "	" "
5228	PV	39							39	70:	" " " "	" "
5188	" "	38							38	71:	" " " "	" "
846	SWS	37							37	72:	" " " "	" "
5303	PV	42							42	69:	" " " "	"
(19)									736			

This is to certify that the above is a correct copy of the Records.

J. W. S. HUTCHINGS, Supt.
By Richardson.

Kansas City, August 11, 1903.

UNLOADING CERTIFICATE.

THE KANSAS CITY STOCK YARDS COMPANY OF MISSOURI.
THE UNITED STATES QUARANTINE STOCK YARDS COMPANY.

RAILROAD.	TIME RECEIVED.
A. T. & S. Fe R. R.	9:25 A. M. May 30, 1903.

Car No.	Initial.	Cattle.	Calves.	Hogs.	Sheep.	Horses & Mules.	Crippled.	Dead.	Total.	Chute.	Consignor.	Consignee.
53962	AT	38							38	10	M D C Co.	(M D C Co.)
53150	" "	39							39	9	" " " "	" " " "
54411	" "	39							39	8	" " " "	" " " "
5212	PV	40							40	7	" " " "	" " " "
1409	SWS	37							37	6	" " " "	" " " "
5009	PV	38							38	5	" " " "	" " " "
5005	" "	38						1	39	4	" " " "	" " " "
60030	" "	40							40	3	" " " "	" " " "
5089	V&N	38							38	12	" " " "	" " " "
52155	AT	40							40	11	" " " "	" " " "
312	SWS	38							38	20	" " " "	" " " "
52605	AT	39							39	19	" " " "	" " " "
53759	" "	39							39	18	" " " "	" " " "
53428	" "	39							39	17	" " " "	" " " "
53964	" "	38							38	16	" " " "	" " " "
5081	PV	38							38	24	" " " "	" " " "
5080	" "	38							38	23	" " " "	" " " "
5064	PV	38							38	22	" " " "	" " " "
53473	AT	37						1	38	21	" " " "	" " " "
53535	" "	39							39	25	" " " "	" " " "
									772			
							Less dead		1			
(20)									771			

Sold to Stock Yards Co. by Mo. Pac.

This is to certify that the above is a correct copy of the Records.

J. W. S. HUTCHINGS, Supt.
By Richardson.

Kansas City, August 11, 1903.

805 William Fletcher—sworn testified on behalf of the defendant as follows on

Direct Examination.

Q. By Mr Angevine: What is your name? A. Wm. Fletcher.

Q. Where do you reside? A. Kansas City, Kansas.

Q. How long have you lived in Kansas City, Kansas, and in this vicinity? A. Since 1873.

Q. What is your business? A. At the present time contracting city clerk, street work, paving and grading, curbing and so forth.

Q. Do you remember the flood of 1903? A. Yes sir.

Q. Were you in Kansas City during that flood? A. I was.

Q. Were you in Kansas City during the flood of 1881? A. Yes sir.

Q. And all subsequent floods? A. Yes sir.

Q. Are you familiar with the land where the stock yards are? A. Yes sir.

Q. Were you familiar with that land before the stock yards were located there? A. Why when I first was familiar with it there was a very small showing of stock yards there in 1873, I have been familiar with it ever since.

Q. Are you familiar with the lay of the land in the district known as the river bottoms there of Kansas City, Kansas, and Kansas City, Mo. A. Yes sir.

Q. Have you been familiar with that district ever since 1873? A. Yes sir.

Q. You may state whether or not the flood of 1881 overflowed the territory now included within the stock yards? A. No sir, I don't think it did.

Q. Do you know where the old bed of Turkey creek is? A. Yes sir.

806 Q. Does the old bed of Turkey creek run through a portion [os] what is now the stock yards? A. Yes sir.

Q. Which part of the stock yards? A. I think it is rather the western part.

Q. West of the exchange building? A. Up in that neighborhood.

Q. Ran in a northeasterly direction? A. Yes sir.

Q. Through the west and northern parts would it be? A. Yes sir.

Q. Has there ever been a time since you lived in Kansas City that the land now occupied by the stock yards had overflowed prior to the flood of 1903? A. Not entirely, no sir.

Q. What part of the yards, if any, was flooded by the flood of 1881? A. Well there was a little low portion of the land towards the north and west the water got up on in 1881.

Q. That was included in what was known as Turkey creek bottoms, the bed of Turkey creek? A. Yes sir.

Q. In the early days Turkey creek flowed through that tract of country and afterwards cut a channel into the Kaw river? A. Yes sir.

Q. That left the old bed? A. Yes sir.

Q. State whether or not the flood of 1881 was the highest flood ever occurred in the Kaw river to your knowledge prior to the flood of 1903? A. Yes sir.

Q. What was the condition of the country known as the river bottoms now covered by Kansas City, Kansas and Kansas City, Mo. at the time of the flood of 1881, that is whether it was as [thivkly] settled and built upon as it is now? A. No sir it was not, not near so thick as it is at present.

Q. State whether or not that entire district was covered with streets and alleys and part of the town site of the two cities during the flood of 1903, prior thereto? A. Yes sir.

807 Q. You may describe to the jury about how that section of the country was built up and occupied by residences and stores and other buildings? A. It was very largely built up, and the packing houses there increased it very much and buildings have been erected and streets been graded and paved. Large improvements all through.

Q. State whether the packing houses of the two Kansas Cities are included in that district? A. Yes sir they are.

Q. You may state where the principal implement houses and the agricultural implement houses and farm implement houses, and wagons and so forth, are located. A. There in the bottom mostly in the river bottom. Mostly in Missouri.

Q. And in the Kaw river bottom? A. Yes sir in the Kaw river bottom.

Q. Where are the principal railroad yards entering Kansas City located? A. They are chiefly in Kansas City, Kas. some in Kansas City, Mo.

Q. In the Kaw river bottom? A. Yes sir.

Q. You may state where the principal freight houses of those railroads are located? A. They are in the bottoms.

Q. In the Kaw bottoms? A. Yes sir.

Q. What other large establishments are located in the bottoms? A. Well the packing houses, manufacturing establishments generally, the implement houses, wagons, engines and so forth all in the bottoms.

Q. The district covered by the flood of 1903 includes the principal part of the manufacturing and wholesale and agricultural implement business and freight business requiring railroad facilities, does it? A. Yes sir.

Q. What is the part of Kansas City known as Armourdale, where is it located? A. It is in the south part of this city.

808 Q. What you call the sixth ward? A. In the Kaw bottoms altogether.

Q. You may state about how many people had their homes in that district at and prior to the flood of 1903? A. Something like 6000.

Q. State whether or not they were all in the flooded district? A. They were.

Q. Where is the first ward of Kansas City located? A. It is in the Kaw bottoms down at the mouth of the Kaw.

Q. About how many people live in that? A. Some six or seven thousand people live there.

Q. State whether that is in the Kaw bottoms? A. Altogether.

Q. Were those people living in the bottoms at the time of the flood of 1903? A. Yes sir.

Q. At the time it commenced? A. Yes sir.

Q. Do you know how those people got out of their homes during that flood? A. Some of the wise ones got out pretty soon, but a great majority I suppose four fifths of them got out most any way they could, in wagons and boats and one way and another.

Q. After the first few hours of the flood was it possible to get into the flooded district with wagons? A. No sir, the authorities would not let people in there unless going after goods or something.

Q. Would it have been possible to drive a wagon into the flooded district after the first few hours of the flood. A. No sir, it would not.

Q. How deep did the water rise in the residence district of Armourdale, on Kansas avenue? A. I think it raised to about 12 to 14 feet, and some lower portions of the city it raised considerably higher than that.

809 Q. Is Kansas avenue the principal street, the principal business street of the district known as Armourdale or the 6th ward of Kansas City, Kansas? A. Yes sir.

Q. How is that built up, by business houses? A. Built up with brick buildings and business houses all the way from the Kaw river for a mile or mile and a half going west.

Q. Did you see that street shortly after the flood subsided? A. I did.

Q. How soon after the water went down? A. The street was piled with broken buildings and brick houses and goods and everything, fifteen to twenty feet high, impassable.

Q. Would it be possible to get through that street with a wagon and horse at all until the street was cleared? A. No sir.

Q. For what length was that street filled, as you have described it? A. I guess about three-fourths of a mile.

Q. You may state whether there were any houses lodged in that street? A. Yes sir. There were houses lodged in the street, houses broken to pieces and thrown in there, all kinds, beyond description.

Q. Were there any brick buildings along there, on that street wrecked and demolished in that flood? A. Yes sir.

Q. About how many? A. I do not know I could not tell you now how many.

Q. Was there any two story brick buildings wrecked there? A. I think there was, there were over here I know.

Q. I will call your attention to one near sixth and Kansas avenue on the south side of the street a double brick building. A. I forgot about that, there was one up about 7th street the back end of it was all torn off, I forget about the one down about 6th street; probably I saw it, but I do not recollect it.

810 Q. How many banks and banking houses, if any, are located on that street? A. Three I think.

Q. Do you know what became of the contents of those banks. A. Two of them was flooded, one I think got out with the big end of their papers.

Q. Do you know what day they got them out? A. No, sir, I do not I could not tell you now what day it was.

Q. Went there with a boat and got them out? A. Yes sir.

Q. During the flood? A. Yes sir.

Q. That is the only banking institution in the flooded district as far as you know got out any papers or anything else is it not? A. Yes sir.

Q. What was the condition of the stocks of goods in the stores along that street after the flood? A. They were ruined.

Q. Was there any large stocks of goods on that street? A. Yes sir.

Q. About how large a stock would you say the largest stock of goods was, on that street? A. I suppose the largest stock of goods on that street would be twenty thousand dollars.

Q. State whether there was a large furniture store on that street, nearly opposite this largest store you have spoken of? A. Yes sir.

Q. Did you see that at the time the flood subsided? A. Yes sir.

Q. Where was the floor of that furniture store when the flood subsided? A. Down in the cellar I think.

Q. The furniture on top of it? A. Yes sir.

Q. That was a large brick building, was it not? A. Yes sir.

Q. What was the condition of many of the floors of the other buildings? A. Many of them were down in-
811 side the floors in the cellar.

Q. Now you may state whether or not a similar condition existed in the first ward of Kansas City, Kansas? A. Yes sir.

Q. Which you have already described here? A. Yes sir, similar condition, just as bad.

Q. How was it in the district of the Kaw valley known as the west bottoms, Kansas City, Missouri. A. Well, I was not over there, all I know about that would be what I saw in the paper.

Q. Were you over before the rubbish was cleared away? A. I was over to Harlem and in through there several times and hundreds of freight cars piled up in all directions.

Q. That is across the river? A. Yes sir.

Q. Across the Missouri river? A. Yes sir.

Q. Did you stand on the river bank at any time and watch the flood as the flood arose and was coming up? A. Yes sir.

Q. Describe to the jury what you saw in the flood? A. I saw bridges go out Sunday.

Q. How many bridges went out? A. Three or four of them.

Q. You saw three or four? A. Yes sir and saw a big tank come down, and stopped and caught and struck the side, and finally they gave way and went out; the current was so swift carried the floating material a mile beyond Minnesota avenue against the current a mile before it checked and went down the other side.

Q. Now describe to the jury in that connection how the Missouri river flows by Kansas City, Kansas, that is the direction it takes and how the Kaw river empties into the Missouri show the direction? A. The Missouri river flows in this direction down—

Q. In a southeasterly direction? A. Yes sir, and the Kaw comes in from the west and strikes the Missouri
812 right down here about at that time the current threw

the Kaw up here and the Kaw ran up a mile before it checked.

Q. The debris went up the Missouri river a mile before it struck the opposite shore? A. Yes sir.

Q. You spoke about seeing tanks come down the river which tanks, do you refer to? A. Standard oil company tanks.

Q. They had a storage place over in Armourdale? A. Yes sir.

Q. About how large are their storage tanks? A. I would think tanks which would hold a hundred barrels.

Q. And about how high? A. 15 feet something like that.

Q. Are those steel tanks? A. Yes sir iron tanks.

Q. Those tanks came down the river? A. They went up the river, and one of them a little steam boat hitched on to it and landed it somewhere.

Q. Did you see that tank come out of the Kaw river? A. Yes sir.

Q. You saw it take the direction which it did take after it struck the Missouri river? A. Yes sir.

Q. Describe to the jury the direction which that tank took after it struck the Missouri river. A. It followed the current of the Kaw away up stream.

Q. That is up the Missouri river? A. Yes sir.

Q. About where did they strike the opposite bank of the Missouri river or where the bank would have been if the water had not been over the bank? A. About a mile up the Missouri river.

Q. There is where it was caught by a steam boat. A. Yes sir there is where it was caught by the steamboat.

Q. And towed back to anchorage somewhere? A. Yes sir.

813 Q. State whether or not the debris all went the same course? A. Yes sir. It all went the same course.

Q. Was that Kaw river so very much higher than the Missouri river? A. Yes sir.

Q. Now about how are the Missouri river bottoms in that vicinity, state whether they are much wider than the Kaw river bottoms or mouth of the Kaw? A. Yes sir.

Q. So that the water after it left the Kaw spread out? A. Yes sir.

Q. State whether or not immediately opposite the mouth of the Kaw river and on the opposite shore of the Missouri river, was a large grove of cottonwood timber, before the

flood, which was carried away bodily by the flood? A. Yes sir.

Q. Trees rooted up and taken away? A. Yes sir.

Q. Do you know about how many houses in the Armourdale district were entirely washed away and carried away by the flood? A. Well there was a count made here, they had about two thousand houses moved from their foundation altogether; how many was washed away I do not know, and I do not know as we ever did have any; we do not know whether we ever had any correct data.

Q. About two thousand you say taken from their foundations? A. Yes sir.

Q. About the freight cars standing in the yards, what happened to them? A. They were overturned and swept out and carried away like sticks and brush.

Q. Do you know whether or not those freight cars were loaded many of them with merchandise? A. Yes sir.

Q. Did you see many of them in that condition? A. Yes sir.

814 Q. Where were they and in what condition were they after the flood? A. They were broken up to pieces and destroyed.

Q. State whether or not you saw many freight cars floating down the river? A. Yes sir.

Q. State whether or not the Standard Oil Company's steel tank cars were washed away or not, or many of them? A. They were, I saw some, I do not know how many, I saw a number of them going down stream.

Q. Do you know how many bridges of Kansas City and immediate vicinity of Kansas City were washed away, that is Kansas City or the Kaw river bridges? A. Somewhere about 14 I think.

Q. Every bridge? A. Every bridge except the Missouri Pacific.

Q. Do you know what the Missouri Pacific people placed on their bridge to prevent it floating away? A. They covered it with locomotives from one end to the other.

Q. Could you tell from where you were, you could see that structure, how many locomotives were on the bridge? A. No I judge from fifteen to twenty.

Q. During the height of the flood could those locomotives be seen above the water or were they completely submerged. A. They were completely submerged.

Q. The locality of the bridge was in plain view from there? A. Yes sir you could see it from the bluffs here.

Q. And the locomotives could not be seen? A. No sir they could not be seen.

Q. Did you see the effects of the flood along James street, that is as to the washing away of buildings and the current washing great holes in the ground and in the street and so forth? A. Yes sir.

Q. Did you notice that? A. Yes sir I did.

815 Q. Did you have any connection with the repairs of James street? A. We repaired some of the sewers over there which were dug out by the flood about fifteen feet below the grade of the street and torn up and broken to pieces and the catch basins, they were torn and some of them broken to pieces; and some of them were pretty well made and the cement held them together, and that current which went through there went across the street and cut out one brick building entirely, and twenty-five feet of another one, and swept about two hundred feet, I think about two hundred feet of buildings off of James street and the Armour building checked it, cut into the corner of the Armour building.

Q. Brick building? A. Yes sir.

Q. The flood took out the corner of it? A. Yes sir and dug out a hole across the street, which was twenty feet deep, all level with the street before the flood.

Q. That street was a graded and paved street was it? [—]

Q. Street car line double track street car line on it? A. Yes sir.

Q. What was the condition of the street itself? A. All cut to pieces it has been filled and repaved since then.

Q. The street was washed out to such a depth it destroyed this sewer you have spoken of? A. Yes sir.

Q. That sewer was fifteen feet below the surface? A. Yes sir.

Q. About how large a hole was excavated by that flood immediately below the street north of Armours? A. There was a hole as I said there that this hole, you mention, about twenty feet deep.

Q. About how large? A. 100 or 150 feet one way and ran down under the Northwestern track and to the Missouri river.

816 Q. What was the condition immediately above that hole on the opposite side of the street, state whether washed out there? A. Yes sir, it was, that is where the building was washed out spoken of, brick buildings.

Q. Two story brick buildings? A. Yes sir, two story brick building and twenty-five feet of another two story brick building, left fifty feet of it; that building was 75 feet on the street, it took twenty-five feet of it, and it never has been rebuilt, that twenty-five feet has not.

Q. It took one building entirely out of that place? A. Yes sir.

Q. Was the ground excavated along where that brick building had been and dug up by the flood? A. Yes sir to a depth of twelve feet or fourteen feet.

Q. And where the two story brick building stood before the flood there was a hole twelve or fourteen feet deep after the flood? A. Yes sir.

Q. Did you notice the railroad track ran down the alley immediately west of James street as to what happened to that railroad? A. That switch there you mean?

Q. Yes. What happened to it. A. It was washed out but it has been rebuilt since.

Q. The switch was torn from the railroad track? A. Yes sir.

Q. What was the condition of Central avenue from where it crossed James street on to and east of the state line and beyond? A. It was similar to Kansas avenue in Armourdale piled up with rubbish, and broken buildings and one thing and another, impassable.

Q. Do you know [wheere] the Missouri Pacific and Union Pacific yards were north of the stock yards or at the north end of the stock yards? A. Well no I do not know the kind of locality the railroads own there. I could not say.

817 Q. Do you know whether or not the Missouri Pacific railroad has any yard known as the cypress yards on the west side of the Kansas river and another yard on the east side of the Kansas river, do you know as to that? A. I know where the cypress yards were, the Missouri Pacific cypress yards.

Q. Where is their shop and round-house? A. Why that is the other side of their bridge down here.

Q. On the west side of the Kaw river? A. Yes sir.

Q. In the flooded district? A. Yes sir.

Q. Do you know what happened to their round house building during the flood. A. All washed out and destroyed.

Q. Do you know where the Union Pacific ice house, and some of their other buildings were further south? A. I know where the Union Pacific shops are I do not know about the ice house where it was.

Q. You may state whether the Union Pacific shops were flooded during that flood? A. Yes sir they were.

Q. Did you go over the James street viaduct which runs south from Central avenue, that is the viaduct goes over towards the stock yards on James street. A. I was over it after the flood many times, drove across there in my buggy, not within a few days I don't think though.

Q. Did you notice the cars in those railroad yards as to what condition they were in? A. When I was going over there they were pretty much fixed up then and the tracks fixed.

Q. There was a viaduct on 7th street going from
818 the northern part of Kansas City to Armourdale district was there not? A. Yes sir.

Q. About how high was that viaduct above the level of the ground. A. I guess twenty feet.

Q. That ran over the Union Pacific and Rock Island railroad tracks and yards did it? A. Yes sir.

Q. What happened to that viaduct? A. It was washed away and torn to pieces.

Q. State whether or not the packing houses were all flooded during that flood? A. They were.

Q. Did I ask you about how many people were drowned in the flood? A. I guess you did not, I don't know that, I did know at the time, I have forgotten, there was a number.

Cross-Examination

By Mr. Ball:

[—] Do you know where the shipping division of the stock yards is? A. No sir.

Q. Do you know where the stock exchange building is? A. Yes sir.

Q. There is a street goes right there east up to the front of the building? A. Yes sir.

Q. If the shipping division lie south of and adjacent to that street, you would know where they are? A. Yes sir?

Q. How close to this shipping division is the viaduct leading to the bluff in Missouri? A. There is a viaduct there, 12th street viaduct do you mean.

Q. That street goes into the front of the exchange building is 16th street is it not? A. I think so. 16th street is Genessee street and Bell street.

Q. Is there a wagon road and viaduct for travel,
819 not street car viaduct—how close to that shipping division or pens is there a viaduct leading up the bluff? A. You might come around where the street cars run now, run up 23rd street or you might go down, you could not go up 12th street.

Q. I mean south through 12th street viaduct is not a roadway? A. No sir you could not get up it.

Q. I am talking about down here at the south east corner of the shipping division of the yards, viaduct comes up from 23rd street? A. I think there is a street comes up through, I have not been around there very recently; I have driven around that way.

Q. That is within a few blocks? A. Yes sir.

Q. The shipping division? A. Yes sir, that is close to the end of the stock yards, it is between, you might say, the stock

yards runs into the cattle barns there and pens and stock yards proper.

Q. Runs up to the higher lands of Missouri? A. Yes sir.

Q. Now you have spoken about a great deal of property that was destroyed in the flood down there, did you know any considerable amount of property that was live stock which were not got out of the bottoms there. A. No not of my own knowledge I saw a few cattle and horses and hogs and so forth floating down the river. I don't know where they came from or anything about it.

Q. Is it not a fact that anything that was alive and had legs generally got out of there even as sudden as the rise in the water was, they got them out? A. Generally speaking that is true.

Q. Do you know the mule yards there of the Sparks
820 Bros. Co.? A. Yes sir.

Q. Do you know of the fact that they got about seven hundred head of mules out of there? A. I heard so.

Q. That Sunday morning? A. I heard so, I don't know anything about it.

Q. After the big rise began? A. Yes, I heard so.

Q. Do you know that the stock yards company had five or six hundred men employed there, and horses.

By Mr. Angevine: Objected to by defendant as not proper cross-examination; overruled; defendant duly excepting.

A. No I do not know how many they had I presume they were used in looking after their interests, so far as my own knowledge goes, I do not know.

Q. You do not know what number of men and horses were available there at that time? A. No sir.

Q. This 23rd street viaduct that would be only about seven blocks south from the exchange building, would it not? A. I do not think it would be over a thousand feet.

Q. And these people which you spoke of some sixteen thousand down in Armourdale, practically all of the people got out without any loss of life? A. They did not look behind them they kept getting them out.

Q. I thought you said four-fifths of them went out there by wagons and boats? A. I think so.

Q. That would be about twelve thousand? A. I think so.

Q. There could not very many of them go by boat. A. There was boats there in use?

Q. About how many boats? A. I could not tell you now.

Q. A very small percentage of the people were taken out by boats? A. Yes sir.

Q. I thought you meant that; how long in your judg-
821 ment would it have taken to have gotten cattle out of the shipping division if they were located where I indicated to you in a former question over to the hills, how long it would have taken to drove the cattle over there. A. If they were unloaded or in the pens?

Mr. Angevine: Objected to by the defendant as not proper cross-examination, and not shown that he knows anything about cattle.

Redirect Examination.

Q. Mr. Angevine: When these people fled from Armourdale, and the first ward, you may state whether or not they got out their household goods or not. A. A very few of them got anything, they left everything behind them.

Q. You know as a matter of fact that scarcely any of them brought out even clothing did they? A. Many of them did not take anything except what they had on.

Q. Very few of them took anything except what they had on. A. All they could do to take care of their children.

Q. You know as a matter of fact boats were at work for two or three days rescuing people from the roofs of their houses? A. Yes sir.

Q. And from the windows and so forth? A. Yes sir.

Q. And you know as a matter of fact that the authorities hunted up and down the Missouri river and had boats sent here to continued to rescue them for two or three days, don't you? A. Yes sir.

Q. And every boat that could be pressed into service was pressed into service by the authorities and used during that flood in rescuing people? A. Yes sir.

Q. Do you know as a matter of fact that quite a number of men staid in the packing houses and other large es-
822 tablishments and never got out during the flood at all. A. I do some of them staid there for a week or ten days looking after packing house property,

Adjourned to January 24th 1905, 10 a. m.

January 24th 1905, 10 a. m. resumed.

Mr. Angevine: I now offer in evidence the weather predictions made by Patrick Connor of the Weather Bureau, at Kansas City, whose testimony has been read here, for the condition of the weather this morning and to-day as published in the Kansas City Star last night.

Mr. Botsford: Objected to by the plaintiffs as incompetent, irrelevant and immaterial and hearsay.

Mr. Angevine: Mr. Connor you will remember said he was a weather for-caster and officer in charge, it was his duty to observe the weather conditions and send out to the public and did send out to the public notices of his predictions as to the weather, and now I want to show what kind of a guesser he is by reading his guess made last night as to the weather we would have this morning; and submit the weather to the jury in connection with it.

By the Court: These prognostications of the Weather Bureau, or what they profess to be are predictions, and 'no one knows what a day may bring forth'.

These are simply what they profess to be predictions and they make the best guess on the subject they can. I do not think it is proper; objection sustained.

Defendant then and there duly excepting.

823 Mr Botsford: Mr Connor's evidence in this case is based upon continued rainfall, continued for one month, and that is the difference between that sort of testimony and what is going to happen.

By the Court: It is not necessary to argue it; proceed with the case.

H. S. Swingley—sworn testified on behalf of the defendant as follows on

Direct Examination.

Q. What is your name? A. H. S. Swingley.

Q. Where do you live? A. Kansas City, Kansas.

Q. How long have you lived in Kansas City, Kansas and in this vicinity? A. About 44 years.

Q. During all of that time have you been familiar with the Kaw river and the streams at Kansas City, Kansas and Kansas City, Missouri; the Kaw and Missouri rivers? A. Yes sir with the exception of a few years I have not been here.

Q. Were you in Kansas City during what has been spoken of as the flood of 1881? A. Yes sir.

Q. Were you in Kansas City during what is known
824 as the flood of 1892? A. Yes sir.

Q. Were you in Kansas City during other floods of more or less consequence in the Kaw river, during that time you have spoken of? A. I have been here all of the time with the exception from 1865 to 1969 four years I was away.

Q. What is your business in Kansas City? A. Fire insurance agent.

Q. And also engaged in the real estate business to some extent? A. Yes sir.

Q. Did your business require you to become acquainted with the various parts of Kansas City, Kansas, and did you become thoroughly acquainted with the city? A. Yes sir. City and county also.

Q. How many wards are there in Kansas City, Kansas? A. Six wards.

Q. About what is the population of the city of Kansas City, Kansas or was in 1903? A. I think about sixty thousand or sixty-five thousand.

Q. How much of that population lived in what was known then as the sixth ward? A. I think about twenty- or twenty-five thousand.

Q. Was that ward all in what was the flooded district, flood of 1903? A. Yes sir the sixth ward is all in the bottom except a small portion of it, on the bluff adjacent to the bottom.

Q. What per cent of that ward lived in the river bottoms? A. Very near all of them.

Q. Where is the first ward of Kansas City, Kansas. A. That is in the vicinity of the Fowler and Armour Packing Companies, just across the river.

825 Q. All of Kansas City, Kansas, on the east side and south side of the Kansas river are in the first ward, are they not? A. Yes sir all what is known as old Kansas City, Kansas.

Q. That includes the stock yards and the country lying south of the stock yards, does it, and north of the stock yards or the east side of the river? A. That includes all of the stock yards except the quarantine yards which is in the 6th ward.

Q. On the west side of the river? A. Yes sir.

Q. All of Kansas City stock yards then except the quarantine yards are in the first ward? A. Yes sir.

Q. And the quarantine yards are in the 6th ward? A. Yes sir.

Q. About what was the population of the first ward at the time of the flood in May and June, 1903. A. I do not believe I could answer that.

Q. Was there any portion of the second ward of Kansas City, Kansas, in the flooded district? [Q.] There was just some of it down along the river there.

Q. A small portion of it? A. A small portion of it.

Q. Now all of the first ward, nearly all of the sixth ward and a small portion of the second ward of Kansas City, Kansas, were located in the river bottom, they were in the flooded district A. Yes sir.

Q. What kind of industries are kept and maintained in the first and 6th wards in the flooded districts? A. Pack-

ing houses and railroads and foundries, and wholesale houses.

Q. Were all of the packing houses of Kansas City, Kansas and those which are commonly spoken of as Kansas City, Missouri, packing houses, located in Kansas City, Kansas, in the first and 6th wards? A. Yes sir.

826 Q. The freight houses and packing houses of the combined two cities are in the flooded district? A. Yes sir.

Q. Were all of the stock yards, public stock yards of the two cities located in the flooded district? A. Yes sir.

Q. And the state line I believe runs through the stock yards? A. Yes sir right through the exchange building.

Q. Part of the exchange building and part of the stock yards are in Missouri and part in Kansas? A. Yes sir.

Q. Do you know where the Atchison Topeka & Santa Fe railway round house and shops are at Argentine? A. Yes sir.

Q. How long have you been familiar with that vicinity? A. Ever since the town started.

Q. You may state how extensive the Santa Fe shops and round houses and yards at Argentine, are. A. There has been an addition built to the round-house in the last six or eight years, they have built new yards there in the last year and they are very extensive.

Q. The yards as they existed at the time of the flood of 1903, you may state how extensive the yards were at that time and shops and round houses? A. Well the yards were considered very fine yards before that [—] in 1903.

Q. Do they have repair shops and round house at Argentine also? A. Yes sir.

Q. It is a division point on the road? A. I think so.

Q. You may state whether or not all of these yards and round houses and shops are located in what was the flooded district of 1903? A. Yes sir.

827 Q. The city of Argentine lies immediately west of Kansas City, on the Kansas river does it not? A. Yes sir.

Q. Adjoins the city, or practically adjoins it? A. Yes sir, Kansas City, Kansas, just across the river from Argentine, to the city limits runs up to it.

Q. Where is the Sulsberger and Schwartzschild packing house from the stock yards? A. It is south of the yards, of the stock yards across the river from the main stock yards.

Q. About how far from the stock yards? A. It is about five blocks above the bridge, which crosses the river there at the stock yards.

Q. Does that packing house have a cattle chute extending from its plant to the stock yards? A. Yes sir.

Q. In which they receive cattle from the stock yards? A. Yes sir the chute runs right from the yards to the house.

Q. Where with reference to the stock yards is the Cudahy packing house? A. It is right across the river just at the end of the bridge, runs over to the stock yards.

Q. Just across the river from the stock yards? A. Yes sir.

Q. Do they have a chute from their plant to the stock yards in which they receive their cattle from the stock yards? A. Yes sir.

Q. Where is the Swift and Company packing house with reference to the stock yards? A. It is just across the river, just across the stret from Cudahy's.

Q. Just across the river from the stock yards? A. Yes sir.

Q. Do they have a cattle chute from their plant to the stock yards in which they receive their cattle from t. stock yards? A. Yes sir.

Q. And the Morris packing house has been built since the flood has it not? A. Yes sir.

Q. And where with reference to the stock yards
828 is the Armour packing company plant? A. It is right out north of the stock yards perhaps a little northwest of the stock yards, on the same side of the river.

Q. About how far from the stock exchange? A. From the stock exchange it is about seven or eight blocks.

Q. They have a cattle chute from their plant to the stock yards in which they receive cattle from the stock yards? A. Yes sir.

Q. And where with reference to the stock yards is the Fowler packing house? A. It is about five blocks north of Armours on James street, three blocks, if not five blocks.

Q. Is that all the packing houses there was in Kansas City at the time of the flood? A. No sir, Ruddy Brothers had a small hourse over in Armourdale.

Q. Where was that with reference to the stock yards? A. About half way between that and Schwartzschild's.

Q. What other large establishments were there in the sixth ward of Kansas City, Kansas, at the time of the flood. A. Well, the cooperage plant was one of the large industries, H. M. Street Manufacturing Company sickle works, Peet Brothers Soap factory and [foundary] down there I do not remember the name of it.

Q. Any grain elevators in that district? A. Yes sir.

Q. And any railroad yards? A. Yes sir, a great many railroad yards.

Q. What railroads had their yards in that district? A. The Missouri Pacific and Union Pacific.

Q. The Rock Island? A. The Rock Island, of course, their roads run through those bottoms, The Santa Fe ran down across the river.

Q. You may state to the jury what occurred to the Kelly Cooperage works during that flood, if you know? A. There was a large portion of that washed away.

829 Q. Do you know what happened to cars standing on the tracks in the various railroad yards during that flood? A. A great many of them turned over and some of them washed away.

Q. Did the Standard Oil Company have a large storage plant in the sixth ward of Kansas City, Kansas? A. Yes sir.

Q. About how many iron or steel tanks did they have in that storage yard? A. They had quite a number of them there.

Q. Can you give an estimate to the jury about how many of those large tanks there was? A. No sir, it is a mere guess on my part.

Q. About how large were those tanks? A. They were very large tanks, but I have not any idea what size.

Q. Were they in the neighborhood of thirty feet in height would you think? A. I would think they were, but I really never paid very close attention to those tanks.

Q. Do you know how they were placed, whether situated on concrete foundation or in what way they were situated? A. No sir I do not.

Q. What occurred to that storage yard during the flood? A. Those tanks were, one of them went down the river and knocked down bridges.

Q. You may state whether or not you were in the vicinity so you know that the tanks were all washed from their foundations or not? A. I think the tanks were all washed away, but I would not be positive.

Q. The tank which went down the river and knocked the bridges out went down about the middle of the afternoon on Sunday did it not? A. Yes sir.

Q. That would be May 31st? A. Yes sir.

830 Q. Now, I will ask you if you saw another tank after that another of those large storage tanks float down the river afterward caught by the steamboat on the opposite side of the Missouri and somewhat near the middle above the mouth of the Kaw river, did you see that transaction? A. No, sir, I did not.

Q. The tank which you saw knocked the bridges down was not caught? A. No sir.

Q. Went down the river? A. Yes sir.

Q. About how many dwelling houses in the 6th ward were washed away from their foundations? A. I could not answer that question. I don't know.

Q. Were you engaged in the relief work incident to that flood? A. Yes sir for ten days.

Q. I will ask you if you know about how many people of the flooded district in Kansas City, Kansas, were ruined, more or less by that flood? A. We estimated that about twenty-five thousand lived in the churches and school houses and court house and wherever they could get in.

Q. And were taken care of by the relief committee? A. Yes sir.

Q. Now how many or about how many if any of those people got out anything more than clothing which they had on when they came out? A. Very few of them got out anything at all.

Q. How were they taken out of the flooded district. A. Great many of them waded out and some taken out in boats; a great many of them were taken out in boats.

Q. After the water got too high to wade out? A. Yes sir.

Q. Do you know of your own personal knowledge the number whose dwelings were washed away entirely? A. I saw a great number coming down the river.

831 Q. You have not been over the Armourdale district since the water subsided, have you? A. Yes sir the second Sunday after the flood I went all over in Armourdale in a gasoline launch.

Q. On the second Sunday after the flood? A. The first Sunday after May 31st.

Q. And that Sunday you went all over the district in a gasoline launch? A. Yes sir.

Q. Over the river bottoms where the houses had been? A. Yes sir and as far west as the 24th street bridge.

Q. So that the water remained up over that district for a week so you could navigate the streets? A. Yes sir very high that Sunday and I made two trips to Swift's packing house.

Q. Do you know of your own knowledge of people being caught in those packing houses and remaining there during the entire time of the flood? A. I heard they were there, there was a great many there that Sunday, but they were going and coming in boats.

Q. Did you participate in the work of relieving and rescuing people from the flooded district? A. I was on what was called the flood committee.

Q. And your work was receiving and caring for them as they came out? A. Yes sir.

Q. Now state to the jury whether or not a great many of those people came out thoroughly wet and water soaked as if they had waded water as deep as they could wade when they came out if you saw many in that condition? A. Well, no, I did not see many of them in that condition, I saw lots of them had their night clothes on, good many came from that place.

Q. After they had gotten out? A. Yes sir.

832 Q. You did not actively participate in the work of rescuing them from the water? A. No sir.

Q. Did you notice the condition of main street of the 6th ward after the flood subsided to see the condition of it? A. Yes sir I was down there several times.

Q. You may describe to the jury the condition of that principal street after the water subsided; that is, whether it was filled with houses and other debris or not, in what condition it was? A. It was just literally filled with houses of all descriptions.

Q. For what length of that street? A. Probably from the river to as far as Daniel's livery stable there where the cars turn to go to Argentine.

Q. About how far would that be? A. Eight or ten blocks.

Q. Would it have been possible for a person to [got] through there with a team or on horse back until that street was cleared out before you could get through it? A. No sir they had to clear it before any one could get through.

Q. Were there any brick buildings destroyed by that flood in that district? A. Yes sir.

Q. About how many brick buildings did you notice at that time as being destroyed? A. Well I do not know how many.

Q. What was the condition of James street and Central avenue districts on the east side of the river as to destruction by the flood and condition of the streets after the water subsided. A. Well, they were about the same condition that Kansas avenue was and Armourdale; I did not get over in the first ward as soon as I got into the 6th ward.

Q. The streets running east and west got more of the debris than the streets running north and south, did they not? A. Yes sir.

833 Q. And the current was from the south to the north? A. Yes sir.

Q. Can you state the condition in the first ward as to buildings destroyed and washed away and so forth. A.

There was a great many buildings washed away in the first ward.

Q. What was the condition of James street immediately north of Armour packing house? A. There was a great deal of lumber and some buildings scattered along in there and the sidewalks torn up.

Q. And the streets washed out? A. Yes sir.

Q. And impassable for horses and wagons? A. Yes sir.

Q. Was there a hole torn in the ground where a building had been on the east side of that street before the flood. A. On both sides of the street.

Q. Building washed out and hole left where the building had been? A. Yes sir.

Q. What kind of a building was washed away immediately west of—on the west side of the street, immediately west of where the street was washed out so large? A. That was a brick building.

Q. Two stories? A. Yes sir.

Q. That building was carried entirely away was it? A. Yes sir, part of one wall standing on the east side, I think part of the wall was standing on the east side.

Q. What became of the bricks of that building? A. Washed away I suppose; they were not there after the flood.

Q. They were not there after the flood subsided? A. No sir.

Q. Large two story brick buildings were washed away and the bricks gone? A. Yes sir.

Q. Did you see an iron safe, weighing in the neighborhood of a ton lying in the hole on the east side of that street
834 after the water subsided? A. I don't remember it.

Q. What kind of a building is the northwest corner building of the Armour packing house? A. It is a very large brick building.

Q. Heavy wall? A. Yes sir.

Q. What was the condition of the northwest corner of that building when the water subsided? A. It was torn out.

Q. Corner of the wall taken right out? A. Yes sir.

Q. Did you see freight cars and other like property going down the river during the flood? A. Yes sir.

Q. Could you give any idea to the jury about how many freight cars, in an hour or so, by watching it, would go down the river? A. No sir, I could not say.

Q. The river was full of them? A. Yes sir, full of all kinds of stuff I did not count them.

Q. Full of houses, and railroad cars? A. Yes sir, everything you could think of.

Q. Did you see cattle in the flood? A. Yes sir.

Q. Can you give the jury an idea how many [vattle] you saw go down the river during the flood or as the waters were receding? A. No sir, I could not give an idea at all.

Q. Were you down on the river bank at any time, say during Tuesday or Wednesday of the flood week? A. Our headquarters were on Minnesota avenue, and I used to run down to the river once or twice a day when I could get away from head quarters there.

Q. Now state to the jury whether or not that flood was not filled with the carcasses of animals for three or four days, the fore part of that flood week? A. Yes sir, that Sunday we went out in the launch I saw carcasses floating in the water.

835 Q. Were you in Kansas City on the day of the highest water of the flood of 1881? A. Yes sir.

Q. Do you remember where you were on that day any particular place? A. Yes sir, I lived seven miles west of town at that time and came to Kansas City that day, with an uncle of mine, and we went to look at a house on the corner of 9th and Forest and then from there to the stock yards.

Q. Were you at the stock yards on that day? A. Yes sir.

Q. State whether or not the stock yards were flooded at that time? A. No water in them in the main part of the yards.

Q. Did you ever see the stock yards flooded prior to the flood of 1903? A. No sir.

Q. Do you know where the old bed of Turkey creek ran along the west of the live stock, where the live stock exchange now is and through the west and north part of the yards, do you remember? A. I remember Turkey creek in an early day ran down through the bottom and emptied right where Dold Packing house now is, and gradually changed the channel to further west until it finally empties in above the stock yards.

Q. Cut a new channel and a new place emptying into the river? A. Yes sir.

Q. Was it over the low places which you speak of in the stock yards, did you ever see water or any water being in the stock yards, prior to the flood of 1903? A. No sir.

Q. You were familiar with the land there before the stock yards were built there, were you? A. Yes sir.

Q. And ever since? A. Yes sir.

Q. Was that flood of 1881 the highest flood which you have ever known in this vicinity prior to the year, 1903?

836 A. Yes sir that is the highest water we ever had. That flood was more in the Missouri river than in the Kaw river; the water was up on Central avenue came up almost to the buggy when I drove down there that day.

Q. On Central avenue? A. Yes sir.

Q. About two feet of water and over up on Central avenue at that time? A. Yes sir, perhaps more two and a half feet.

Q. But none in the stock yards except in the low places, you have described? A. None up in the main yards, it was down along the river.

Q. But none in the main yards at all? A. No sir.

Q. Now you say that—or describe to the jury what that lay of the ground along the river was, which you have spoken of, was it lower than the balance of the yard just low river bottom? A. Yes sir, it was river bank.

Q. Do you know whether that has been filled up since that time and prior to the flood of 1903? A. Yes sir, it has been filled up gradually.

Q. And every year or two there is a flood greater or less occurs in the Kaw river, nearly every year? A. The Kaw river usually gets up in the spring, but nothing like it did in 1881 and 1903.

Q. And there was a flood which has been spoken of in 1892? A. Yes sir. The water was pretty high that year.

Q. No water got in the stock yards then? A. No sir.

Cross-Examination.

By Mr. Ball:

[—] The people who lived in this flooded district, I think you stated amounted to something like 25000? A. In Armourdale.

Q. That is on the west side of the Kaw river? A. 837 Yes sir.

Q. Now all of those people got out didn't they practically? A. I suppose, I think they did, some, of course, there was some lost, I don't know about that.

Q. Is it not true that the death loss was very small in the flood district? A. I think so taking into consideration the volume of water there, there was some people lost their lives, I think.

Q. And is it not true those who did lose their lives did not do it on account of not being warned, but staid there trying to rescue their property and ran the chances of that kind? A. Yes sir, I think that is true.

Q. Now there was a vast amount of property in that flooded district that could not have been rescued and saved except by wagons and men hauling it out, is that not true? A. Yes sir, unless—

Q. And large stocks and stores and shops and household goods and all of that kind of thing would have had to have been carried out by means of wagons or some transportation means.

Mr. Angevine: I would like to have the witness finish his answer. What was it you were going to say?

Witness: Unless they commenced in time to take them out.

Mr. Ball: Well, wouldn't it have taken an equipment of wagons and transportation facilities which was not available for taking all of that, what you might call property, dead property out of the flooded district, merchandise and household goods? A. Yes sir, it would have taken a greater number of wagons to have taken it all out.

Q. Lumber and all that sort of thing? A. Yes sir.

838 Q. And there was not any adequate supply of transportation facilities to get that stuff out? A. I don't think there was.

Q. Not anything like the amount which was there? A. No sir.

Q. Now is not this true also, that all of the live stock which was afoot and alive, like cattle or horses, that it would not have taken long to have driven them from any part of this flooded district to the highland?

By Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial and not proper cross-examination, and calling for a conclusion of the witness; and not common knowledge whether they could or not.

By Mr. Ball: I asked the first question in regard to the amount of property caught in the flood and all that sort of thing;—putting it on the theory and exploited it to the court and jury the idea it was impossible of getting this stuff out; now I am asking the witness about the difference between live property and dead property.

By the Court: If this man knows how long it would have taken to driven this stock out of these yards under the circumstances, he can state.

By Mr. Ball: Do you know what is known as the shipping division of the stock yards here? A. Yes sir.

Q. They lie immediately south of 16th street and south and southeast from the exchange building? A. Yes sir.

Q. Do you know where Allen avenue is? A. Yes sir.

Q. Where is that with reference to the stock exchange building? A. That is south east of the exchange building.

Q. I mean about how far? A. Three or four blocks.

Q. South of the exchange building; now that viaduct leads to the highland on the Missouri side of the Kaw does it not?

A. No sir that just goes across the track and then there
839 is a- approach goes down into the bottom. It doesn't go up to the bluff.

Q. I understand the viaduct does not, that is an avenue and way up to the bluff, is it not. [Q.] That Allen avenue viaduct starts on the level on Wyoming street and goes across the railroad tracks and goes down again over on Turkey Creek.

Q. It is a road out? A. You can go on around, yes sir south.

Q. Do you know where the Sparks Brothers mule barn is? A. Yes sir.

Q. Do you know whether on Sunday morning after eight o'clock and after the water commenced, that big raise, commenced to go into the yards, that they after eight o'clock and by half past ten got seven hundred mules out of their barns. A. I knew nothing of that.

Q. Their barns are right across the street from the shipping division pens are they not? A. Yes sir.

Q. Do you know of any considerable property, live stock, down there except these cattle in controversy, which was not taken out, that is prior to the climax of the flood. A. No sir. I don't know anything personally about stock, at that time down there during the flood.

Q. Was there any in these packing houses you have testified about as far as you know? A. Well I did not see any there.

Q. Is it not true there was not a packing house caught with any of their stock in the flooded district. A. I really do not know.

Q. Do you know any packing house that got any stock caught in the flooded district? A. No sir.

Q. These cars which you spoke of having witnessed going down the current, do you know where they came from?
840 A. No sir, I do not.

Q. You do not know whether they originated further up the valley or was some stock which might have been in the flooded district here? A. No sir, I do not.

Q. Do you know of the movement on Sunday morning of a bunch of cattle out by the way of Allen avenue viaduct and to the hills? A. No sir I knew nothing of it.

Q. You do not know that? A. No sir.

Q. And I understood you a moment ago to say, you did not know of any other live stock which was caught in the pens except cattle. A. No sir.

Redirect Examination

By Mr. Angevine: Do you know anything about any stock which was in the stock yards at the time of the flood? A. No sir.

Q. You know nothing about the stock in question, whether they were or not? A. No sir.

Q. And you say you do not know anything about whether the packing houses had any stock or not? A. No sir.

Q. Do you know whether or not it is a fact that they do not aim to have any stock left over on Sunday to keep any over? That is they aim to buy just what they can use during the day Saturday, or what is the custom in regard to that. If you know? A. I really do not know what the custom is.

Q. Do you know anything about whether or not it would be practicable to drive three year old Texas cattle through the city from that place or would they scatter all over the city, what would be their condition if they should turn them out there and attempt to drive them out. A. Probably scatter.

841 Q. Do you know as a matter of fact that it happened frequently that one or two Texas cattle got away from the yards and ran all over the city and giving a great deal of trouble to the authorities? A. Yes sir I have known that quite a number of times.

Q. What is the habit of those cattle when they do get loose in the city? A. They seem to be very vicious and wild.

Q. Would you consider it at all practicable to turn out a drove of three thousand of that kind of cattle from the stock yards and attempt to drive them out of the city in a drove?

Objected to by the plaintiffs unless the witness had some experience which qualifies him.

Mr. Angevine: He say he has seen the habits of them when they did get out.

Objection sustained. Defendant duly excepting.

Mr. Ball: Do you know anything wilder than a drove of mules.

By the Court: Objection sustained.

Ore Cable, sworn, testified on behalf of the defendant as follows on

Direct Examination.

Q. What is your name? A. Ore Cable.

Q. Where do you live? A. Kansas City, Kansas.

Q. How long have you lived in Kansas City, Kansas and this vicinity? A. Over thirty-eight years.

Q. How long have you lived at your present residence? A. 32 years.

Q. In what part of the city do you live? A. I live in the north part, Forest avenue between 5th and 6th.

Q. State whether or not your residence where you have lived for the last 32 years overlooks the Kaw bottoms?

842 A. Yes sir.

Q. About how far are you from the mouth of the Kaw river? A. About a mile.

Q. On high land? A. Yes sir.

Q. Have you been familiar with the Missouri and Kaw river at and in the vicinity of Kansas City during all of the time you have lived here? A. Yes sir.

Q. Do you remember the flood known as the flood of 1881? A. Yes sir very well.

Q. Do you remember the flood known as the flood of 1892? A. Yes sir.

Q. Did you ever hear of the flood known as the flood of 1903? A. I certainly did, yes sir.

Q. Are you familiar with the location of the Kansas City stock yards? A. I know where they are located, yes sir.

Q. And also acquainted with that track of land before the stock yards were located there? A. Yes sir.

Q. What was the condition of that land when you first knew it as being high or low? A. There was not anything on it, it is higher than the land between it and the river.

Q. It was considered high bottom land was it? A. Yes sir it was the highest portion of the bottom land.

Q. Was that covered with timber when you first knew it? A. Yes sir, the most of it.

Q. And since that it has been cleared off and stock yards built on it? A. Yes sir.

Q. And part of the stock yards are in Missouri and part in Kansas are they? A. Yes sir.

Q. Do you know where the old bed of the Kaw river in the vicinity of the stock yards, is the old channel turned from that vicinity down to the Missouri river and across Central

843 avenue somewhere in the vicinity of Abernathy furniture factory? A. Not the Kaw river.

Q. The bed of Turkey creek? A. Yes, Turkey creek used to enter in down east of Armour's packing house.

Q. Do you know where the old bed of that stream was in the vicinity of the Stock Yards along west probably of the live stock exchange and their north yard? A. No sir, I don't know I could not locate that now.

Q. You were familiar with it before the stock yards were built? A. Yes sir.

Q. Did you ever see or know of water being there over the stock yards prior to the flood of 1903? A. No not unless it ran through the bed of Turkey creek.

Q. Unless it was in Turkey creek? A. Yes sir.

Q. Has there ever been any flood in the Kaw river in the 38 years you have lived here high enough to flood the present site of the stock yards? A. Not to my knowledge, no sir.

Q. Or the site of the stock yards, as they existed in 1903? A. No sir.

Q. Did you see the flood of 1903? A. Yes sir.

Q. You may describe that flood to the jury as nearly as you can? A. I don't know as I could describe it; on Saturday night, it was supposed, by general supposition here that the flood had reached its height and between that and Sunday morning it rose from five to seven feet at least it washed the people out of Armourdale in Kansas City, Kansas by morning.

Q. By Sunday morning? A. Yes sir.

Q. During the night Saturday night and Sunday morning they were flooded out? A. Yes sir, all day Sunday.

844 Q. How many bridges was there across the Kaw river in the vicinity of Kansas City? A. There must have been ten or a dozen between here and Turner.

By the Court: The bridge question has been fully gone over.

Q. [Ny] Mr Angevine: You may state whether or not, the entire river bottoms of the Kaw river in the vicinity of Kansas City, were submerged by the flood of 1903? A. Certainly was, on the low lands between the two bluffs.

Q. Flooded entirely from bluff to bluff? A. Yes sir.

Q. About what depth did it cover the first and the sixth wards of Kansas City, Kansas, that is Armourdale district and packing house district on the east side of the river. A. Ten or twelve feet from bluff to bluff.

Q. Had you ever known a flood of that kind in the river since you have been here? A. Never has been one, no sir.

Q. Has there ever been a flood in the river since you have been here which would endanger the stock in the stock yards at the present site of the stock yards? A. No sir.

Q. Do you know about how many houses were washed away from the flooded district in Kansas City, Kansas? A. No sir I do not, said to be several hundred.

Q. Did you go over the flooded district soon after the flood subsided? A. As soon as I could get over, yes sir.

Q. What condition did you find there as to the destruction and washing away of houses? A. It was a scene of ruin and desolation. You could not describe it, you would have to see it to understand and appreciate it; houses torn

from their foundation and collected up on the streets, and the streets torn out, and the water pipes washed away and railroad track, and the streets strewed with debris of all kinds, both in Armourdale and Kansas City, Kansas.

845 Q. Do you know what became of the inhabitants of the first and 6th wards of Kansas City, Kansas during that flood; what was done with them? A. They were brought up here and put in the churches and public buildings and taken care of by the citizens.

Q. Do you know whether or not those people were able to get anything out except clothing they had on? A. Very few of them.

Q. Did you go along James street and Central avenue soon after the flood subsided? A. Yes sir as soon as they allowed people to go over there.

Q. What condition did you find there? A. I found the street all torn up, and houses [qrecked].

Q. And how wide was the stream at Kansas City, Kansas, when it was at its height? A. Which direction.

Q. The width of the stream across the river from bluff on one side to the bluff on the other? A. I don't know I suppose a couple or two miles.

Q. Was that stream from ten to 20 feet deep all over that entire width that distance. A. It was until you got to the upper end of Armourdale it got lower up there.

Q. At the upper end? A. Yes sir.

Q. Do you know of any portion of Kansas City, Kansas, or Kansas City, Missouri, in the river bottoms which was not submerged by that flood to the depth of from ten to twenty feet? A. No sir, I do not, as I said before in the west portion of Armourdale it was lower than it was down towards the river. Sloped down toward the river.

Q. You may state about the current in the river during the height of the flood, whether it was very rapid or otherwise? A. It was very rapid.

846 Q. Could you give the jury an estimate about how many miles the current was, judging by the floating stuff in the river? A. No sir, I crossed the river over here to Kansas City, Missouri, Tuesday, after the flood, in a gasoline boat, and I found the current was very strong.

Q. You may state whether or not the driftwood in the river passed very rapidly during that flood? A. Yes sir, it certainly did.

Cross examination waived.

W. A. Coombs—sworn testified on behalf of the defendant as follows on

Direct Examination.

Q. By Mr Angevine: What is your nome? A. W. Coombs.

Q. What is your business? A. Assistant general live stock agent of the Santa Fe system.

Q. Where is your office? A. In the exchange building.

Q. At the Kansas City stock yards? A. Yes sir.

Q. In the basement or up stairs? A. Yes sir, in the basement.

Q. Was your office at that place in May and June 1903? A. It was up to the flood.

Q. State to the jury whether your office was flooded during that flood? A. Well, the water went about two and a half feet above on the floor above us. So we were entirely under water.

Q. The basement story was entirely under water and two feet or two and a half feet over the floor above your office. A. Yes sir, on the floor directly above us.

Q. How high is the floor of that second story above
847 the level of the stock yards surrounding the building.

A. I should think, our ceiling is ten feet and then it goes probably three feet and a half under ground outside.

Q. Are you familiar with the habits of Texas cattle and New Mexico cattle in regard to being wild and hard to handle or easily handled or otherwise. A. Yes sir, somewhat.

Q. You may state whether or not it is a frequent occurrence that one or more of that kind of steers get away from the stock yards company at the stock yards? A. Yes sir, they occasionally get away.

Q. Now [ahat] are the habits of these animals when they do get loose in Kansas City? A. They are very wild and chase every man or anything but a steer. And they will horn anything they come in contact with when they get away from anywhere and loose.

Q. How far is it from the stock yards until you would get out of the thickly settled portion of Kansas City, Kansas, and Kansas City, Missouri? A. Now I am not as well acquainted with the city as some, but I have lived out around the edges some what, I do not think they could get through the city without being driven six miles, there they come in contact with dogs and everything that would frighten cattle of that kind to death.

Q. From your knowledge of the habits of that kind of cattle, would you say that it would be practicable or impracticable to turn a drove of three thousand of them out of the stock yards and attempt to drive them through the city? A. I would not.

Q. Would it be practicable or impracticable. A. It would not be practicable.

848 Q. You may state whether or not;—what time did you leave the stock yards on Saturday evening May 30th. A. I think about seven o'clock.

Q. Up to the time that you left there on that evening, did you have any information as to the condition of the flood which would indicate that the stock yards was in danger of being flooded? A. No sir, we did not anticipate that the water would be in our basement at that time.

Q. When you left there? A. When I left there.

Q. Did you leave everything pertaining to your office? A. Yes sir everything, I left checks, that is in my desk and did not think of such a thing as their being destroyed.

Q. You had no information about anything of a flood which would injure things, even in your office? A. No sir, I did not.

Q. When did you next go to the stock yards; did you go there Sunday morning? A. No sir, I did not go there Sunday morning; I could not get there.

Q. How close did you get to it. A. I got to the bottom of 12th street viaduct.

Q. You got to the bottom of 12th street viaduct? A. Yes sir. Walked down there.

Q. About how far is that from the stock yards? A. I should think three-fourths of a mile.

Q. State whether or not the country from there to the stock yards was flooded at that time? A. There was a great many leaving 12th street viaduct at that time in boats trying to make the stock yards.

Q. And it was impossible at that time any way to get to the stock yards except by boat was it? A. Yes sir, I would not risk it with a boat, the current was too swift; I did not try it.

849 Q. It has been suggested in evidence, or in questions of counsel, that you might have removed those cattle from the stock yards here, why didn't you do it. A. Why it never entered into the heads of anybody in the stock yards I don't think to move any stock out of the stock yards; we never thought of such a thing and there never was any such a suggestion made by anybody, and did not deem it necessary; I talked with the stock yards foreman Mr. Huthings, Saturday evening, and he says—

Plaintiffs object, don't state that.

Mr. Angevine: It goes to the source of his information.

By the Court: He says he talked with them, but what their conversation was, is incompetent.

Mr. Angevine: From your conversation with him or with anybody else, or from all of the information which you had when you left the stock yards Saturday evening or Saturday night, was there anything to appraise you of the flood which would endanger cattle in the yards? A. There was not.

Q. Was there any other reason why you did not attempt to move the cattle in question? A. We supposed that we had the cattle delivered to the stock yard company and other carriers, connecting carriers.

Q. You may state whether or not from your experience there and the custom of the yards, you considered what had been done as a delivery of the cattle? A. Yes sir we did everything that is customary to do in delivering cattle to a connecting carrier—it was done in the same usual manner that it is the custom always to do, we delivered those cattle to the stock yard company, for the connecting carrier and those which were to go through without feeding we delivered to the Missouri Pacific.

Q. You say that was the custom before the flood and since the flood? A. Yes sir.

Q. And has always been the custom? A. Yes sir, since I have known anything about business there.

850 Q. If the way bills for these cattle were found in your office or in your local agents office in the live stock exchange after the flood, have you any idea or knowledge how they came there? A. I have not.

Cross-Examination.

Q. You say it was not practicable to move those cattle out of those low lands in view of this flood? [Q.] Not after we found it was necessary to move them, we could not move them.

Q. Don't you know, and didn't your office know, that ten feet of water had passed Topeka Friday night at nine o'clock on top of the existing condition? A. No sir, I did not.

Q. Your general offices were right there at Topeka? A. Yes sir, the general offices were there, at Topeka.

Q. And your Mr. McLellan was keeping in touch with the flood conditions? A. I don't think we had any messages from Mr. McLellan at all; we were keeping in touch in a general way.

Q. And you know now, as a matter of fact, whatever you knew then that there was a raise of ten feet or more, passed Topeka, Friday evening, thirty hours before?

By Mr. Angevine: Objected to by defendant as incompetent irrelevant and immaterial; what he knows now he could not use it then.

Objection sustained; plaintiffs duly excepting.

Q. You have a son haven't you connected with your department? A. Yes sir.

Q. And he went to Emporia with these cattle when they were taken in June.

By Mr. Angevine: Objected to by defendant as incompetent, irrelevant and immaterial, and not cross-examination.

Objection overruled; defendant duly excepting.

A. Yes sir.

851 Q. And he was also at Evarts and saw the receipt of these cattle there?

By Mr. Angevine: Objected to by defendant, as incompetent, irrelevant and immaterial and not cross-examination.

By the Court: It is not cross-examination.

Plaintiffs then and there duly excepting.

Q. You say you supposed that you had the cattle delivered? A. We had done everything that we usually do to deliver cattle of that kind, yes sir.

Q. To whom did you suppose you had them delivered? A. We supposed some of them to the Missouri Pacific and others at the stock yards for feed and to be delivered by the stock yard company to the connecting carrier to the Missouri Pacific.

Q. Do you know any arrangement your railroad company had with the Missouri Pacific before you brought these cattle in here?

Mr. Angevine: Objected to by defendant as not cross-examination.

Objection overruled, defendant duly excepting.

A. In a general way, yes sir.

Q. What I mean is, did you have any arrangement? A. In a general way I know that the arrangement was made, I can tell you who they were made with if you want to know.

Q. You say you know it, you do not mean you know it of your own knowledge; you did not make it? A. No sir, I did not make it.

Q. Was there somebody told you about it, some of your officers? A. Yes sir, one of our officers.

Q. Who was it? A. Mr. Horton, I think.

Q. Do you know who it was? A. Can I tell you

852 the conversation.

Q. I am not asking you for that? A. I can't answer that, I can explain it to you.

Q. You personally did not make any arrangement any how? A. No sir, no arrangement made in our office.

Q. Either by you or Mr. Titus? A. No sir, it did not come under us to make that arrangement.

Q. Now, Mr. Titus' position with the Santa Fe system, is precisely the same, is it not, as that of Mr. Douthitt of the Missouri Pacific railway company.

By Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial and not cross-examination, and calling for a conclusion of the witness, and the witness is not shown to have any knowledge of the position, occupied by Mr. Douthitt and is simply a conclusion of the witness, and if it is material at all, the proper way would be to prove what his position is, whatever it was. I object to it, it is not competent.

By the Court: I will sustain the objection to this question; it is not shown here that this man knows what Mr. Douthitt's duties are, if he does know, he can state.

Q. Do you know what the position of Mr. Douthitt is, with the Missouri Pacific? A. General live stock agent.

Q. Do you know whether his duties are the same with that railroad company, and the same as Mr. Titus' with your railroad company?

Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and imaterial, and calling for a comparison of the duties without stating the facts.

By the Court: The question is whether you know.

A. I do not know what Mr. Douthitt's duties are; they differ some certainly, some have certain authority, and some differ from others in different lines of different roads.

853 Q. You do not know what Mr. Douthitt's duties and authority was? A. No sir I do not.

Q. As a matter of fact, you found you had not delivered these cattle, or any of them to anybody, did you?

By Mr. Angevine: Objected to as incompetent, irrelevant and immaterial and as calling for a conclusion of the witness.

Objection overruled; defendant duly excepting.

A. No sir, I never found out we had not; we had them delivered.

Q. You had them on your hands, why didn't you?

Mr. Angevine: Objected to as incompetent, irrelevant and immaterial and calling for a conclusion of the witness.

Objection overruled; defendant duly excepting.

A. They were sent back to us and the Missouri Pacific the 20 car loads they had were yarded and by the stock yard company and the other cattle were yarded by them, and when the high water came they were all put together and mixed, and they were left on the viaducts, from that time there was an arrangement made with me.

Q. Did you make those arrangements? A. Yes sir, from that time I made all arrangements.

Q. Anyway there was sixty cars of these four trains, you never pretended to deliver to the Missouri Pacific? A. We pretended to deliver them all, had delivered them all in the usual way, every one of them.

Q. What was the usual way? A. Same way they were delivered.

Q. How did you deliver them? A. Delivered 20 cars to the Missouri Pacific tracks and the other at the stock yard company, to be turned over to the Missouri Pacific.

Q. Don't you know as far as that attempt on Satur-
854 day was concerned, that Mr. Douthitt, the agent of the Missouri Pacific, simply tried to see, if he could not as an accommodation to you people get at least 20 cars of those cattle out of there on your request? A. It don't make any difference, they were delivered; he was there to see if he could not get them out; the Missouri Pacific don't deny getting them.

Q. I am not arguing this with you;—you know that Mr. Douthitt of the Missouri Pacific merely as an accomodation to your railroad that morning, undertook to see whether he could not get 20 cars of these eighty cars for you, out of those yards and found he could not do it, and then refused to take them?

By Mr. Argentine: Objected to by defendant as incompetent, irrelevant and immaterial, and calling for the conclusion of the witness and not for any statement of facts; calling for the opinion of the witness as to Mr. Douthitt's conduct, and also not cross-examination.

Objection overruled; defendant duly excepting.

A. I never knew that until I heard him testify on the stand here.

Q. Don't you know that those twenty cars were yarded over there in the Missouri Pacific chutes and unloaded there at the request and expense of the Santa Fe railroad. A. No sir, I can explain that to you if you will allow me.

Q. Didn't the Santa Fe railroad pay for unloading those cars.

By Mr. Angevine: Objected to by defendant as incompetent, irrelevant and immaterial—

Witness: Yes sir, all these expenses were paid by agreement between shippers and our attorneys and myself after they were on the viaduct.

855 Q. I am talking now about this train you unloaded at the Missouri Pacific chutes and took right over to the shipping division, or the yard man took over to the shipping division this train of twenty cars, that was done at the expense of the Santa Fe railroad company, was it not?

By Mr. Angevine: Objected to by defendant as incompetent, irrelevant and immaterial, and not cross-examination, and asking for something nobody testified to, and is not a fact.

By the Court: Objection overruled; defendant then and there duly excepting.

A. They were unloaded at the Missouri Pacific chutes. And the expense for that unloading, and feed charges, were paid—the Santa Fe railroad company, had an agreement between the shippers and the railroad company and a bond given to cover that in case they were to be paid—

Q. That was a month afterward,—I am asking you— A. There was no agreement made for those charges in a month after, it was I think two weeks after.

Q. The Missouri Pacific did not pay any charges? A. No sir, agreed to be paid by all of us, at the conclusion of the agreement, and when the cattle were sent over to Lang, Kansas.

Q. That is the station near Emporia, where they were pastured? A. Yes sir, these cattle all went to Lang.

Q. Now is it not a fact, that in June, after the flood subsided, and these cattle were brought down, there was a conference between you and the representatives of these companies, the Empire State Cattle company, and the Minnesota & Dakota Cattle company, Mr. Lathrop, and Mr. Moore, in regard to our taking these cattle off of the hands of the Santa Fe railroad company here at Kansas City? [Q.] Never any agreement made to take them off of their hands.

856 Q. I did not ask you if any such agreement was made; I ask you if there was a proposition of that kind made and conference and discussion in that regard and that these two companies refused to accept them from the Santa Fe at Kansas City?

By Mr. Angevine: Objected to by defendant as not cross-examination, and as incompetent, irrelevant and immaterial.

Mr. Ball: I want to ask Mr. Coombs if it is not true that these negotiations were had and that they wanted us to take them off of their hands, and that there was no question but what the Santa Fe had the cattle, and no point at the time made.

By the Court: Whatever the nature of the conference between the attorneys and the parties in interest, it was agreed what should be done with the cattle; that agreement was made between the defendant and the plaintiffs in this case and that agreement is in writing as the result of these negotiations.

Mr. Ball: I beg your Honor's pardon; there was nothing agreed—if your Honor will examine the writing it will show. All of the parties agreed that the cattle ought to be pastured somewhere because of their condition, that was true, that was a recognized condition, but as to what the Santa Fe should do with them, was not agreed to.

By the Court: I do not think this examination will affect what the understanding of the parties was, from what happened at the time. It is true the Santa Fe took hold of these cattle and a contract was made of this matter afterward. That would not settle a dispute between the Missouri Pacific and the Santa Fe; we can only settle here between these parties and the Santa Fe.

857. Mr. Ball: I want to say, that they never made any point of anybody else having them.

By the Court: That may be true as far as you are concerned but the Missouri Pacific is not a party here and we can't determine those matters of the Missouri Pacific. What is necessary here is to show what was done by the parties at the time.

Mr. Ball: I do not know whether I can pursue that inquiry, under your ruling.

By the Court: The cattle were on your hands, belonged to somebody here at Kansas City, they were in this condition, you made an agreement as to what was to be done with the cattle; you consented to it.

Now that part of this matter is in writing. Of course, the plaintiffs here were contending that the Santa Fe was liable at that time for those damages; the Santa Fe contended that it was not liable, there is no question about that. Whatever may become of the cattle afterward that may be a different proposition; I do not think we will go into this conference with the attorneys.

Mr. Ball: I offer to show by the witness, Mr. Coombs, that in June, about June [Loth] and within a few days of the 10th, 1903, a month before the negotiations and agreement in which a bond was made, covering the expense, the Santa Fe railroad company requested, through Mr. Coombs, and Mr. Lathrop, its

counsel, the plaintiffs to take the cattle off of their hands, off of the hands of the defendant railroad company; that it was urged and argued, that we were in the cattle business and the Santa Fe railroad company was not in the cattle business; that the plaintiffs refused to take the cattle off of the hands of the Santa Fe railroad company, but did consent,
858 however, for the Santa Fé taking and making such disposition of them in the way of pasture as would enable them to be put in proper condition for further shipment.

That thereupon the defendant announced in this conference, through Mr. Coombs, that they would take the cattle to the pasture at Emporia; that the selection of this pasture and the arrangements of them, was solely the act of the Santa Fe railroad company, and was not in any way determined by the plaintiffs, or either of them, and that when it was definitely learned in this conference that plaintiffs would not accept the cattle from the Santa Fe railroad company, at this time, that Mr. Coombs, immediately turned around to his assistant and directed him to telegraph to Emporia and arrange for the pastures.

And we offer to show that there was no claim at any time in the numerous conferences held at that time that these cattle or any part of them had been turned over to the Missouri Pacific or anybody else, with the entire recognition of the fact that they were still on the hands of the Santa Fe railroad company, and that claim never was made until this trial and until a few days ago of the amendment of the answer.

By Mr. Angevine: The defendant objects to the testimony as incompetent, irrelevant and immaterial, and as not proper cross-examination.

By the Court: Is it denied here that defendant wanted or requested the plaintiffs to take these cattle?

By Mr. Angevine: That the defendants requested the plaintiffs to take the cattle off of their hands—I do not know as to that, I never heard that question discussed before.

By the Court: Very well, you can ask as to that.

By Mr. Ball: That is a fact, your railroad company,
859 in June, this was a month before the making of this bond, I want to call your attention, when the cattle were at the stock yards, and soon after they came down off of the viaduct, is it not true that you gentlemen, wanted and urged, that the defendant, by yourself, and Mr. Lathrop, urged plaintiff to take these cattle off of the Santa Fe's hands. A. I do not remember of any such a proposition, you taking the cattle, we would give you the cattle in a minute if you wanted them.

Q. Didn't you ask them to take them? A. No sir.

Q. Didn't you also in my office, Mr. Lathrop walked up and down, and ask, that the Santa Fe railroad company was not in the cattle business? A. Yes sir, you stated you had pastures for them, we said we would give you the cattle if you wanted them; we told you we would arrange to let you have the cattle and deliver them as soon as we could get them off at that time.

Q. Do you mean to say that you were not trying to get us to take them? A. No sir I do not think so, we told you that we would do everything we could and stay with the cattle and help you out in every way possible to save money, no matter who had it to pay in the end.

By the Court: The question is this, did you as representing the Santa Fe railroad company or any other persons representing the Santa Fe railroad to your [knowledfe] request that plaintiffs take the cattle.

By Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial, and if there was any conversation of that kind, it was in the way of a compromise or adjustment of the matters in dispute, and would not be admissible in evidence under the law.

Objection overruled, defendant duly excepting.

860 A. I do not remember of our making them any proposition.

By the Court: It is not a propostion, did you request them to take these cattle? A. No sir not to my knowledge.

By Mr. Ball: Do you not remember of Mr. Lathrop arguing with us, that we ought to take these cattle? A. I do not know what Mr. Lathrop may have said to you.

Q. In your presence? A. I do not remember of his arguing or asking you to take these cattle; we would have been glad to have you take them.

Q. And you were not backward about intimating that. A. You would not have taken the cattle, you did not want the cattle; you did not want them, you would not have taken them, the only proposition talked of was to do the best we could with the cattle and make the expense as light as possible, and agreed not to delay on technicalities, we agreed not to delay on technicalities, and satisfy the owners of the cattle, and do everything we could to reduce the expense and make it as light as possible and send them out to the pasture, as we agreed to do. And all agreed it was better, you decided

at the time, it was not practicable to drive these cattle then through the city; we all agreed it was not right, and that they could not be driven through the city to the pastures where Mr. Allen said there was a pasture I think a mile away; we decided to let them be, of course as soon as we could get them off of the viaduct, we would do it and send them to Lang, Kansas, we agreed to hold them there until you people, or until the owners were satisfied that they were strong enough to ship to a distance.

Then I telegraphed to these parties to come down and separate the cattle; they decided not to separate the cattle at Kansas City, because they could do it better at Lang,
861 or in the pastures; then when they got out to Lang, and looked at the cattle, they said that they would let them all go together, as they were going to the same destination, and that when they branded them, they would separate them there. Then I sent a man from my office Evarts, South Dakota, to assist these men in every way possible to make the expense as light as possible, no matter who had it to pay.

Q. Now in talking about taking them out to the adjacent pastures, there was no question about these cattle being so wild, that they would run away or anything of that kind, at that time. A. Yes sir southern cattle, of course, these were two year old cattle, but after being yarded as they were, they would be more docile, I will admit that, but even these cattle it was not practicable in the condition they were to drive them through the city, the dogs would get after them and they would get scared to death and gone to the wind.

Q. They could not run very much? A. Yes sir, you let them get running, and they run like everything.

Q. Your railroad company hauled these back to Emporia or Lang to these pastures? A. Yes sir.

Q. And then hauled them from there on to Atchison and by way of the other roads to Evarts? A. Yes sir.

Q. Under the same original routing and the way bills that they had been loaded in from Texas? A. Yes sir they were carried to their destination on their usual way bill; on the regular way bills.

Q. In all of this talk which you have recounted, you did not say anything about the Missouri Pacific having
862 any of these cattle? A. The Missouri Pacific was not in it then, they were all mixed together, and we agreed to do the best we could with them.

Q. But you never intimated that there was twenty of these cars of these cattle that the Missouri Pacific had the custody of at that time? A. No sir they were back on the viaduct and all mixed together.

Q. About how many interviews did we have along there the middle of June after these cattle came down off of the viaducts? A. Quite a good many.

Q. Down at Mr. Lathrop's office once or twice were we? A. Yes sir, the first interview we had was in our temporary office on Main street near 9th.

Q. In your office on Main street? A. Yes sir, that is where you served that notice on me, you urged and wanted me to sign it and I told you that I would give you all the information I could and do all I could do to help you, if you wanted any documents signed I would refer you to our attorney Mr. Lathrop.

Q. That notice was served? A. Yes sir on me, we do not deny that.

Q. I did not ask anything except to acknowledge the fact. A. That is all.

Q. Then we had the same interview in my office, didn't we? A. Yes sir I presume we did there, yes sir I guess all of them.

Q. And in all of those interviews, you never, and Mr. Lathrop never pretended for a minute that any part of these cattle were in the custody of the Missouri Pacific? A. No sir, we dropped that long ago.

Q. Was the Missouri Pacific in any way mentioned
863 in any of these numerous interviews. A. Not to my [knowledhe], we were trying to get relief for the cattle.

Q. And it was recognized all of the time that the cattle were on your hands, were they not?

Mr. Angevine: Objected to by the defendant as calling for a conclusion of the witness, and incompetent, irrelevant and immaterial.

By the Court: Objection sustained; plaintiffs then and there duly excepting.

Re-Direct Examination.

Q. By Mr. Angevine: At the time of the conferences you have spoken of, did you know that the Missouri Pacific had taken twenty cars of cattle and turned them in at the north end of the stock yards and had them driven to the south end and put with the other cattle. A. We knew they had them in charge; the changing them from their chute where they were unloaded to different parts of the yard was done by the stock yards company.

Q. And did the Missouri Pacific in any way consult you about unloading those cattle into the yards? A. Not to my knowledge, no sir.

Q. You had no consultation with them? [Q.] And were not requested to consent to the change or anything of any kind? A. No sir.

Q. And didn't know anything about it at the time they were turned in? A. No sir.

Q. Now you were asked if you did not know that Mr Douthitt was to make arrangement to take out one train load of those cattle; I will ask you if you did not know and understand during that day, Saturday, that the Missouri Pacific was to take out all of those cattle? A. In a
864 general way, it had not come to me at that time, but, in a general way I knew they were to take the cattle out.

Q. And the handling of these cattle up to the time of the flood did not come under your jurisdiction? A. No sir, it did not.

Q. You had nothing to do with making the arrangement? A. No sir.

Q. That came under another jurisdiction? A. Yes sir, another department.

Q. Now you may state to the jury, whether or not the various conferences about which Mr Ball has asked you, were not for the purpose of minimizing the injury and loss to the cattle and reducing the expense to the lowest possible figure, so far as you were concerned? A. Yes sir, the cattle were over on the viaduct, and we talked it over with the owners of the cattle and our attorney Mr Lathrop, and I also talked it over with them myself, and I told them that I was willing to [fo] everything we could to save any expense on the Santa Fe to do everything was proper, to save the expense and make it as light as could be, and no matter who had to pay it in the end.

Q. And there was a denial on your part, and on behalf of the Santa Fe by you that the Santa Fe was in no manner liable for that calamity, was there not? A. Yes sir.

Q. At every conference? A. Yes sir.

Q. And the only participation you had in the matter was for the purpose of saving the loss as much as possible? A. Yes sir and making the expense as light as possible.

Q. And you never assumed at any of those conferences that the Santa Fe was in any manner responsible for the transaction? A. No sir.

865 H. W. Sharp—sworn testified on behalf of the defendant as follows on

Direct Examination.

Q. By Mr Angevine: What is your name? A. H W Sharp.

Q. What is your business? A. General superintendent of the Santa Fe at Kansas City.

Q. Superintendent over what division? A. Kansas City division.

Q. What does that include? A. It includes the terminals of Kansas City and vicinity.

Q. Were you such superintendent in May and June, 1903? A. Yes sir.

Q. During the latter part of May 1903, were you notified by your superior officers of the road at Topeka of a certain shipment of cattle from Hereford and Bovina, Texas and Kenna, New Mexico to arrive at Kansas City for delivery to the Missouri Pacific road?

By Mr Ball: Objected to by the plaintiffs, if that notification is in writing I think it ought to be produced.

Mr. Angevine: It is only preliminary.

Br Ball: I object to showing the notification if it came in writing, unless the writing is produced.

Mr Angevine: It is simply preliminary to another question he did not make the arangements himself and the telegram has been introduced in evidence; now I want to know if he was notified of that and what he did, certain things he did under that, that is what he is called for.

Mr Ball: I object to the question.

By the Court: Is there any telegram here in evidence to Mr Sharp notifying him of these things.

Mr Angevine: There are two or three notices in evi-
866 dence by the plaintiff of Mr Sharp's connection with the matter.

By the Court: I think he may answer it.

Q. Question read. A. Yes sir probably by wire and verbal.

Q. By whom were you notified verbally? A. General Superintendent Hurley.

Q. In Kansas City during that time? A. Yes sir.

Q. Now I will ask you if on Saturday May the 30th, some time during the day, a clerk came to you at your office from the stock yards office, live stock office, with the request for cars to be delivered to the Missouri Pacific for the shipment of these cattle north.

Objected to by the plaintiffs as leading; objection overruled.

A. There was.

Q. About what time in the day was that request made to you? A. Between nine and ten o'clock in the morning.

Q. Did you have authority without consultation with others to comply with that request, and furnish him cars. A. I did not, I talked to a man [—] has authority in those matters I went and got information.

Q. Where was he located

Objected to by the plaintiffs, the witness' talk over the wires.

By the court: Who was this man?

Witness: Superintendent Kennan, superintendent of transportation, Topeka. C. W. Kennan.

Q. By Mr Angevine: Is he the man who had charge and decided whether rolling stock of the Santa Fe should leave the system or not? A. Yes sir.

Q. You had no authority without receiving authority from him to comply with that request? A. No sir, I did not.

867 You say you took the matter up with him by wire? A. Yes sir, talked with him by wire, through the operators, and received permission to do so, to deliver the cars to the Missouri Pacific and I gave the order accordingly.

Q. Now you may state whether or not you did give an order to get the rolling stock of the road to be turned over to the Missouri Pacific? A. I did.

Q. About what time was it? A. I gave the order to Argentine, it was immediately after talking on the wire somewhere near ten o'clock.

Q. Is Argentine the place where your storage yards are? A. Yes sir.

Q. That is where your rolling stock was kept? A. Yes sir.

Q. To whom did you give the order at Argentine to get that rolling stock ready? A. Mr. C. Haney, the man in charge in such affairs at that point.

Q. Did you go to Argentine, personally that forenoon? A. I did.

Q. With Mr. Hurley? A. Yes sir.

Q. What time did you return from Argentine? A. About half past 12 somewhere along there.

Q. Now you may state whether or not you, soon after your return, called up that officer at Argentine by phone or wire and asked him as to getting that rolling stock over? A. I called him up after getting back to the office and asked him how the cars were getting along.

Q. What did he say to you? A. He said he had received notice from the Missouri Pacific they would not want the cars.

Q. That he received notice, they did not want the cars? A. Yes sir.

868 Q. About what time in the day was that? A. I should judge somewhere about one o'clock.

Q. You then made no further effort to get the cars over? A. No sir.

Q. Mr. Sharp during the morning of Sunday May 31st, you may state whether or not the California limited train came into the union depot on its westward trip? A. It did.

Q. About what time in the day? A. About 8:10, about its regular time.

Q. You may state what kind of a train that was? A. That is our California limited train from Chicago.

Q. Passenger train? A. Yes sir, it is our banner train, passenger train.

Q. Best train on your road is it? A. Yes sir.

Q. From one end of the line to the other? A. Yes sir.

Q. Was that loaded with passengers at that time? A. It had passengers in it, I do not know how many.

Q. What was done in the way of preparing to take that train on west? A. Well we tried—

Q. About coaling the engine? A. We uncoupled the engine from the train, and sent it to the coal chute in the yards near Turkey Creek and had it coaled, but we did not get it back to the train.

Q. The coal chute where the engines coal is in the yard? A. About opposite 19th street.

Q. That it the engine got back almost as far as 12th street and was [was] caught in the flood; was it by reason of the flood you could not get it back to the train? A. Yes sir; our main train was taken by the Burlington engine and put in the Hannibal yard, across from the depot, we expected the water would not get in there, but it did, and soaked the

869 entire train.

Q. So you never got the engine or the train there? A. No sir.

Q. How were the passengers got out? A. The passengers were taken out and taken on the street car up town.

Q. Was it by reason of the rapid rise of the water that your engine failed to get back there to take that train out? A. Yes sir and floating driftwood.

Q. That was Sunday? A. This was on Sunday morning.

Q. You may state whether or not you spent the entire night of Saturday night at your office and on duty? A. Yes sir, in the office and vicinity.

Q. And you always keep somebody on duty day and night in the yards do you? A. Yes sir.

Q. And that was your night on duty? A. Well, the men were pretty well used up.

Q. You staid there? A. Yes sir, I staid there that night and let the boys go home.

Q. Now you may state about how much the water rose from four o'clock on Sunday morning until noon of Sunday about what was the rise in the water in that vicinity; in other words, I will ask you if you examined one of the man holes in the sewer in the vicinity of your office about four o'clock in the morning? A. I e-amined the man holes, the height of the water in the man holes several times.

Q. Had the water got on the street in the vicinity of your office at four o'clock Sunday morning? A. No sir it had not, I should judge from four o'clock in the morning taking the height of the water in the manholes, up until noon that day, that the rise would be seven or eight feet in that vicinity

870 Q. That was over the entire bottoms? A. It was in that vicinity.

Q. That would be when it was flooded there it would flood the entire bottoms would it? A. Yes sir, the bottoms were flooded but I do not know about the raise at other points; I was in the water near Turkey creek up until half past ten that day.

Q. Mr. Sharp, you have been in attendance during this trial, and have heard the testimony have you in regard to the delivery of the train load of cattle to the Missouri Pacific on Saturday morning? A. Yes sir.

Q. Were you at any time notified before the flood that that train load of cattle had been turned into the stock yards by the Missouri Pacific? A. No sir, I did not know it until afterward, long afterward. I did not know but that the train had gone out of town until long afterward.

Q. You had no knowledge that these cattle were caught in the flood? A. No sir.

Q. Did you see a stamp on a paper which was presented here yesterday purporting to be a receipt from the Missouri Pacific for that train load of cattle? A. Yes sir.

Q. You examined that stamp did you? A. Yes sir.

Q. I will call your attention to the stamp now on exhibit 14a and 14b and ask you to state whether or not that is the stamp of the Missouri Pacific Railway company used immediately after the flood of 1903 in stamping receipts for freight delivered to them? A. We have in the same packages out of which this came a number of similar receipts stamped similarly and they pass current for receipts right along.

871 Q. Did you ever hear any question being raised about the genuineness of that receipt in question, raised about the delivery of the stock or property shown by the receipts so stamped? A. No sir.

Q. The Missouri Pacific road has never raised any question about it? A. No sir.

Q. And that was the usual manner of stamping them after the flood? A. Yes sir on those.

Q. Do you know whether or not the Missouri Pacific's general offices, warehouses, freight houses and so forth in Kansas City were destroyed by that flood? A. Their local office was not destroyed, the local office up stairs the second floor, though the yard office and warehouse was partly [qrecked,] I do not know exactly to what extent. I did not examine them very closely.

Q. That was the customary stamp for their use at that time? A. Yes sir.

Q. Do you know where this receipt was found? A. No sir it was found in our regular files and brought to me by the chief clerk Mr. Farley, I requested him to find that receipt and he found it.

Q. When we adjourned Saturday evening, you and I had a conversation and I requested you to search through your files? A. Yes sir.

Q. Was it in pursuance of that request you asked your clerk to hunt your files? A. Yes sir.

Q. And you say he found it in the regular file? A. Yes sir.

Q. And took it out of the file by your orders and brought here? A. Yes sir.

By the Court: Why should this stamp of the Mis-
872 souri Pacific dated a month afterward they are supposed to have received these twenty cars of cattle, be on this document? A. I do not know, the fact of the matter was that all railroad people were well covered up with work immediately after the flood; I know we were and routine matters which should have been attended to and ordinarily would have in the ordinary course of business in three or four days, were not attended to for months and their bills and so forth were checked up as we could get to them, and while I do not know, I presume the Missouri Pacific offices were in the same condition of that of every other office in town.

Q. You know about this stamp,—long before the date of this stamp these cattle had been taken back to Lyon County? A. No sir I did not know that these cattle had been taken back to Emporia; but the pressure was so great on every office in town, on getting their routine work out after the flood, and

I would judge that was filed, they came to them and checked them and stamped them, and sent them over, I know we had hundreds of papers that way.

Mr. Angevine: I will ask you if your office was not left in such a condition by the flood it was utterly impossible to check up matters of this kind for a considerable time afterward to ascertain the condition of your records and what had been done with a good deal of the property? A. Yes sir, our office was in a very bad shape, six feet and eight inches of water went through it, and threw the records over the floor.

Q. Was it possible to handle your books and papers and files and papers for a considerable time after that flood? A. No sir, they had to be, what we had left, had to be washed and dried and spread out on the roof in the sun to dry, and the general pressure from resuming business in the bottoms
873 kept every one busy for a while until business and records got straightened around.

Q. I will ask you if that kind of a receipt was the kind of a receipt which the Missouri Pacific customarily and usually gave to your road for property turned over to it for shipments, if that was the usual form. A. That is a through bill [statetemt], that goes with through bills to a connecting line and they check them and send them back to us, we have in this package, we have here returned, we have similar receipts to that.

Q. Now were these bills here usually made out at your office all of these receipts made at our office and sent over with the way bills customarily? A. Yes sir.

Q. And does this bill come back by messenger or usually sent back by mail or by another messenger from the Missouri Pacific office. A. It is usually sent back by mail or messenger in the regular course of business, but it is not sent back by the messengers we send it over there with it.

Q. And they return it afterward? A. Yes sir.

Q. But it is never returned at the same time it is sent over is it? A. No sir not that I ever knew of.

Q. Mr. Sharp, you say that Mr. Hurley was in Kansas City, during the beginning of the flood of 1903? A. He was here.

Q. He is the witness who was here during the early part of this trial as a witness on the stand, is he? A. Yes sir.

.Q And he is general superintendent of the eastern grand division of the Santa Fe railway company? A. Yes sir.

Q. Do you remember on what day he came to Kansas City? A. I do not exactly but it was about the 26th or 27th somewhere along there.

874 Q. He came into Kansas City from the east from a trip over his division did he? A. Yes sir.

Q. Does he keep a private car with an office fitted up in his car for his convenience in travelling over his division? A. He does.

Q. Had his car with him at Kansas City? A. He did.

Q. Do you know where that car was during the flood? A. It was on the wall track of the union depot, until some time early in the morning of the flood, then it was taken from there by the Burlington switch engine and put on the north end of the Burlington transfer track, in the Hannibal yard, the left track.

Q. The left track? A. Yes sir.

Q. That was Sunday morning? A. Yes sir.

Q. Where was Mr. Hurley during the day Saturday May 30th and the night following? A. He was at the Coates house early morning of Saturday and then I went with him from Kansas City to Argentine about ten o'clock Saturday morning.

Q. From where did you start to go to Argentine? A. We started from our freight house at the corner of Hickory and Joy.

Q. And how did you get to Argentine? A. We took an engine and a box car and rode on top of the box car so we might see the extent of the water as much as possible.

Q. For what purpose did you go to Argentine at that time. A. To size up the situation and see the extent of the water and figure on a probable possible further rise.

Q. You say you took an engine and box car? A. Yes sir.

Q. And you say you rode on top of that box car? A. Yes sir.

Q. For what purpose did you ride on top of that car? A. So we might get a better view, and wider view of the surroundings.

875 Q. Do you know whether Mr. Hurley was in communication with the Santa Fe, Topeka, offices, during the day Saturday and Saturday evening in regard to the flood situation? A. He was during Saturday.

Q. He was during Saturday? A Yes sir, I don't know about after.

Q. Did you see telegrams passed between him and Topeka office in regard to the flood? A. Yes sir.

Q. Did you talk with him personally about the flood situation? A. I did.

Q. Was that a matter of frequent discussion between you and Mr. Hurley on Saturday? A. That is what we had the meeting for.

Q. There was some parts of your railroad between Topeka and Kansas City under water at that time was there not during Saturday? A. Yes sir.

Q. And were these dispatches to and from Topeka for the purpose of keeping in touch with the situation and ascertaining the extent of the probable rise in the river? A. I presume they were such messages as came to him on the road.

Mr. Ball: Plaintiffs object, the dispatches will show what they were for.

By the Court: I think so.

Defendant duly excepting.

Q. Mr. Angevine: Have you any of those dispatches with you which passed between Mr. Hurley and other officers of the road? A. I have not.

Q. Do you know whether any of them were left or filed in your office or not? A. Some of those messages were joint to me, and such as were joint were received in my office and filed there.

876 Q. What became of them? A. We had six or seven feet of water in there and that destroyed them all.

Q. Never found them since the flood? A. No sir.

Q. Now you went to Argentine for the purpose of ascertaining the flood conditions along your line between Kansas City and Argentine, did you? A. Yes sir.

Q. How long did you stay at Argentine? A. We left Kansas City about ten o'clock and got back about 12:30.

Q. You left Kansas City about ten o'clock and got back about 12:30? A. Yes sir.

Q. What was the condition at Argentine while you were there? A. It was pretty hard, they had about four inches of water over the rail of the main line.

Q. I will ask you if there was any other low places between Argentine and Kansas City, if so where was it? A. Yes sir, just west of Rex mills, about the same amount of water there as was at Argentine.

Q. And how was it between that low place Rex mill and Argentine? A. There was no water, the ground was high.

Q. How was it at that time at Kansas City, was there any water on your tracks? A. No sir, none whatever.

Q. Or in any part of Kansas City? A. No.

Q. Now while you were at Argentine did you discuss the flood conditions with Mr. Hurley, as to the probable further rise in the river based on the information that he had from up the river; what conclusion did you and Mr. Hurley come to at that time as to condition of the flood whether it would probably rise any higher or not? A. We thought from the information which we had, and which he told me, and from

the way the water had been rising that the crest of the flood had about reached Argentine, and we figured that even in the lowest part of the yard, we believed if we got as
877 much as two feet more, that the contents of the cars would not be damaged.

Q. At that time did you have your storage yards in Argentine for the storage of cars and merchandise being shipped into and out of Kansas City and through Kansas City, that way? A. Argentine was our storage yard and handling yards for all business passing through Kansas City, [illegible] such stuff.

Q. State whether or not you had considerable number of cars in your yards at that time loaded with merchandise and property? A. Kansas City and Argentine both had something over 1400 loads and six hundred empties.

Q. In the two yards? A. Yes sir most of them at Argentine.

Q. From your personal examination of the flood conditions at that time at Argentine and from your conferences with Mr. Hurley, and the best information you could obtain from up the river, did you at that time apprehend that there would be any further rise in the river? A. We did not think that there would be any further rise that would cause us, or that could possibly cause us any trouble.

Q. How much of a rise did you say it would take to endanger the property and merchandise in cars and then standing on your tracks at Argentine? A. At 12:30 in that neighborhood, at that time, two feet or two feet and a [illegible] rise could come without injuring anything in a car.

Q. You could [—] stood a further rise of two feet or two and a half feet without injury to the property in your yards? A. Yes sir.

Q. Would that two foot rise have flooded the stock yards at Kansas City, Missouri? A. No sir.

Q. Was there anything in the information which you had to indicate at that time that you would have a rise, or further rise of two feet? A. No, sir, there was not, and
878 we did not think there would be that much.

Q. And from the best information you at that time you thought that the crest of the flood was upon you?

Mr. Ball: The plaintiffs object to the question as leading; he can tell whether he knows.

By the Court: The questions are leading.

Q. Mr. Angevine: Well you may state whether or not at that time you had any reason to apprehend any further rise in the Kaw river? A. We had not; the fact of the matte[illegible]

is we went up there for the purpose of sizing up the situation and to see and talk the matter over and to judge of the conditions, and we did as I have stated and Mr. Hurley came to the conclusion that the flood had reached its maximum height and we thought that we were absolutely safe, because even should it rise even as high as two feet more, and which we did not consider it probable, we would be entirely safe on all of our merchandise cars.

Q. You may state where your engines for the Kansas City division were then located? A. They were located at Argentine, with the exception of what we used in Kansas City.

Q. Where were the coaches that were not in use at that time? A. They were at Argentine also.

Q. Also in your storage yards? A. Yes sir.

Q. Were they located similarly to the cars of merchandise which you have spoken of and the empty cars? A. Yes sir the same.

Q. Were your engines located on grounds similarly situated higher or lower than the yards. A. About the same level right along side of the coach yards.

Q. From this information which you had at that time, did you come to the conclusion then that it was necessary or not necessary to move your equipment, cars and
879 things, from that yard.

By Mr. Ball: Objected to by the plaintiffs as leading; and the witness is not competent to state what conclusion he came to.

Objection overruled; plaintiffs duly excepting.

A. We came to the conclusion that it was not necessary; in fact it was not necessary even to move the cars out of the lower part of the yard at that time.

Q. Then you say you returned to Kansas about 12:30 was it? A. Yes sir.

Q. That was on Saturday 12:30 was it? A. Yes sir. Saturday 12:30 p. m.

Q. Did you continue to keep in touch with the Argentine yards by phone or wire during the afternoon of that day? A. I did.

Q. Was there any time during the afternoon of that day, that the water rose into your Kansas City yards? A. There was not.

Q. When did you first obtain information from the Argentine yards as to a dangerous condition of the flood there? A. Along in the evening some time probably from four to six o'clock.

Q. What evening do you mean? A. Saturday evening.

Q. May 30th? A. Yes sir. The water seemed to be rising right along, still rising slowly and it continued to rise slowly all the evening and still the reports were not alarming at all, until eight or nine o'clock in the evening the water was coming up pretty well.

Q. Now you may state if any time during that evening you and Mr. Hurley acting upon the reports which you were receiving from Argentine, determined it was prudent to move any of your equipment from Argentine yards, if so,
880 state what there was about that? A. We thought it best, or rather I thought it best to bring in our yard engines and coaches which was done.

Q. About what time did you commence bringing those in? A. About four o'clock in the afternoon completing about eight o'clock.

Q. From about four o'clock in the afternoon until eight o'clock in the evening Saturday May 30th, you moved your engines and coaches from Argentine to where? A. To the south end of the Kansas City yard right along, the 27 engines and set about opposite 19th street right next to the mule barns.

Q. The mule barns which have been spoken of in this case? A. I presume they are, just north of Allen viaduct, the coaches put there up in the yard along side of Liberty street and up in that direction.

Q. That was your yards between Allen avenue viaduct and 12th street viaduct? A. Yes sir.

Q. How was that ground as compared with the grounds at the stock yards as being comparatively the same level ground or otherwise? A. Well, I think that ground where the engines were located is a little bit lower than the stock yards.

Q. Did the water go over that ground before it did at the stock yards or after? A. I do not know when it came over at the stock yards.

Q. Now when you moved that equipment into that yard, was that your best judgment that that would be an entirely safe place for that equipment at that time? A. It surely was.

Q. Did you have up to that time, to the time you finished moving that equipment out of the Argentine yard, any information any time, from up the river indicating a rise which would flood your Kansas City Yard? A. None.

881 Q. Where were these engines and coaches which you then moved up into that yard during the flood? A. They were there all of the time at the same place.

Q. Caught right there in the flood were they? A. Yes sir; some of them down in a hole, turned over.

Q. Was that in the vicinity where the hole was in your yards? A. Yes sir, and the hole was right about, two-thirds of the string of engines, toward the north end.

Q. What was the condition of that yard before that hole commenced to wash there, what kind of a yard was it, was it surfaced up level the same as ordinary yards? A. Yes sir.

Q. What was the surface? A. The surface in there, it was cinders and slag, smelter slag.

Q. Did you consider that a good solid surface for a railroad yard? A. Yes sir.

Q. When did you first discover that a hole was being washed there? A. About 9:30 Sunday morning.

Q. About 9:30 Sunday morning? A. Yes sir.

Q. How did you discover that? A. I do not remember just the time.

Q. How did you discover that? A. I was there in the water and trying to find somebody to help me move some of the engines. And in that sort of a way from 19th street was a vacant place where there are no tracks and the water was coming in there and making a whirlpool, and the timbers and so forth and debris floating around going in a circle, and I happened to notice that by having to bump up against some of it; then I worked away along the engines, and I found that the bottom was washing out from under my feet.

Q. You walked into it? A. Yes sir, I got a stick and waded out there as far as I could to keep out of that hole, the hole was forming at that time.

882 Q. How deep was the water around that hole at that time where it had not washed? A. It was not quite enough to float me only occasionally.

Q. It came up to about how high on you? A. It came up to about here on me (showing)

Q. On your [wasit] or hips? A. Yes sir.

Q. Now you may state how large a hole washed in the yard there by that flood? A. It extended from our main lines across to and inside of the mule barn, and I should suppose it was probably 250 feet in diameter.

Q. And about how deep? A. It was 29 feet deep,—may be 29 feet deep I do not know the measurements of the hole or the area of it, I did not see that measurement.

Q. How much of your equipment, if any, went into that hole. A. We had three pullman cars and two ten wheel engines and two large prairie types.

Q. They went down in that hole during the flood, did they? A. Yes sir.

Q. You have spoken of a low place in your tracks just west of Rex mills, you may describe to the jury how the river runs at that point, that is, as to whether it is straight or on a curve? A. The Santa Fe tracks follow the river bank all the way from Argentine to a point just west of Rex Mills; the river runs or curves just west of Rex mills, and just west or about the present 5th street bridge, so that when the water comes up in the river to that height it covers the tracks at the low place there.

The tracks became part of the river there for a short distance.

Q. The river from Argentine runs east towards Rex Mills and then turned near 5th street bridge and turns and
883 bears off northeast and north? A. Yes sir.

Q. So that your track is on the south side of the river along there is it? A. Yes sir.

Q. And on the outside of the curve? A. Yes sir, on the outside of the curve.

Q. Now during the afternoon of Saturday May 30th, 1903, you may state or during the evening of that day, when you moved your equipment out there, what was the condition of that point on your line with reference to the flood and driftwood? A. Well, I did not see that, that afternoon, after passing through it; but we were through all that particular point, and that is one reason we brought our engines and coaches from Argentine so as to get them by that point; I could not give you a description of that, that afternoon, because I was not there, I passed by there about 12:15 somewhere along there the drift was coming down, and coming in so then, we had to stop once or twice and take the drift wood off of the track.

Q. The driftwood drifting in? A. Yes sir.

Q. With the condition of the water which was there, if there should be any rise of a foot and a half or two feet, would it be practicable to move a string of stock cars through that or take stock cars loaded or empty through there? A. Through that point, well, it would depend on how many men you could get with a string of cars and how well they did their work to keep the float and drift away from it, it would be necessary to keep the drift wood away from it.

Q. To keep it from wrecking the train?. A. Yes sir; we had great difficulty getting our engines down through that one point on account of that.

Q. Bringing the engines and coaches? A. Yes sir; I did not know that, I was not there, the master mechanic who came with them reported that to me.

884 Objected to by plaintiffs.

Q. Was that reported to you at the time as part of the information about the movement of those engines?

Objected to by the plaintiffs, any action of this witness [calimed] to be based on it, it is mere hearsay.

Mr. Angevine: This is knowledge of the flood conditions.

By the Court: Objection sustained; defendant excepting.

Q. Up to the time that this flood actually broke into your Kansas City yards and flooded what is called the west bottoms of Kansas City, Missouri, including the stock yards district, did you have any information from up the river which would indicate a rise to the extent of flooding that district? A. No sir, I did not.

Q. What is the practice of your road and other roads delivering stock to the stock yards at Kansas City, in regard to leaving cars stand on the delivering track or do they immediately remove them. A. Why we are not allowed to leave them there at all; in the first place, the stock yards insist we take them out so as to provide room for other stock following, and in the next place why we aim to get the weights on the cars and take them out so far as we can and as soon as possible.

Q. Is that the universal practice of your road to immediately take your cars to the Argentine yards to be weighed and cleaned on unloading the stock? A. Yes sir, it is.

Q. Do you know personally, whether any cars were left by your company at the stock yards on May 30th standing on the unloading chutes? A. Yes sir.

Q. What do you know about that? A. I know there was not any there.

885 Q. They were returned? A. They were returned to Argentine.

Q. You may state whether or not other roads do frequently have some of your stock cars and you have some of the stock cars of other roads, and whether that is a practice which frequently occurs? A. Yes sir, the equipment is used by different roads.

Q. And it very frequently happens when they get some of your cars they keep them for a long time, does it? A. Yes sir.

Q. Mr. Sharp, do you know when a train of twenty cars, stock cars, which was delivered by the Santa Fe road to the Missouri Pacific road on the morning of May 30th, were returned to your road.

Mr. Ball: Objected to by the plaintiffs as it assumes the fact of delivery.

Mr. Angevine: I think it has been very effectually testified to.

By the Court: It is based on the testimony of defendant.

Mr. Ball: I submit there is a dispute about that, it is not competent for counsel to commence a question by assuming every fact.

Objection overruled; plaintiffs duly excepting.

A. Some of those cars have never reached this station again since we delivered them to the Missouri Pacific, others of them, a lot of cars came in on our own train from other directions later, after the flood, and others were delivered to us in July.

Q. By whom? A. By the Missouri Pacific, at various dates in July.

Q. That train, as a train, then was not returned to your yards before the flood? A. No sir, it was not.

886 Q. Nor as a train, it never was returned? A. No.

Q. Is there an association at Kansas City, Kansas, known as the Central Association of Railroad Officers Kansas City division? A. There is.

Q. How long has that association been in existence to your knowledge? A. To my knowledge over five years, it has been in existence a good many years before, but not to my knowledge.

Q. But to your personal knowledge it only dates for five years? A. Yes sir.

Q. I will ask you what this book is which I hand to you? A. That is the rules of that association and shows the various resolutions which have been passed at various meetings, of that association.

Q. What railroads are members of that association. A. All lines in Kansas City.

Q. Have you a list of the lines there at that page of that book? A. Yes sir.

Q. Will you read that list?

Objected to by the plaintiffs, as it is absolutely outside of the issues in the case.

By the Court: What is the purpose of this.

Mr. Angevine: I want to read rule 16 when I get it properly identified.

Mr. Ball: There is no pleading of any rule.

By the Court: I think the law of the courts will have to fix that.

Mr. Angevine: The supreme court of the United States as I understand it, decided one case directly on the point of delivering cars of property on a designated side track where it

was the understanding of the delivering and receiving road that that was the place of delivering.

887 By the Court: Your contract here provides your relations with these parties, and when your liability shall cease.

By Mr. Angevine: That is a case to the point as to what is a delivery and shall constitute a delivery, and that is all we offer this for.

By the Court: I think the law will fix that. I will sustain the objection.

Mr. Angevine: The defendant excepts to the ruling of the court. Now I want to put the title page of this in to show what roads are members of that association and I would like to put that rule in the record.

By the Court: Very well.

Mr. Ball: We object to the title page and also to the rule as being incompetent, irrelevant and immaterial and not bearing on the issues in this case.

Mr. Angevine: The defendant now offers the title page of the by-laws and rules of the Central Association of Railroad Officers, of Kansas City division, May, 1904, showing that the defendant in this case, the Atchison, Topeka & Santa Fe Railway company, and the Missouri Pacific Railway Company, and other railways therein mentioned, are members of that association; and in connection therewith, the defendant offers in evidence rule 16 of said association, in regard to the delivering of cars by one road to another; delivering cars of freight by one road to another, and I would like to put this rule,—I do not want to read it for the sake of having it go before the jury; I suppose there is no objection under your ruling of having me read it and put in [in] the record.

Mr. Ball: We object to it for the reasons already offered.

Mr. Angevine: Which rule is as follows; may I read it for the purpose of making the offer?

888 By the Court: Very well.

Mr. Angevine: "Resolution XIV. That it is the sense of this association that the delivering lines responsibility for the contents of all cars, ceases with the delivery of such cars on the regularly designated connection between such hours as the delivering and receiving lines agree upon with seals intact.

Dated February 12th, 1895."

Mr. Angevine: We offer that in evidence.

Mr. Ball: It is objected to by the plaintiffs for the reasons before stated; and for the further reason it has no pertinency

or application to this case, it does not bear on any of the issues in the case and it is incompetent proof of anything.

By the Court: It is probable in the mind of the court, that in a controversy between two of these lines, which have united in the formation of this rule, that this rule might be proper to fix the time of delivery; but, in this case, as between the plaintiffs, shippers, and defendant, the objection will be sustained.

The defendant then and there duly excepting to the ruling of the court.

Q. By Mr. Angevine: Do you know the custom and the usage in Kansas City, as to the manner of delivering loaded freight cars with the freight therein from one railroad to another? A. I do.

Q. You may state what that custom is? A. Well on business that goes through to connecting lines cars shall be set on a designated track by the delivering company between agreed hours, and when such cars are so set responsibility of the delivering company, according to our agreement ends there.

Q. Is that the custom between the defendant the Atchison, Topeka & Santa Fe Railway company and the Missouri
889 Pacific Railway Company, and was it the custom? A. It is and was.

Q. During and prior to May 1903? A. Yes sir.

Cross-Examination.

By Mr. Ball: What time was it you and Mr. Hurley made this trip over there to Argentine on top of this box car. A. We left Kansas City, about ten o'clock in the morning.

Q. Saturday morning? A. Yes sir, and returned about 12:30.

Q. At that time your line was under water at various places between here and Topeka? A. It was under water at Holliday.

Q. Any other place? A. I do not know about points beyond there personally.

Q. The wire was open from Topeka? A. It was on that day, Saturday.

Q. Was it up to the time that you concluded this trip yourself, over there, wasn't it? A. I think it was, yes sir.

Q. Mr. Hurley had certain wires from the office of Topeka while you were with him didn't he? A. You mean received wires while he was with me?

Q. No sir. A. No sir, he did not receive any wires while he was with me.

Q. But he had received wires that day you say, while you were with him? A. Yes sir.

Q. Now do you know where this water came from? A. No sir.

Q. Do you know where it came from? A. No sir.

Q. If it came from the portion of the Kaw, west, up in the Manhattan country, the flood would pass Manhattan and pass Topeka quite a time before it reached Kansas City, would it not? A. I am not familiar with the country west of Topeka at all.

Q. Do you know now, that ten feet of water passed
890 Topeka Friday evening about nine o'clock, a ten foot rise on top of the condition you have been telling about? A. I never heard of it until I heard it mentioned in this court this morning.

Q. Mr. Hurley had wires from there Saturday morning? A. How is that—There was not any of them stated anything about ten foot of water.

Q. And all through the day Saturday you had wires? A. He got some more messages when he came back had information about that, I do not know.

Q. They related to the condition of the flood and what you and Mr. Hurley might apprehend what was coming? A. Yes sir. Nothing entirely changed our estimate.

Q. They came from your office? A. No sir I can't say those messages, you mean the originating point of the messages.

Q. I mean the information which you and Mr. Hurley were getting, and Mr. Hurley was getting from Topeka, in regard to what you and he might apprehend would happen down here in the way of a rise in the river? A. Yes they came from his office.

Q. They came from his office? A. Yes sir.

Q. Now if there was ten or twelve feet of rise from what had been before that passed Topeka about nine o'clock Friday evening, the 29th, do you know why Mr. Hurley did not know about that?

Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial, and this witness could not answer that only by a guess, it would be an inference why Mr. Hurley did not know it.

By the Court: Objection sustained.

Q. And the wires after nine o'clock Friday evening, were open between here and Topeka, so if that was a fact, there would be no trouble about you and he being informed of it?

891 Mr Angevine: Objected to by the defendant as calling for a conclusion of the witness; he can state the fact whether the wires were working or not.

By the Court: Objection sustained.

Q. Were the wires working Friday after nine o'clock? A. They were.

Q. So that rise did pass Topeka about nine o'clock Friday evening? A. No sir, I never heard of that until to-day.

Q. Do you know when that rise left Manhattan? A. No sir, I don't know anything about that ten foot rise, I never heard of it before.

Q. You found out about it here Sunday, didn't you? A. No sir, I did not know anything about any rise might come by Topeka.

Q. Just the rise which came in Sunday you have been telling about you knew about it when it got here? A. Yes sir.

Q. When did it get here? A. It commenced to get over in the bottoms along Sunday morning some time.

Q. It rose on Sunday between four in the morning and noon Sunday there was a raise of about how much? A. About seven or eight feet.

Q. Now that water did not come out of the ravines right here did it? A. I don't know where it came from.

Q. You know it didn't do that? A. No sir, I don't know where it came from.

Q. You know it did not fall here? A. I don't know where it came from.

Q. Was it raining here then? A. It did rain some, I don't know how much.

Q. Did it rain enough to make eight feet of water in the Kaw valley? A. I could not say that, I was not measuring the water.

892 Q. You were present on the ground there, you know that water came down the Kaw valley or river? A. It rained slightly on Friday.

Q. It came down the Kaw river, it came from the direction of Argentine? A. I don't know anything beyond that.

Q. You did not inquire beyond Argentine as to the condition? A. No sir, Mr Hurley, general superintendent was keeping me posted as to the condition.

Q. Did Mr Hurley inquire beyond Argentine, he was here with you? A. I don't know what he did?

Q. You do not? A. No sir.

Q. You know as a matter of fact it had been raining all of the month of May, that the river had been rising right along up to the time you and Mr Hurley on Saturday took this trip over there? A. No sir, I do not know that.

Q. You do not know that? A. No sir.

Q. Is it a fact or not? A. I don't know it to be a fact.

Q. There had not been much rain during May? A. I don't know, I do not have any recollection of how long a rainy period we had, or in what districts; that district you mention is away from here, a district I never was in, in my life, I do not have the knowledge which you ask.

Q. You know that the flood was coming down the Kaw river from the west don't you? A. We knew that there was water coming down the Kaw river, where it came from, I don't know.

Q. You knew it was coming from the Kaw wherever the Kaw might happen to be, it was coming down from the west down the valley of the Kaw river? A. I do not know where that water originated, I know it came here down the Kaw, but I do not know where the water originated.

Q. It rolled here on the situation anyhow? A. Yes we got it here.

893 Q. And it came down the channel of the Kaw river? A. Yes sir.

Q. Now do you know any reason why your road and your officers you and Mr. Hurley or somebody should not have known about this rise which passed Topeka Friday night at nine o'clock ten or twelve feet? A. I did not know there was such a rise.

Q. If so, do you know of any reason why they should not have known it.

Mr Angevine: Objected to by the defendant as calling for a conclusion of the witness.

By the Court: Objection sustained.

Q. There was a rise here of seven or eight feet on Sunday between four o'clock and noon? A. Yes sir.

Q. Do you know of any reason why you or Mr Hurley or other officers of your road should not have known before that rise got here, that it was coming?

Mr Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial, and calling for the conclusion of the witness.

Objection overruled?

A. No sir I do not.

Q. Now it was coming up right along on Saturday was it not? A. Slowly.

Q. This heavy rise arrived here Sunday? A. Well, yes, Saturday night and Sunday morning, during the night Saturday night and Sunday morning.

Q. Now if the volume of water, if that wall of water which reached here at that time and made that raise of seven or

eight feet between four o'clock Sunday morning and noon of Sunday, if that originated as far west as Manhattan, do you know how long it would take it to run down the
894 Kaw river and [and] reach this place from Manhattan?

By the Court: He has testified that he is not familiar withe this country.

A. I do not know a thing about it.

Q. Mr Ball: If it came from there, do you know of any reason why your railroad company should not have known of the fact that it was coming.

Mr Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial.

By the Court: Objection sustained; plaintiffs then and there duly excepting.

Q. How much of a rise occurred on Saturday here, do you know? A. No I do not.

Q. Do you know how much occurred on Sunday? A. No sir I do not exactly, I was up all night that night, and I telephoned in to the shop, and I tried to keep posted.

Q. Or on Monday? A. No sir; and going from one to the other, I watched the man-holes and then I got into the water afterward so that I am giving you the best of my judgment as to what occurred.

Q. Now the Santa Fe yards and terminals and where they held and handled cars at Kansas City, are altogether in the Kaw valley are they not? A. Why, yes. I think that would be considered right. Right along side of the river and away down towards the Missouri side part of Kansas side.

Q. These points where you were telling Judge Angevine about, you and Mr Hurley determined to move your freight cars and engines and one thing and another up there, that was within the Kaw valley and the highest land available to you people for tracking your cars and engines was it not?

A. Yes sir, it is in these bluffs, or in this valley be-
895 tween Kansas [bluss] over here and Kansas City, Missouri bluffs just opposite the stock yards, on the Kaw river, on the east side.

Q. You picked out the highest part which you had available of those yards for the disposition of these cars which you have been telling about? A. Only one point of that yard in particular higher than another I think; we thought Kansas City would be perfectly safe. And we had no thought of water ever coming over those tracks there; I did not think up to four o'clock Sunday morning.

Q. You did not get any information about the amount of this water coming down the Kaw river out west here? A. All the information I could get of that any way before the wires were down that night.

Q. Before that? A. We had no information whatever that there would be any such water.

Q. Now referring to these exhibits number 14a and 14b which are stamped Missouri Pacific Railway company freight office June 30th, 1903, passed Kansas City, Mo., those are receipts are they not, for the way bills.

Mr. Angevine: Objected to by the defendant, as the receipts are the best evidence of what they show, they appear to show a different state of facts.

Objection overruled; defendant duly excepting.

A. As I take it, that stamp is evidence that the way bills have been received and checked up with the freight and that they have the shipments complete; that is what it conveys to me.

Q. Those receipts, however, are for the way bills themselves, are they not.

Mr. Angevine: Objected to by the defendant as not the best evidence.

896 Objection overruled; defendant duly excepting.

A. It is for the way bills for the freight is represented by those way bills and when we get them back from the connecting carrier line, we are then satisfied that they have the freight that the way bills represent.

Q. That indicates does it not, those stamps of the Missouri Pacific indicate that they were made for the way bills on the 30th of June, 1903, and stamped by the Atchison & Topeka & Santa Fe shows stamped back on the 4th of July, 1903, don't they? A. Read that question.

Q. Question read The sheet indicates that it was made in our office on May 30th, 1903, and the Missouri Pacific stamp returned on these sheets to us, indicates that they have received; the way bills and the freight, they checked the way bills, and have taken no exception whatever, otherwise, if there was any exception, they make it on the sheet.

Q. Was there a Santa Fe stamp? A. It is similar; the office stamp, date received in our office, receipt in our office of these papers.

Q. What papers, of this? A. Yes sir.

Q. Now then, you know do you now, as a matter of fact, three weeks, before the 30th of June these way bills and cattle covered by them, were down there at Emporia in the

pastures and had been taken there by your railroad company three weeks before this stamp was put on there. A. I do not know that; I did not know that the Missouri Pacific turned that stock into our yards after we delivered it to them.

Q. You know it now?

By Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial, and not cross-examination.

897

By the Court: Objection sustained—plaintiffs then and there duly excepting.

Q. On the 30th of May, 1903, do you know where the way bills for these cattle were? A. No sir.

Q. Did you know where the cattle covered by these cars were named in here? A. No sir, I know nothing personally about the location of the cattle or the way bills.

Q. Do you know whether the Missouri Pacific, as a matter of fact, ever had any cattle covered by those cars? A. From our records, I do.

Q. I am talking about the cattle, do you know whether they ever had these cattle? A. No sir, not personally, I do not.

Q. I believe you stated in regard to these cars taken over to the Missouri Pacific unloading pens on Friday morning about nine o'clock?

By Mr. Angevine: Objected to by the defendant as assuming something that the witness did not testify to; the witness never testified they were taken to the unloading pens, and never mentioned them. Mr. Ball persists in saying that we put them at the loading pens, our witness testified they put them on the transfer track. And the further objection this witness did not testify as to the transfer, that I remember.

By the Court: I will sustain the objection.

Plaintiffs then and there duly excepting.

Q. You stated that after the flood subsided you got some of these cars back or found them in your own possession, some of them you got from the Missouri Pacific at various stations, is that right? A. I did not say that after the flood we had found some of them in our own possession.

Q. What is that? A. I did not say after the flood we found them in our own possession.

898

Q. I do not want to misstate you, of course; is it not true you found some of them in your own possession after the subsidence of the flood? A. Immediately after the flood.

Q. I do not know whether it was immediately, whenever it was. A. We did not find any in our possession, they were delivered to us by the Missouri Pacific road, or cars which had been delivered by us to the Missouri Pacific, and by them redelivered to us at some other point and came in on our trains. I have looked at our record of those cars, none of them were delivered back to us before the flood or even just after the flood.

Q. These twenty cars? A. Some of them never have been returned to Kansas City, as far as our line is concerned at Kansas City, yet.

Q. Now where did you get these cars after the flood and what cars you did get where did you get them from? A. We checked up last Sunday to see where those cars were, as I stated awhile ago some of the cars were never returned to us, some returned to us by the Missouri Pacific in July, and some came in on our own road into Kansas City, being the first record we had of them after our delivery to the Missouri Pacific on May 30th.

Q. That was these empty cars? A. It was cars in which that stock was delivered to the Missouri Pacific.

Q. These twenty cars if they were unloaded down there to the Missouri Pacific chutes, the cattle gotten out of them, I believe you said they were immediately shipped back to Argentine? A. No sir, I did not say that.

899 Q. Didn't you say when the cars were unloaded, ran into the yards and unloaded from your line, that as soon as they were unloaded you never left the cars there, but immediately switched them back to your Argentine yards? A. Yes sir, I said that.

Q. That is true? A. Yes sir.

Q. When these twenty cars were run into the chutes and unloaded what was done with them? A. I could not say, they were delivered to the Missouri Pacific.

By the Court: This was on the Missouri Pacific track he insists these were unloaded.

Witness: They were put through the union depot on the tracks and were delivered by us to the Missouri Pacific.

Q. Were the cattle in them? A. Yes sir, after that we did not know about what they did with them, I speak now from our record, I did not see the cattle, I have got a record and gone over it very carefully; as a matter of fact we do know those cattle were delivered.

Q. That was in on their way to the Missouri Pacific unloading chutes? A. Whatever that sheet there shows, those two sheets.

Q. Do you know anything about unloading these twenty cars in the Missouri Pacific chutes. A. I do not know they were unloaded by the Missouri Pacific at all, never had any advice to that effect; I did not know it and in fact I did not know it until recently.

Q. If they were unloaded in the Missouri Pacific chutes where would those cars go in the ordinary course?

By Mr. Angevine: Objected to by defendant as calling for a conclusion of the witness, and the witness is not presumed to know how the other roads unload cars, he has not been examined as to that, it is not cross-examination.

900 By the Court: He has testified where the cars did start.

By Mr. Ball: In the ordinary course if twenty cars were run into the Missouri Pacific chutes and there unloaded what would become of those twenty cars, the cars themselves, not the cattle.

By Mr. Angevine: Objected to by the defendant as not cross-examination, the witness has not testified he knew anything about whether they were shipped there or not.

Objection overruled; defendant duly excepting.

A. The ordinary course of business, if the Missouri Pacific did not use that equipment that would return it to us empty through the union depot and 12th street in regular order same as any other business is handled.

Q. Back to your Argentine yards? A. No sir; in other words the Missouri Pacific would make a regular redelivery of the cars to us in the same manner in which we made the delivery to them of the loads in the first place.

Q. As a matter of fact you do not know anything personally, about what was done with those cars or with these cattle? A. No sir, personally, I do not.

Redirect Examination.

Q. By Mr. Angevine: You say the regular course would be for the Missouri Pacific, if they did not use your cars in which the cattle were delivered would have been to at once return them over the same route delivered them into your yard would it.

By the Court: The jury understand what the witness stated in that respect.

Q. Did you keep a record of the movements of the cars of the Santa Fe Railway as they were delivered to and received from other railroads? A. We do.

901 Q. Was a record made of the delivery of these cars to the Missouri Pacific? A. There was.

Q. Was there a record of the return of those cars at any time before the flood? A. There was not.

Q. The only record of the return of the cars was at the various times as you have described? A. Yes sir.

Q. So that string of cars was not returned to you before the flood? A. It was not.

Q. You were asked on cross-examination about the rise of ten feet in the river at Topeka, did you receive any message of any kind of any such rise coming from Topeka? A. I did not.

Q. When did the telegraph wires between Kansas City and Topeka cease working? A. I am unable to state that; the wires kept dropping off one by one; I am unable to state when the last wire went down, but it was some time in the afternoon of Saturday May 30th, and what time I do not know; we had no wires that night, I know that.

Q. Saturday night? A. No wires Saturday night We had no wires after supper, I know.

Q. Now were your passenger trains still running over the road? A. No sir, not on our own road, had passenger trains over the Frisco.

Q. Were you running your trains out of Kansas City over the Frisco? A. Yes sir.

Q. To what point? A. Olathe.

Q. Over there on your Missouri cutoff line? A. Yes sir.

Q. Now you may state whether or not you had telephone communication with the Santa Fe office at Topeka during the night of Saturday night? A. I did, I talked with the, from the Hickory office two or three times.

902 Q. How did you have to do to get that telephone connection, did you have to go somewhere else. A. I left my office and went to the corner of 12th and Hickory and went in the exchange building there in the telephone exchange and talked there.

Q. Were the telephones at your office working Saturday night? A. Two private lines were working but the public line was not working, one private line.

Q. When you wanted to talk to Topeka you had to go to the Hickory and Central office? A. Yes sir.

Q. How far was that from your office? A. Three blocks.

Q. How many times did you go there during the night?

By the Court: This is not proper redirect examination, this witness was examined before court adjourned, and re-examined now, going into that matter.

Mr. Angevine: On cross-examination they asked about this matter which was new matter; we except to the ruling of the court.

Mr. Botsford: We want to recall Mr. Coombs for a moment.

Mr. W. A. Coombs recalled testified on behalf of the plaintiffs as follows on:

Direct Examination.

Q. By Mr. Botsford: Do you remember of giving a deposition in this case at my office on the 21st day of December last. A. I do not remember the date, I remember of being there and giving an affidavit.

Q. Is that your signature appended to that deposition? (showing witness deposition) A. Yes sir.

Q. In that deposition, I will ask you if the following question was asked you and answer given by you? "What did you do about the matter? Answer. We immediately
903 went to the stock yards company, because the stock yards company had put the stock on the viaduct to see what could be done about taking care of them, getting hay to them and getting them water?" Do you remember of that question being asked and that answer given. A. I presume it was, as I stated before, we immediately did everything we could to take care of these cattle.

Mr. Angevine: We object to this reexamination and recross-examination of this witness; it does not seem to be recross-examination on any new matter.

By the Court: Objection overruled; defendant then and there duly excepting.

Q. By Mr. Botsford: continuing—"Did you do that personally; answer, No sir some of our men;" was that question asked of you and that answer given? A. I do not remember, I can answer the question.

Q. The question is, which I asked you, was that question asked of you and that answer given in your deposition, did you give that answer? A. I do not remember, I can give the answer now.

Q. I am not asking you that; was that question asked of you and that answer given?

Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial, whether it was or not.

Objection overruled, defendant duly excepting.

Q. Mr. Botsford: Was that question asked you and that answer given? A. I presume it was if it is there.

Q. "Some of the Santa Fe men under your direction did that; answer, some of the Santa Fe men went to the stock yards company to see if everything was being done for the stock that could be done, still they did not need any direction, they were taking care of them,—had to because they
904 were in their hands; they were in the stock yards and they were taking care of them;" was that question asked and that answer given? A. I presume it was.

Q. "How long did they remain on the viaduct; answer, that is something I can't tell without the figures, but they remained there several days?" A. Yes sir.

Q. "How long did you continue to look after them"? "We continued to look after those cattle until they got to Dakota" Was that question asked you and that answer given? A. Yes sir.

Q. "Until they got to Dakota" answer, "Yes sir"; was that question asked you? A. We had nothing to do with the cattle while they were on the viaduct.

Q. Was that question asked you and that answer given? A. I kept close watch of the cattle as to what they were doing and what they were getting as near as I could in the interest of all parties.

Q. "About what time was that" answer, "Well, it was some time, last July", is that correct was that question asked you and that answer given? A. Yes sir. Some time, what do you mean by some time.

Q. Your answer, it was sometime last July, did you give that answer? A. I do not catch the idea.

By the Court: This witness practically stated that his company did everything that they could about the cattle—now is there anything to the contrary in the deposition.

By the Witness: No sir!!!

By the Court: He so stated on the witness stand before. I think you did, didn't you?

905 Witness: Yes sir.

By Mr. Botsford: I will ask you if this question was asked and this answer given; "Well when the flood subsided were they taken down into the yards" answer, "Yes sir, just as quickly as the water got down so we could get cars in there they were taken down off of the viaduct. The tracks were washed out and we had a great deal of trouble getting cars in there"; was that question asked you and that answer given?

By Mr. Angevine: Objected to by the defendant as immaterial.

By the Court: I think it is immaterial; there is no conflict on that proposition; the witness here testified that they brought these cattle down as soon as they could.

Mr. Botsford: Plaintiffs duly except.

Q. By Mr. Botsford: Was this question asked of you and this answer given; "Do you know how long they remained in the yards before you could get the tracks and cars in shape" answer, "No sir, I could not tell you; but we were after the stock yards company to get the tracks fixed as fast as they could so we could get them out, because we were anxious to get them out and into the country"

Objected to by defendant as immaterial; overruled.

A. Yes sir.

Q. "And finally did get them out" answer, "Yes sir and took them to Emporia I think some of them were left; some of the poor ones were left at the Emporia stock yards and put in a little yard and fed hay; the balance were run over to Lang and some stopped at Lang; that is about five or six miles this side of Emporia" Was that question asked and that answer given?

906 By Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial; and not cross-examination.

By the Court: I cannot see this is in any way changing the testimony given by this witness.

By Mr. Botsford: It simply confirms our idea that these cattle were never out of the defendant company's possession.

By the Court: The defendant company took them out to the pasture at Emporia, and the only contention by anybody there was at one time turned into the possession of the Missouri Pacific twenty cars, and the other turned into the stock yards, and I think no one but what understands the situation; and under the testimony of this witness especially, the company has not been endeavoring to shield themselves, and doing everything it could to minimize that loss.

Q. Mr. Botsford: continuing—"And put on the pasture" answer, "Yes sir" "What pasture" answer, "A pasture secured by our man in charge of the stock yards there, William Hatcher.

Mr. Angevine: We object to any further reading of the deposition.

Mr. Botsford: I am asking you if this question was asked and that answer given.

By the Court: The objection will be sustained.
Plaintiffs then and there duly excepting.

Q. By Mr. Botsford: I wish to ask this question; "Were they secured for the express purpose of these cattle or generally" answer, "For the express purpose of this shipment; I telegraphed him to make preparation for them there"; was that question asked and that answer given.

Objected to by the defendant on the same ground as before.

Witness: Yes sir they were, I telephoned to make
907 arrangements for these cattle; I made the arrangements myself.

By the Court: You did it for the defendant company? A. Yes sir.

Defendant rests.

And thereupon the defendant rested its case, and the plaintiffs to further maintain the issues upon their part offered and introduces evidence in rebuttal as follows towit:

Mr. L. A. Allen, called testified on behalf of the plaintiffs in rebuttal as follows:

Direct Examination.

By Mr. Ball:

Q. I believe you stated when you were on the stand before, you knew these cattle? A. Yes sir.

Q. Now state whether or not there was any available way to get these cattle out of the yards on Saturday night and Sunday?

By Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial, and not proper rebuttal testimony. It is part of the plaintiffs' case.

By the Court: I do not think it is proper rebuttal.

By Mr. Ball: If your Honor please, he examined Mr. Coombs as to the matter of these cattle being wild and the dogs would get them, and that it was not feasible to take or
908 drive them out there through the streets in any way. I want to show that it was.

By the Court: That was in answer to your question on the main case, as to how they might be taken out of the yard.

Mr. Botsford: We had Mr. Allen here to testify to this matter.

By the Court: I will allow him to answer this question in view of that fact.

Defendant then and there duly excepting.

Q. Read the question. Question read.

[A.] By the Court: Answer yes or no? A. Yes.

Q. Now state how and in what way that could have been done? What means were available for the purpose.

By Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial; and not proper rebuttal.

By the Court: Objection overruled; defendant then and there duly excepting.

A. They could have been driven out in the country any time during that time.

Q. How long would it have taken to have gotten them from the shipping pens where they were to the highlands? A. Twenty or thirty minutes.

Q. What available means, men and horses were there, if any one desired to move them, they could have had the services of them?

Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial, and not proper rebuttal, and what any one could have had access to, is not the question.

It is a question within the defendant's means of handling these cattle.

By the Court: Objection sustained; plaintiffs then and there duly excepting.

909 Mr. Ball: We say that any means the defendant could have had the use of to take these cattle out of there on Saturday and Saturday night or Sunday.

Mr. Angevine: We object to that as a conclusion of the witness as to whether any means were available to the defendant or not, is not a statement of facts, and is not rebuttal.

By the Court: Objection overruled; defendant then and there duly excepting.

By the Court: Answer yes or no.

A. Yes sir.

Q. Mr. Ball: What were they?

Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial, and not proper rebuttal.

Objection overruled; defendant duly excepting.

A. Men and horses.

Q. How many? A. About the yards about three hundred horses and three or four hundred men there all of the time to use those horses; some commission men, and some salesmen and some cattle drovers, and speculators, and traders.

Q. Did they have horses and men that was available there for moving the cattle. A. There were two stables there which hired horses.

Q. About how many men and horses.

Mr. Angevine: The defendant moves to strike out the statement of the witness about men and horses being available there; many commission men and traders and other dealers, showing it was not employes of this defendant.

By the Court: I will sustain the motion; plaintiffs then and there duly excepting.

Mr. Ball: About how many men and horses would have been reasonably sufficient to drove those cattle and handled them through the streets and out to the highlands? A.
910 Eight or ten men.

Q. Could they have handled the cattle, so as to prevent their scattering and going all over the city?

Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial, and not proper rebuttal.

Objection overruled; defendant duly excepting.

A. Yes sir.

Q. What do you know of pasture which was available to put these cattle in?

Mr. Angevine: Objected to by the defendant, this witness testified on that point while he was on the stand.

By the Court: Yes, it is not proper rebuttal; objection sustained; plaintiffs duly excepting.

Q. Mr. Ball: What was the nearest way out to the highlands from the shipping division.

Mr. Angevine: Objected to by defendant, the witness was interrogated in regard to that matter while on the stand before.

By the Court: That is my recollection.

Mr. Ball: I have examined about that, I know; that was one of the points I desired to prove by him, and he came in, a few minutes late.

By the Court: I think he testified in regard to that.

Mr. Ball: I will ask the witness; do you recollect whether you were asked about that before? A. I do not know as I testified as to the distance.

By the Court: You did testify about the pasturage? A. I think I did, yes sir.

Mr. Ball: Well as to the distance and the way out from the shipping pens or division?

By the Court: You did testify as to the nearest way
911 out did you not? About the distance? A. I testified I think as to where the pasture was out of the city, but

not as to the distance from the shipping division, I do not think I did.

By the Court: Very well, he may answer.

Mr. Ball: Just tell that briefly? A. From the shipping division to the highlands.

Q. Yes to get out of the Kaw valley.

Mr Angevine: Objected to by the defendant, that is a different question, I am satisfied that the witness testified in regard to it.

Objection overruled; defendant duly excepting.

A. From the southeast corner of the shipping division to the viaduct it is about 450 or five hundred feet, to the south east gate.

Q. What viaduct? A. What is known as Allen avenue viaduct goes to the bluffs.

Q. And then when you got on that how far is it to the uplands? A. It goes right out to the uplands.

Q. That Allen avenue viaduct does? A. Yes sir.

Q. How far above the surface of the valley is that? A. It rises, an incline over the railroads out around the bluffs, it is about, perhaps five hundred feet long, I do not know the exact length of the viaduct, something like that though.

Q. Does it go over the railroad tracks and then down to the level again? A. Yes sir.

Q. And about how far is it to the hills then from the shipping division? A. From the hills to the shipping division I think somewhere about in the neighborhood of a thousand feet including the distance from the gate to the viaduct and over the viaduct to the hills, I should think somewhere in the neighborhood of a thousand feet.

912 Q. Do you know of any live stock which was taken out of there on Saturday or Sunday morning, or Saturday night?

Mr Angevine: Objected to by the defendant, the witness was interrogated fully about the matter, and he told about the different bunches of cattle.

By the Court: Objection sustained, it is not proper rebuttal.

Cross Examination.

By Mr Angevine: [—] What is known as Allen avenue viaduct is a branch viaduct going over the railroad tracks, or in other words there are three ends to that viaduct? A. Yes sir.

Q. The north end of that viaduct is on the low lands is it not? A. Yes sir.

Q. And the south end, street branch, is on the low lands? A. Reasonably low, yes sir.

Q. It is in the river bottom is it not both ends of it? A. It runs around the corner of the bluff.

Q. And then to the left of that is an arm or branch of the viaduct that turns off to the left and goes up to the hill? A. Yes sir.

Q. That is the one you spoke of going up the hill? A. Yes sir, that is one of them.

Q. The other end, the south end is on the river bottom, is it not? A. Not on the river bottom, it is on O K creek or Turkey creek bottom.

Q. That is practically on the first level is it, of the Kaw river bottom. A. There is not much difference.

Q. As a matter of fact, the water broke through there up to the south end of the Allen avenue viaduct before it did at the stock yards, did it not? A. I did not know it did before.

Q. Didn't the water break over from the Kaw river into Turkey creek at the south end of the Allen avenue via-
913 duct before it got into the stock yards? A. I did not know that [—] did, I was not over at that point.

Q. It is a fact that the left branch of the Allen avenue viaduct the one going up to the hills was not floored at that time is it not? A. Yes sir.

Q. There was nothing but stringers? A. Yes sir.

Q. And Texas cattle cannot walk stringers small as they are? A. There was a traveled roadway not completed.

Q. And there was a long portion of it had no planks on at all, was there not? A. Yes sir.

Q. A hundred feet or more was not planked? A. Yes sir, that is perhaps so.

Q. The other branch went down into the bottoms of Turkey creek? A. Yes sir.

Q. And from there it was at least three miles in any direction before you could get out of the thickly settled portion of Kansas City, was it not? A. No sir.

Q. In which direction could you get out in those three miles? A. You could have gone up Summit street, or turned on the Southwest boulevard, at the junction of the boulevard and 24th street and gone out over that way two or three streets, going south toward Westport and Southwest boulevard too.

Q. You would have to go through Westport going that way? A. Go to the west of Westport.

Q. You would have to go through Westport? A. No sir, not go through the town.

Q. How far would it be before you would get out of the thickly settled part of the city, after you would leave the stock yards going in either of those directions? A. The way we bring in and take out cattle we do not go through the thickly settled part of it, we do not aim to.

914 Q. It is through the city, and you would have to pass through the thickly settled parts, would you not, in going either of those directions? A. We do not go out the thickly settled parts of town, we do not have to, you can if you want to. The streets have very few buildings on them when you strike the high ground.

Q. After you strike the high ground then you come into the thickly settled part of the city? A. No sir, you keep to the west of Westport.

Q. What street would you take? A. Take what is called Westport I think formerly called Westport avenue and been turned back into a road I think and called Roanoke avenue now.

Q. Would you pass through Roanoke? A. No sir, right by the Roanoke yards.

Q. Would you pass through Rosedale? A. No sir, not necessarily go that way.

Q. Would you go over between Rosedale and Roanoke? A. You could, yes.

Q. What street would you take to get out of town? A. There is a road about midway between, going out of Roanoke boulevard, what we call Roanoke boulevard now and Rosedale, I do not know what the name of that road is.

Q. It is right in the bottom of a ravine? A. The road goes up a ravine, yes sir.

Q. That goes into Turkey creek about the center of Rosedale, does it not? A. No sir it is away this side two or three roads goes up through the bluffs there.

Q. The first one, the first road going up through the bluffs, took you out east of Roanoke, or north? A. No sir.

Q. Where would it take you? A. No sir, right to the west of Roanoke.

Q. It would take you between Roanoke and the
915 main part of Kansas City Missouri, would it not, the first one of those ravines? A. No sir, Roanoke would be on the east; what is now called Roanoke boulevard or Westport road used to be called, and the Prospect road they drive cattle in and out.

Q. That goes up the center of the ravine until it gets into Roanoke district? A. Passes to the right of Roanoke, west of Roanoke.

Q. That is thickly settled for a mile beyond the upper end of that ravine? A. Very few settlements along the west Prospect road.

Q. How far is it from the stock yards to the entrance to that ravine, you have spoken of? A. To make a rough guess about a mile and a quarter I think, perhaps a mile and a half.

Q. Thickly settled all that distance? A. No sir that part of the bluff along down there has been held in large tracts and not thickly settled.

Q. You have to go out the Southwest boulevard to go to that? A. Part of the way, yes.

Q. You would have to go along the tracks of the Metropolitan Street Railway Company? A. The Boulevard you would not; that would be one road.

Q. That is the road you would have to take to go up that ravine? A. That Westport boulevard is.

Q. There is a double track street railroad on that street? A. Yes sir.

Q. That extended all along the length of that Southwest boulevard, did it not? A. Yes sir.

Q. And cattle would have to go over Turkey creek on a bridge, would they not; would they not have to cross Turkey creek on a bridge? A. Would not cross Turkey creek at all.

Q. In Rosedale? A. No sir.

916 Q. Would they not cross Turkey creek in going that road? A. No sir, would not cross it at all.

Q. Turn off before you get to it? A. Yes sir.

Q. Do you know whether the Santa Fe Railway company had any men in their employ at Kansas City with horses available for use in handling these cattle? A. I do not know whether they did or not.

Q. You never knew of them having any, did you? A. No sir.

Q. The stock yards company have their own horses for their own use in handling cattle do they? A. Yes sir.

Q. And these stock men you have spoken of, have them for their use in handling cattle? A. Yes sir and for any use they may be needed for.

Q. No trouble at all to handle three thousand Texas cattle there is it; through the city there would it? A. I could handle them very easily.

Q. You would not want more than one assistant? A. Yes sir I would want more than that.

Q. You know as a matter of fact very frequently happens when a Texas steer gets out of the yards there, they cause a great deal of trouble in the streets? A. Yes sir.

Q. That very frequently happens? A. Yes sir.

Q. And chase people in the streets? A. Yes sir.

Q. And break in through show windows sometimes? A. I believe that has happened.

Q. And you know as a fact some have gone through the principal streets of Kansas City, Missouri and went through plate glass windows? A. Yes sir.

Q. You know that very frequently happens, do you not? A. Occasionally.

Q. You know of people being frequently run down by them in the streets, do you not? A. Well, yes, not frequently run down.

917 Q. Texas cattle get loose and take after a man and run over him if he don't climb a telegraph pole? A. Wild Texas steer will do it.

Q. Frequently happens when they get out of the stock yards, that they do that? A. Not often they trample down people.

By Mr. Ball: This Allen avenue viaduct I believe Judge Angevine asked you if part of it was unplanked or something?

Mr. Angevine: Excuse me just one moment; I will ask you to look at that picture and state if that is a correct picture of Allen avenue viaduct as it existed at that time? Showing at the time of the flood at least one hundred feet unplanked of the viaduct there? A. Yes sir, I think it is, I think it looks a good deal like it was that Sunday morning I was down there.

Q. You could not have taken those Texas cattle over that? A. No sir, not that portion.

Mr. Ball: Could they have been taken over the other portion? A. Yes sir.

Q. Any trouble about that? A. No sir.

Q. That Allen avenue viaduct is a sort of a name-sake of yours? A. Yes sir, named after me.

Mr. R. P. Isitt, sworn testified on behalf of plaintiffs on rebuttal as follows:

Direct Examination.

Q. Please state your name? A. R. P. Isitt.

Q. You live in Kansas City, Missouri? A. Yes sir.

Q. You are the agent of the Missouri Pacific? A. Yes sir.

Q. What kind of agent? A. Local agent.

Q. Freight or passenger? A. Both.

918 Q. Both freight and passenger? A. Yes sir.

Q. Where are your offices? A. Three offices, three stations, all stations in Kansas City, Mo. and Kansas.

Q. Did you occupy the same position in 1903? May and June? A. Yes sir.

Q. Mr. Isitt, what do you know about 20 cars of cattle being unloaded Saturday morning, 30th of May, at the Missouri Pacific chutes which came in over the Santa Fe from Texas and New Mexico? A. I know of that, yes, sir.

Q. I will ask you to state at whose instance and at whose expense they were unloaded at that time?

By Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial and not tending to prove any issue in the case.

By the Court: Objection sustained—plaintiffs then and there duly excepting.

Q. Mr. Isitt, do you know whether the Missouri Pacific did accept those cattle from the Santa Fe Railroad company or not?

By Mr. Angevine: Objected to by the defendant as calling for a conclusion of the witness; the witness ought to be required to state the facts and not any conclusions.

Mr. Ball: That is what I am asking for is facts.

By the Court: Let him answer, yes or no.

A. No sir, I do not.

Mr. Ball: I will hand you exhibit 14a and 14b and ask you what those papers are and what they indicate?

By Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial and not the best evidence as to what they indicate.

By the Court: Bring the witness down to testify in regard to any point connected with the paper, papers themselves show what they are.

919 Mr. Ball: Those are bills, receipts for the way bills are they not?

Mr. Angevine: Objected to by the defendant as leading and suggestive.

By the Court: You may state what they are; defendant duly excepting.

A. These are receipts interline way bills.

Q. They appear to be stamped by the Missouri Pacific passed June 30th, 1903?

By Mr. Angevine: We move to strike out the last answer of the witness as being an attempt to contradict the written instrument, which speaks for itself.

Overruled, defendant duly excepting.

Q. Question read—what does that stamp mean? A. This is a stamp put on by a clerk in my office when he handles these interline bills which are referred to, instead of the document, and stamps that as an indication they have been received.

Q. And do you know how they got on there a month after the flood? A. No sir I could not tell, there were many things happened at that time, nobody can explain.

Q. Does that indicate anything, or in any way the freight itself, the cattle, were in the custody and charge of the Missouri Pacific at that time.

By Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial and not rebuttal.

Objection sustained.

Mr. Ball: It is a mere explanation of what these documents indicate in the course of railroad business.

By the Court: Proceed.

Mr. Ball: Do you know of any arrangement with the Santa Fe railroad company had with the Missouri Pacific railroad company to accept these four trains of cattle at Kansas City. A. No.

920

Q. Do you know whether they had any such arrangement with them or not? A. No.

Q. If they did have any such arrangement, under the order of your office and authority of your office, with whom would they have that arrangement.

Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial and calling for a conclusion of the witness.

By the Court: Objection sustained, plaintiffs then and there duly excepting.

Q. By Mr. Ball: Whose business of the Missouri Pacific Railway company would it be to make any such arrangement with the Santa Fe to take these cattle.

Mr. Angevine: Objected to by the defendant as incompetent, irelevant and immaterial and not proper rebuttal.

By the Court: Objection sustained, plaintiffs then and there duly excepting.

Mr. Ball: At the time those documents were stamped there, June 30th, do you know where those cattle were? A. No.

Q. Look at that document there, what is the number (15) did you sign that? A. Not personally.

Q. Do you know anything about it? A. I believe it was signed by one of my clerks.

Q. Do you know where the cattle were at the time it was signed? A. No.

Q. It appears to be dated there 6:35 a. m. does it not? A. Yes.

Q. Do you know where those cattle were at that time? A. No I do not; yes, well, personally I do not, but there
921 are records I know they were here in the company's yards, or placed at the unloading chutes.

Q. What do your records show in regard to them?

Mr. Angevine: Objected to by the defendant as incompetent irelevant and immaterial and a repetition, the witness has already stated they were here in their yards or at the unloading chutes.

Objection overruled; defendant duly excepting.

A. About the cars or the cattle.

Q. Both?

Mr. Angevine: Objected to by defendant as incompetent, irrelevant and immaterial, and whatever the records may now show is immaterial.

By the Court: It probably would not be the best evidence.

By Mr. Angevine: I am making the objection on the ground.

By the Court: Objection sustained.

Q. Mr. Ball: You have your record there? A. Yes sir, I have part of the record, I have the record of the receipt of the cars, the cars were received from the Santa Fe.

Q. That the cars or the cattle? A. That the cattle were unloaded, they were placed to the unloading chutes and unloaded.

By the Court: By the Missouri Pacific. A. They were unloaded by the stock yards.

Q. Mr. Ball: They were unloaded at your chutes? A. Yes sir. Unloaded at our chutes.

Q. [illegible]sed Jun[illegible] placed them there? A. We placed them there.

[illegible]uri Pacific road.

Q. What became of the cars and the cattle.

Mr. Angevine: Objected to by defendant as incompetent, irrelevant and immaterial, what became of them.

By the Court: Do you know what became of them.
922 A. I do not know what became of the cattle. The cars were, after the flood, picked up and went out of our yard in various directions:

Q. What is that? A. They went out of our yards in various directions and at different times, the empties.

Q. After the flood? A. Yes sir.

Q. Did your road, and do these receipts indicate that your road accepted them for further transportation out of here.

Mr. Angevine: Objected to by defendant as incompetent, irrelevant and immaterial, and not the best evidence.

Objection overruled.

A. Not necessarily.

Q. Did you accept the cattle for further transportation out of here?

Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial, and the witness says personally he knows nothing about it, he did not handle the transaction personally.

By the Court: Do you know whether you received the cattle from the Santa Fe road? A. Only from what is reported to me by my subordinate, and the records I had in the office, personally I did not handle the case at all.

Mr. Ball: Your subordinates signed that receipt there did they not? A. Yes sir, that is a receipt for the cars, what is called an interchange slip.

Q. You are talking about number 15 now? A. Yes sir.

Q. That is not a receipt for the cattle? A. That is a certificate that the cars have been received and taken for the purpose of adjusting the rental on the cars between the different lines, that is the purpose of that slip. That
923 is such a slip as is signed by both lines, no matter what the circumstances are under which the car is delivered whether it is right or wrong it makes no difference.

Q. It don't indicate anything then in reference to whether your line has accepted for further transportation to another point those cars, or not? A. Not at all.

Q. And that receipt does not mean you received the cattle which were originally in the cars?

Objected to by defendant as leading; sustained.

Q. Mr. Ball: Does it indicate anything in reference to the cattle themselves? A. No.

Mr. Angevine: Defendant objects to that as not the best evidence, the slip is here before the court and has been introduced in evidence and there is a column here to indicate whether the cars are loaded or empty, and each one of those cars is marked in that column, and the instrument itself is the best evidence, and for that reason I object to it and ask to strike out the answer, because I was objecting to it at the time.

Mr. Ball: That does not purport to show whether they were loaded at the time it was signed or not.

Mr. Angevine: I will submit it to the court, under that column.

By the Court: Van you tell at the time the person signing this receipt, whether or not they were receipting for loaded or unloaded cars? A. Yes sir.

Q. And this is a receipt for loaded cars? A. Yes sir.

Mr. Ball: Did the Missouri Pacific accept for further transportation these 20 cars of cattle or any of these four trains of cattle of the Santa Fe Friday evening and Saturday morning?

924 Mr. Angevine: Objected to by defendant as incompetent, irrelevant and immaterial and not rebuttal and it is not shown that this witness personally knew anything about the transaction and it is a conclusion of the witness from the facts which should be stated.

Objection sustained: Plaintiffs then and there duly excepting.

Mr. Ball: Did the Missouri Pacific accept any of these cattle as shown by the record of your office for further transportation, of the Santa Fe.

By Mr. Angevine: Objected to by defendant as not the best evidence, [incompane,] irrelevant and immaterial.

Objection sustained, plaintiffs duly excepting.

Cross-examination waived.

Lester Woolf, sworn testified on behalf of plaintiffs on rebuttal as follows:

Direct Examination.

Q. What is your name? A. Lester Woolf.

Q. Where do you live? A. 1400 Forest Avenue, Kansas City, Mo.

Q. What is your business? A. Stock man.

Q. At the stock yards, Kansas City, Mo? A. Yes sir.

Q. Were you in that business in May and June, 1903? A. Yes sir.

Q. At the same place? A. Yes sir.

Q. Did you have any live stock in the yards at Kansas City, on Saturday, Friday or Saturday, May 29, and 30, 1903? A. Yes sir.

Q. What stock did you have there.

Objected to by the defendant as incompetent, irrelevant and immaterial and not rebuttal.

By the Court: What is the purpose of this.

925 Mr. Ball: I propose to show by Mr. Woolf, that he had some five hundred head of stock there, that they were loaded into, at such points of the yards, that he got them out of there Saturday night at eight or nine o'clock.

Mr. Angevine: It is part of the plaintiffs' case in chief.

By the Court: Objection sustained. Plaintiffs then and there duly excepting.

M. Mullen, called testified on behalf of plaintiffs as follows on rebuttal.

Direct Examination.

Q. Mr. Ball: Do you remember the various conferences which occurred between you and Mr. Frost, your counsel, and Mr. Coombs and counsel of the railroad company in reference to these cattle here; I mean the conferences which occurred in June right after the cattle came down off of the viaduct?

Mr. Angevine: Objected to by defendant as incompetent, irrelevant and immaterial and not proper rebuttal, it was part of the plaintiffs' case in chief.

Objection overruled, defendant duly excepting.

A. Yes sir.

Q. Where did those conferences generally occur?

By the Court: What do you desire to show by this witness.

Mr. Ball: I desire to show at that time by this witness that the railroad company through Mr. Coombs and through its counsel, Mr. Lathrop, were urging the Minnesota & Dakota Cattle company and the Empire State Cattle company, to take the cattle off the hands of the Santa Fe at this place; that there

926 was at no time any claim or pretense that any of these cattle had ever been delivered to any other carrier, but it was thoroughly recognized that the Santa Fe railroad company still had them in custody and never parted with them.

Mr. Angevine: We object to the testimony as incompetent, irrelevant and immaterial and not rebuttal.

By the Court: I will permit you to ask him directly whether the defendant desired to take the cattle off of their hands, but I do not see any necessity of going away around it.

Defendant then and there duly excepting.

Q. Mr. Ball: State if it is not a fact that Mr. Coombs and Mr. Lathrop at a number of conferences held at my office and Judge Botsford's office, did not urge the two cattle companies there to take off of their hands these cattle that are here in controversy, the four trains?

Objected to by defendant as incompetent, irrelevant and immaterial and not proper rebuttal.

Objection overruled, defendant duly excepting.

By the Court: Answer the question, yes or no.

A. Yes sir.

Q. Mr. Ball: State whether or not at any time there was any suggestion made on that part of Mr. Coombs or the counsel of the railroad or anybody representing them that any part of these shipments had been theretofore delivered to any other railroad?

Objected to by defendant as incompetent, irrelevant and immaterial and not calling for any statement of fact and for a conclusion of the witness.

Objection overruled, defendant duly excepting.

A. Never had made any offer.

Q. State if you made the arrangement for the shipment of these cattle with Mr. Brown, who was called as a witness here?

927 Objected to by the defendant as incompetent, irrelebant and immaterial, and not the best evidence, and is not rebuttal.

By the Court: Objection sustained; plaintiffs then and there duly excepting.

Cross examination waived.

Mr W. A. Frost, called. Testified on behalf of plaintiffs as follows on rebuttal.

Direct Examination.

Q. By Mr Ball—

By the Court: Do you desire to prove the same thing by him?

Mr Ball: Yes sir.

By the Court: Did the Santa Fe Railway company request you to take these cattle off of their hands A. Yes sir.

Mr Angevine: Defendant objects to the question by the court and excepts to the ruling of the court.

By the Court: At that time did they discuss with you as to whether the cattle had been delivered to the Missouri Pacific road? A. Nothing said about the Missouri Pacific road.

Mr Angevine: The defendant also objects to that question and excepts to the ruling of the court.

By the Court: Is that all.

Mr Ball: Yes sir.

928 Mr W. H. Brown—called and sworn. Testified on behalf of plaintiffs on rebuttal as follows:

Direct Examination.

Q. You live here? A. Yes sir.

Q. Are you one of the attaches of the court here? A. Yes sir.

Q. Did you live here in 1903, May and June? A. Yes sir.

Q. Do you remember the flood generally? A. Yes sir.

Q. Do you know of the taking of any live stock out of the stock yards or the flooded district on Saturday or Sunday May 30th or 31st, 1903

Mr Angevine: Objected to by the defendant as incompetent irrelevant and immaterial, and not proper rebuttal.

Objection sustained; plaintiffs then and there duly excepting.

And the above and foregoing was all of the evidence offered and received in the trial of the said above entitled causes, and by the said several parties.

And thereupon upon the conclusion of all of the evidence in the case, the plaintiffs prayed the court to instruct the jury as follows:

The court instructs the jury to find the issues for the plaintiffs; which instruction the court refused to give, and to which action, ruling and decision of the court in refusing to give said instruction, the plaintiffs at the time duly excepted.

And thereupon the plaintiffs prayed the court to give to the jury the following instructions:

929 I

The court instructs the jury that if you find from the evidence that the transportation of the cattle of plaintiffs immediately after the same were rested, fed and watered at Strong City and at Wellington could have been continued by defendant to Atchison so that defendant could have tendered or delivered said cattle to a connecting carrier at Atchison, and that defendant's road from Wellington and Strong City to Atchison was then open and free from obstruction from floods, for the safe transportation of said cattle from Wellington and Strong City to Atchison, and that defendant could have transported said cattle from said points to Atchison after said cattle had rested and were fed and watered at said points, then it was the duty of defendant to have proceeded with the continued transportation of said cattle from said points after said cattle were fed and watered there, to Atchison, and that duty on the part of defendant existed notwithstanding the defendant by its officers agents or servants may have been informed or learned that the road of any of the connecting carriers north of Atchison was flooded, and if defendant neglected to perform that duty and such neglect contributed to cause or caused the death of and injury to plaintiffs' cattle, then your verdict should be for plaintiffs.

And the court refused to give such instruction, to the refusal of the court to give such instruction, the plaintiffs at the time duly excepted.

930 II

The court instructs the jury that if you find from the evidence that defendant by its agents, officers or servants ascertained and learned, after plaintiffs' cattle were fed and watered and had rested and had been reloaded at Strong City and Wellington of the approach of the flood at any point along the line where said cattle was to be [transportaed] over defendant's road, then it was the duty of defendant to [ecercise] such high degree of care, prudence and vigilance in regard to said cattle as was reasonably necessary to prevent the destruction of or injury to said cattle by or from such flood or the consequences thereof.

And the court refused to give such instruction, to which action of the court, the plaintiffs at the time duly excepted.

III

The court instructs the jury that when the safe and continued transportation of live stock in the possession of a common carrier is threatened by storm or flood such carrier is bound to use due care, prudence, vigilance, and diligence to prevent, if possible, injury or damage to such live stock, and under such circumstances it is the duty of the common carrier to be self-possessed, prudent and careful and to exercise the highest degree of care in the transit of the live stock proportionate to the threatened danger, in order to avoid, if possible, the destruction of or injury to the live stock from such threatened storm or flood.

And the court refused to give such instruction, to which action of the court in refusing to give such instruction the plaintiffs at the time duly excepted.

931 IV.

The court instructs the jury that if you find from the evidence that the defendant by its officers, servants or agents, after plaintiffs cattle were detained at Strong City and Wellington and after they were fed and watered and had rested and were reloaded, learned of an impending or threatened flood along or across the line where said cattle were to be transported, and that the continued transportation of said cattle from said points was liable to or might result in the destruction or injury of said cattle, or any of them, then it was the duty of defendant to retain said cattle of plaintiffs at Strong City or Wellington or other safe place until said impending or threatened flood should subside so that said cattle could be safely transported over the residue of the route to their destination, and if you find from the evidence that defendant was negligent or careless in discharging that duty, and that such negligence contributed to cause, or caused, the death of and injury to plaintiffs' cattle complained of, then your verdict should be for plaintiffs.

And the court refused to give such instruction, to which action of the court in refusing to give such instruction, the plaintiffs then and there duly excepted.

V.

The court instructs the jury that the evidence in this case proves that the cattle of the plaintiffs in controversy were routed over defendant's road by way of Emporia to Atchison, Kansas, and that they were there to be delivered by defendant

to a connecting carrier. And the court instructs the jury that defendant had no right to deviate the transit of plaintiff's cattle from said route by way of Emporia and Topeka to Atchison, to defendant's road by way of North Ottawa to Kansas City,

and that defendant did not have the right upon the
932 arrival of plaintiffs' cattle at Kansas City to unload them in the Kansas City stock yards, and that the deviation of said cattle of plaintiffs from defendant's line by way of Topeka to Atchison to Kansas City and the deposit of said cattle in said stock yards was wrongful, and that defendant by such deviation assumed all risks in the shipment of said cattle and that as a result of said deviation, the flood is no justification or defense to this action, and that defendant is liable to [plaintiffss] for any and all injuries which you may find from the evidence plaintiffs suffered in consequence of such deviation and in consequence of the deposit of plaintiffs cattle in said stock yards, and in consequence of said cattle not being fed and watered while in the viaducts of said stock yards.

And the court refused to give such instruction, to which action of the court in refusing to give such instruction, the plaintiffs then and there duly excepted.

VI.

The court instructs the jury that if you find from the evidence that notwithstanding the deviation by defendant of plaintiffs' cattle from Emporia to Kansas City, defendant at Kansas City could still, by the exercise of care, prudence, vigilance and diligence on its part have caused the continued safe transportation by a connecting carrier of said cattle from Kansas City northward, but that defendant failed to exercise such care, prudence, vigilance and diligence, and that instead thereof defendant placed said cattle in the Kansas City stock yards, and that by reason of the want of such care, prudence, vigilance and diligence said cattle were placed where they could not be fed or watered, and that plaintiffs suffered damage by the death of some of said cattle and injury to the residue by reason thereof, then your verdict should be for plaintiffs.

And the court refused to give such instruction, to which action of the court in so refusing to give such instruction the plaintiffs then and there duly excepted.

933 VII.

The court instructs the jury that if you find from the evidence that defendant by its officers, agents or servants knew of the flood at Topeka in the Kaw river while plaintiffs cattle

were still in the stock yards, and after they were watered and fed, at Strong City and Wellington, or at the time the continued transit of plaintiffs' cattle was resumed from Strong City and Wellington or before they reached Emporia, then you are instructed that defendant was bound to take notice that the flood which existed in the Kaw river at Topeka would continue down the River at Kansas City.

And you are further instructed that if the defendant had knowledge of the flood conditions in the Kaw river at Topeka and thereafter diverted the shipment of plaintiffs' cattle at Emporia to Kansas City, then defendant took the risk and responsibility of such deviation of plaintiffs' cattle and is liable in this action to plaintiffs for any and all injures or damages which resulted to plaintiffs' cattle from such deviation and for all loss suffered by plaintiffs from not feeding and watering said cattle at the Kansas City stock yards.

And the court refused to give such instruction to which action of the court the plaintiffs then and there duly excepted.

VIII.

The court instructs the jury that a common carrier upon being notified of the signs of approaching danger, if such danger is of a character as would reasonably awaken apprehension of destruction or injury to live stock being transported by such carrier, is bound to the exercise of the highest diligence, prudence, vigilance and dispatch, and to exercise every means of escape within its power, to avoid and prevent, if possible, the destruction of live stock under those cir-
934 cumstances, and you are further instructed that that duty devolved upon defendant respecting plaintiffs' cattle at Wellington, Strong City, and at Emporia and also at Kansas City.

And the court refused to give such instruction, to which action of the court the plaintiffs then and there duly excepted.

IX.

The court instructs the jury that although the destruction of or damage to property by flood is an Act of God, and although where such destruction or injury results wholly from a flood such flood constitutes in favor of a common carrier a defense, yet you are also instructed that in order for such flood or Act of God to constitute a defense it [mush] have been the sole cause of the damage or injury without any negligence of the carrier concurring therein, and if defendant's negligence, if you find such negligence as defined in other instructions, contrib-

uted with the flood to cause the destruction of or injury to plaintiffs' cattle, then such flood or Act of God is not a defense, but defendant is liable for the loss resulting in such case for and on account of the negligence of the defendant carrier contributing with the flood in causing the destruction or injury of the cattle.

And the court refused to give such instruction, to which action of the court the plaintiffs then and there duly excepted.

X.

The court instructs the jury that if you find that plaintiffs cattle which were placed by defendant in the Kansas City stock yards were, in order to prevent said cattle from being drowned, placed in the viaducts of said yards, and that during the time said cattle so continued to remain in said viaducts, it was impossible, by reason of the flood, to feed or water the same for any length of time, and that in consequence of
935 such inability to feed and water said cattle, some of said cattle died and the balance were injured, and if you further find from the evidence that defendant's negligence, if you find the fact of such negligence, in holding plaintiffs' cattle at Strong City and Wellington after the cattle were fed and watered there, or the negligence of defendant after learning of the flood at Topeka in not retaining said cattle at Strong City or Wellington or other safe place, until said flood had subsided, if you find that defendant was so negligent, or that the shipment of said cattle from Emporia to Kansas City instead of proceeding with said cattle by the way of Topeka to Atchison, or that defendant was negligent at Kansas City in not delivering said cattle to another carrier, or in not removing same the yards, contributed to the death of said cattle, or any of them, and to the injury of the residue, then you are instructed that plaintiffs are entitled, on any one of said findings by you to a verdict, for the amount of the loss resulting from such destruction of said cattle and such injury to the residue of the herd, and if you find for the plaintiffs you are further instructed that the measure of their damages is the difference between the market value at Evarts, South Dakota, of plaintiffs' cattle at the time they would have reached said Evarts if said cattle so shipped had gone through without the destruction or injury thereof, and the market value at said Evarts of the residue of said cattle as they actually were when they were delivered at Evarts.

And the court refused to give such instruction, to which action and ruling of the court the plaintiffs then and there duly excepted.

936

XI.

The court instructs the jury that if you find from the evidence that the cattle of plaintiffs would in the ordinary transportation of the same have reached South Dakota on the 1st of June, 1903, and that defendant by the exercise of prudence and diligence could have safely transported said cattle so as to have reached South Dakota on the 1st of June, 1903, and if you further find and believe from the evidence that defendant by its agents, servants or officers did not exercise care, prudence, vigilance and diligence in the shipment of said cattle and that in consequence thereof said cattle did not reach South Dakota until the middle of July, 1903, and if you further find and believe from the evidence that in consequence of said delay the market value of said cattle at Evarts in South Dakota was lessened on the arrival thereof in said South Dakota, then you are instructed that it is your duty to find for the plaintiffs in this cause in addition to the damages for the death and injury of the cattle, if under other instructions you find defendant liable for such death and injury such additional damages as plaintiffs may have suffered by reason of such delay in the shipment of the residue of plaintiffs cattle by the defendant.

And the court refused to give such instruction, to which action and ruling of the court the plaintiffs then and there duly excepted.

XII.

The court instructs the jury that if you find for plaintiffs and that the market value of plaintiffs cattle at the time defendant finally delivered the same to a connecting carrier was less than the market value of said cattle when defendant received the same and that such diminution in the market value of said cattle was caused or contributed to by defendants' want of due care as defined in other instructions of the court, then you are instructed that in passing upon

937 and determining the amount of such diminution of value, you may consider the difference in the condition of said cattle upon their arrival at Kansas City and when they were taken therefrom also whether in consequence of such want of due care any of said cattle have died since they reached the pastures of South Dakota, also whether cattle shipped from Texas to and arriving at the Dakotas, in the middle of July are more liable to perish during the following winter from the cold thereof than if they had reached the Dakotas on the first of the preceding June, together with all the other facts and circumstances in evidence bearing on such question of diminution in the market value of said cattle.

The Court refused to give such instruction, to which action and ruling of the court the plaintiffs then and there duly excepted.

XIII.

The court instructs the jury that if the defendant by its officers had notice and knowledge of the flood before or after the arrival of plaintiffs' cattle at Kansas City, and by the exercise of due care and prudence and diligence could have thereafter had the cattle transported to a place of safety either by defendant's own equipment, or by delivery to a connecting carrier, or by driving the cattle out of the yards, where such flood was impending, then it was defendant's duty to exercise such care, prudence and diligence and to remove or procure the removal of said cattle from said yards by any available means; and if the jury find and believe from the evidence that defendant failed and neglected to exercise such care and diligence and that but for such failure said cattle would not have been caught and injured by the flood, then defendant is liable for any loss to plaintiffs' by reason of such failure to exercise due care and diligence, and in such case it would make no difference whether connecting lines were or were not at the time open for traffic to
938 the point of destination.

And the court refused to give such instruction, to which action and ruling of the court the plaintiffs then and there duly excepted.

And thereupon the defendant prayed the court to give the following instruction to the jury:

The court instructs the jury to return a verdict finding the issues for the defendant.

And the court over the objection of the plaintiffs gave said peremptory instruction so prayed for by defendant to the jury to return a verdict for the defendant; to which action ruling and decision of the court in giving said instruction to peremptorily return a verdict for the defendant, the plaintiffs duly excepted at the time.

And thereupon the jury pursuant to said peremptory instruction so given by the court, to return a verdict for the defendant made and returned in open court a verdict, in words and figures as follows, to-wit:

"We, the jury, in the above entitled case, duly impaneled and sworn, upon our oaths find for the defendant.

F. E. McLAIN, Foreman."

In the giving of said peremptory instruction so prayed for by defendant, and given to the jury to return a verdict for the defendant, the court at the time delivered a written opinion, in words and figures as follows, to-wit:

In the Circuit Court of the United States for the
939 District of Kansas, First Division.

The Empire State Cattle Company, et al., Plaintiffs,
No. 8155. vs.
The Atchison, Topeka & Santa Fe Railway Company, Defendant.

The Minnesota & Dakota Cattle Company, Plaintiff,
No. 8157. vs.
The Atchison, Topeka & Santa Fe Railway Company, Defendant.

Memoranda of Decision on Request for Peremptory Instructions.

The above entitled cases arose over the shipment of about three thousand head of cattle from New Mexico and Texas points to Evarts, South Dakota. The petitions of plaintiffs count on a violation by defendant of its duties as a common carrier for hire, resulting in loss to plaintiffs. In the interests of time, by agreement of parties, the cases were consolidated for the purpose of this trial and are now being tried together.

The answers of the defendant allege the contracts for the shipment of cattle to have been made in writing by plaintiff with the Pecos Valley & Northeastern Railway Company, limiting the common law liability of the defendant. These contracts are set forth in extenso in the answers filed and are admitted by the pleadings in the cases.

It is the contention of the defendant that the damage and loss, for which these actions have been brought by
940 plaintiffs, accrued to plaintiffs from a flood in the Kaw river, of such an unprecedented and unexpected nature as to constitute what is known in law as an act of God. Defendant also files a cross demand against plaintiff The Minnesota & Dakota Cattle Company, in case No. 8157, for money paid the Stock Yards Company at Kansas City, and for pasturage on the cattle during carriage.

The trial of the cases has consumed much time, and the largest latitude has been granted counsel for the respective parties in the bringing out of all the facts and circumstances of the cases. The matter is now before the court on requests for instructions. The facts are practically undisputed and briefly, in substance are these:

The cattle were shipped by plaintiffs from Kenna, New Mexico, Bovina and Hereford, Texas, which stations are on the line of The Pecos Valley & Northeastern Railroad Company, on the 25th and 26th days of May, 1903, destined to the pastures of the plaintiffs in the neighborhood of Evarts, in the state of South Dakota. The contracts of shipment are in writing and are in the usual form of live stock shipping contracts, limiting the common law liability of the carrier, and were made between plaintiffs and The Pecos Valley & Northeastern Railway Company. The parts of the contracts material to this inquiry are:

(1) "That the live stock covered by this contract is not to be transported within any specified time nor delivered at destination at any particular hour nor in season for any particular market."

(2) "The company agrees to stop cars at any of its stations for watering and feeding where it has facilities for so doing whenever requested to do so in writing by the owner or attendant in charge, and the party of the second part agrees not to confine his stock for longer period than twenty-eight consecutive hours without unloading the same for rest, feeding and water for a period of at least five consecutive hours, provided he is not prevented from doing so by storm or other accidental causes."

941 (3) "The shipper hereby assumes and releases the company from risks of injury or loss which may be sustained by reason of any delay in such transportation of said stock or injury thereto caused by ..... injury to tracks or yards, storms, washouts ..... or from any and all other causes whatever. The liability of the carrier or any fact essential thereto in any instance or case shall not be presumed, but the burden of establishing such liability is assumed by the shipper in the event of a suit."

It is further stipulated that the conditions of said contract shall apply and inure separately in favor of each of the several connection carriers. It is further provided in the contract: "And on so delivering to such connecting carrier, all liability of the company whatever, for carriage of or on account of said stock, shall be thereby ended, it being understood the company assumes no obligation whatever on account of the carriage of said stock beyond its road, and that the company shall not be liable for any damage to, injury of or delay of said stock, or of anything whatever that may happen to the same after such delivery or tender of delivery in case such connecting carrier shall refuse to receive the same. Each

carrier in the route shall receive such stock when delivered to it, transport the same over its road to the succeeding carrier in the route, and it is distinctly understood that the responsibility of each carrier shall not begin until it receives such stock from the consignor or from the connecting carrier, and shall cease when it delivers the same to the connecting carrier, or, if the last carrier, at the place of destination."

The contracts entered into do not specify the route of shipment from points of shipment to destination, but the way-bills upon which the cattle were shipped, and other evidence, discloses that the cattle were, by the initial carrier,
942 routed over its own line to Amarillo, Texas, thence over the defendant's line of road by way of Wellington, Strong City, and Topeka, to Atchison, Kansas, thence over the Burlington road to Council Bluffs, Iowa, and from thence to point of destination over the Milwaukee Railway.

The evidence further shows that when a part of the shipment arrived at Strong City and another part arrived at Wellington, stations on defendant's line of road, the cattle were unloaded for feeding, water and rest. The cattle were accompanied at all times by owners of the stock or their representatives in charge signing the contracts. During the time the cattle were at these stations on the defendant's line of road for feed, water and rest, the defendant company was notified by the Burlington road that on account of washouts on its line near Hamburg, Iowa, it could not receive the shipments at Atchison or carry the same as contemplated. Thereupon the defendant company commenced negotiations with the Missouri Pacific Railway to receive the cattle at Kansas City and carry them to Council Bluffs, Iowa, thus performing the part of the service which it was originally contemplated the Burlington should have performed from Atchison, Kansas, to Council Bluffs, Iowa. After the defendant was first notified by the Burlington that it could not carry the cattle as contemplated, the Burlington thereafter notified the defendant that its road was in repair and that it would receive the cattle. A portion of the cattle were thereupon loaded upon the cars of the defendant company and started forward, when the defendant was again notified by the Burlington company that its line was again washed out and that it would not receive the cattle at Atchison. Neither the Burlington nor the Atchison, Topeka & Santa Fe Railway had stock yards at Atchison at the time to accommodate the cattle if forwarded there. A portion of the cattle, consisting of forty-two cars, were forwarded to Kansas City, were received and transported by the Burlington Railway. It was

arranged between the defendant and the Missouri
943 Pacific that the latter company should receive and transport the remainder from Kansas Cit: These negotiations delayed the cattle on the 27th and 28th days of May at Strong City and Wellington after their arrival at these points. Thereafter, under the arrangement with the Missouri Pacific, the cattle were forwarded to Emporia, Kansas, and from thence, by way of North Ottawa, to Olathe, Kansas, and from thence to the Kansas City Stock Yards over the Frisco tracks, and were there received in the night of the 29th and morning of the 30th days of May. Twenty cars of the cattle were transferred by the defendant to the Missouri Pacific tracks and were by that company placed at its stock yard chutes and were unloaded by the stock yards company. The remainder of the cattle were unloaded from the cars where placed by the defendant company in the stock yards. Efforts were made by the representatives of the plaintiffs accompanying the cattle, on the 30th day of May, to have the cattle forwarded to point of destination, but without success. The Missouri Pacific Railway made an attempt to move a portion of the cattle, but did not succeed in so doing, and the cattle were left in the stock yards at Kansas City on the day and night of the 30th of May, and for many days thereafter, as hereinafter stated.

It appears from the evidence that during the greater part of May, 1903, unusual and [unprecendented] rains fell in the watershed of the Kansas River, which empties in to the Missouri river at Kansas City. To such an extent was this true that a vast amount of property located in the valley was inundated and destroyed by high water in the Kaw river following in consequence of such rain. The railways running along and across this valley were overflowed and the property destroyed. The railway and other bridges crossing the river, were, in almost every instance, carried away by the flood. Many thousands of homes in Kansas City were submerged and the inhabitants fled to the hills and other places of
safety, with nothing saved from destruction but the
944 clothing they had on. Business houses and contents were submerged and destroyed. The water in the river covered the entire valley to a depth of from ten to twenty feet. Nothing like it ever before occurred in the history of the valley. It was, in fact, as shown by the evidence, a great public calamity to Kansas City and other cities and towns in the valley. The stock yards in which the cattle in question were located were, for the first time in history, inundated on the night on the 30th and the morning of the 31st of May.

To save the cattle in question from drowning, they were driven up into overhead viaducts leading from one portion of the yards to another, and were there kept for more than a week, during the continuance of the flood, without sufficient feed or water, from which cause more than five hundred of the cattle died and the remainder were weakened and greatly injured.

At the time the cattle were carried to Kansas City by the defendant company, its lines of road from Topeka to Atchison and from Topeka to Kansas City were submerged by the flood and could not be operated. After the subsidence of the flood, owing to the fact that the cattle were in such a starved and weakened condition as to be unfit to be carried forward to the point of destination, the defendant, seeking to minimize the loss and damage to the cattle, and with the consent of plaintiffs and after the plaintiffs had refused to receive the cattle from the defendant, carried the remainder of the herd to pastures in Lyon County, Kansas, where they were held until about the tenth of July, following, when they were forwarded by defendant company on the original billing to Atchison, Kansas, and from thence to point of destination over the Burlington and the St Paul railways. Before removing the cattle from the pastures in Lyon county, plaintiffs gave bond to pay the freight charges at the point of destination and also to repay to the defendant the amount of the charges of the stock yards company for care of
945 the cattle while held in the stock yards (in amount $2428.60), and paid the pasturage of said cattle in Lyon county, Kansas, (in amount $2820.38), which amounts are stipulated by the parties to be reasonable and necessary in the event it should finally be determined plaintiffs were liable therefor. A cross demand for these amounts has been filed by the defendant against the plaintiffs in case No. 8157.

The damage sustained by plaintiffs, including the loss of the cattle which died, damages to the remainder sustained which occurred by reason of their weakened and starved condition when received at point of destination, and extra charges and expenses incurred in the delay in shipment and the holding of the cattle in Lyon county, and the lateness of the season when they reached their destination, are quite large; and while there is a variance in the amount of damages sustained by plaintiffs, as testified to by different witnesses of the plaintiffs, yet the evidence of plaintiffs in this respect is wholly uncontradicted by any testimony of the defense.

The grounds upon which plaintiffs base their right of recovery in this matter, as specifically set forth and alleged

in the petition of the Minnesota & Dakota Cattle Company, are as follows:

"Plaintiff states and charges the fact to be that by the exercise of due and reasonable care in the carriage and transportation of said cattle from the point of shipment aforesaid to Atchison, Kansas, all of said loss and damage could have been avoided, and that defendant was guilty of negligence therein in the following particulars, towit:

First—Defendant did not exercise due and reasonable care, but was negligent in its detention of said cattle at Wellington, Kansas, and at Strong City, Kansas, and by the exercise of due and proper diligence could have carried and transported said cattle to Atchison, Kansas, by way of Topeka, Kansas, and delivered the same to the connecting carrier at that point, and thus escaped the peril and de-
946 struction of the flood.

"Second. That defendant was guilty of negligence, after having so long detained said cattle at Strong City, and at Wellington, Kansas, in not further detaining or holding them in some place of safety until the unprecedented flood in the Kaw river, hereinbefore mentioned, had subsided, so that the transportation of said cattle might be safely resumed.

"Third. That defendant was guilty of a wrongful and [begligent] act in diverging and deviating the shipments of said cattle to Kansas City, Missouri, off of the line of transportation over which said cattle were directed by the plaintiff to be carried.

"Fourth. That the defendant negligently and carelessly, and knowing that an unprecedented flood was descending the Kansas river, hauled said cattle into the low lands and the mouth of said river, and unloaded and left them in front of the approaching flood.

"Fifth. That defendant, after having wrongfully transported said cattle to Kansas City, failed and neglected to move, or cause to be moved, the same from their position of peril in the stock yards at Kansas City, Missouri, as defendant had reasonable time and opportunity to do, but the same were overtaken by the flood.

"Sixth. That the defendant did not exercise due and reasonable care and dilligence and was negligent in not properly or sufficiently feeding and watering said cattle, both while the same were at Strong City, Kansas, and at Wellington, Kansas, and while the same were in the yards and viaducts of the Kansas City Stock Yards Company at Kansas City, Missouri.

"Plaintiff further states that all of the several injuries, damages and losses to and of said cattle hereinbefore specified, and the losses and expenses aforesaid, were each and all caused by the several negligences and want of due and reasonable care in the transportation and carriage of said cattle by the defendant."

947 The specific grounds of negligence alleged on the part of the plaintiff The Empire State Cattle Company are of identical legal import.

That the flood in question was unprecedented in its character is alleged by plaintiffs in their petitions. That it was extraordinary in its nature is attested by the fact that the water rose many feet higher than ever before known in the history of the valley, and rose very rapidly in the latter part of the night of the 30th day of May and the forenoon of the 31st day of May. That it was wholly unanticipated in height and destructive force is manifest by the undisputed fact that millions of dollars worth of property was placed and left in the valley here at Kansas City by the owners thereof, which was inundated and destroyed, much of which could have been carried to a place of safety had it been possible to have anticipated the calamity. As it was, the owners fled to the hills and other places of safety in conveyances, in boats, and in every possible way, to save their lives and the lives of the members of their families. That the flood was of such unprecedented nature and character in its height, suddenness and destructive force as to constitute what is known in law as an act of God, admits of neither doubt nor argument. Does this fact, established by the undisputed evidence in the case, relieve the defendant of liability?

Under the undisputed evidence, what was the direct, efficient and proximate cause of the loss sustained by plaintiffs? The defendant contends "The act of God." The plaintiffs contend "The negligence of defendant." Which contention is correct?"

It is not enough in this case that plaintiffs show that some act of negligence of the defendant furnished the occasion for the loss, or that some act of negligence of the defendant contributed to the injury; but before plaintiffs may recover in these actions it devolves upon them to trace the loss which they have sustained to the negligence of the defendant as the direct and proximate cause of the injury.

948 While the authorities in this country are not in harmony upon this proposition, yet the federal decisions all agree therein. In Chicago, Milwaukee & St. Paul Railway Company v. Elliott, 55 Fed. 949, Judge Sanborn, delivering the opinion, says:

"The rule of law which governs in this case is not difficult of statement, but, like many other rules, the difficulty is solely in its application. 'Causa proxima non remota spectavur.' An injury that is the natural and probable consequence of an act of negligence is actionable. But an injury that could not have been foreseen or reasonably anticipated as the probable result of the negligence is not actionable, nor is an injury that is not the natural consequence of the negligence complained of, and would not have resulted from it but for the interposition of some new, independent cause, that could not have been anticipated. Obviously, the relation of causes to their effects differ so widely and are so various, that no fixed line can be drawn that will in each case divide the proximate cause from the remote cause. The best that can be done is to carefully apply the rule of law to the circumstances of each case, as it arises. The effect sometime follows immediately upon its moving and proximate cause, and, again, that cause works out its effect with unerring accuracy after a long period of time."

In Railway Company vs. Kellogg, 94 U. S. 469, Mr. Justice Strong, speaking for the Supreme Court, said:

"It is generally held that in order to warrant a finding that the negligence, or an act not amounting to wanton wrong, is the proximate cause of the injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen, in the light of the attending circumstances."

In Hoag v. Railroad Co., 85 P. A. St. 293, it is said:

"The true rule is that the injury must be the natural and probable consequence of the negligence,—such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrong doer as likely to flow from the act."

In the light of these and other authorities, and the undisputed evidence in these cases, have the plaintiffs so alleged and proven?

It is first contended by plaintiffs that the delay of the trains at Strong City and Wellington, on the 27th and 28th days of May, was negligence and the cause of the injury to plaintiffs. It is true that if this delay had not occurred and the cattle had been promptly forwarded to and through Kansas City, they would not have been caught in the flood at Kansas City; or, if they had been kept at such points until the flood
949 had subsided, they would not have been injured as they were at Kansas City. But it is equally true this delay or failure to longer delay was not the cause of the injury.

The question here is, if the carrier delayed the shipment for an unreasonable time, but for which he would have been able to deliver the cattle safely or to deliver them to a connecting carrier by whom they would have been carried beyond danger from an act of God causing loss, is the carrier liable for the consequences of such delay? Upon this question the courts differ widely. The courts of New York, Illinois, and others states hold the defendant liable in such case. The rulings in the federal court are to the contrary. Insurance Company v. Tweed, 7 Wall, 444; Railroad Co. v. Reeves, 10 Wall. 176; Scheffer v. Railroad Co., 105 U. S. 249; Railway Co. v. Insurance Co., 139 U. S. 223; The R. D. Bibber, 50 Fed. 841; Thomas et al v. Lancaster Mills, 71 Fed. 481.

Again, it is alleged by plaintiffs that the cattle should have been forwarded, as originally intended, by Atchison and not by Kansas City, and if so, that the injury would not have occurred. The written contract of shipment made, as has been seen, does not specify the route to be followed, but upon this question the contract is silent. The route originally contemplated by the parties was to Atchison, thence by the Burlington. While the cattle were en route to Atchison and stopped at Wellington and Strong City for feed, water and rest, the Burlington notified the defendant that on account of washout on its line near Hamburg, Iowa, it could not receive the cattle. The cattle were delayed by defendant pending negotiations for a different carriage. During the pendency of such negotiations the Burlington notified defendant its line was again open. The cattle were ordered forward, and were loaded and started en route. Again the defendant was notified by the Burlington that its line was out and it could not receive the cattle. A portion of the cattle were again returned and
950 unloaded at the stock yards at Strong City. At the time, neither the defendant nor the Burlington had yards at Atchison to accommodate the cattle. Arrangements were completed for the Missouri Pacific to receive them at Kansas City and transport the cattle from there. By this time it was impossible for the defendant to carry the cattle over its line to Atchison or to carry them to Kansas City otherwise than the way they were carried. That the contract of shipment and the circumstances, common business prudence, and the law as well, authorized a departure from the original-y intended route of shipment, I have no doubt, unless the defendant knew or should have known that by such departure the safety of the shipment would be endangered. Snow v. I. B. & W. Ry. Co., 9 N. E. 702; Hutchinson on Carriers, Section 311; International

& Great Northern Railway Co. v. Wentworth, 27 S. W. 680. There is no evidence in the case which in any wise sustains the allegation of plaintiffs that the cattle were not properly fed and watered while at Strong City and Wellington.

Again, it is alleged by plaintiffs that the defendant "negligently and carelessly and knowing that an unprecedented flood was descending the Kansas river, hauled said cattle into the low lands at the mouth of said river, and unloaded and left them in front of the approaching flood. That defendant, after having wrongfully transported said cattle to Kansas City, Missouri, as aforesaid, carelessly and negligently failed and neglected to move, or cause to be moved, the same from their position of periol in the stock yards at Kansas City, Missouri, as defendant has reasonable time and opportunity to do, but the same were overtaken by the flood."

As to whether the act of the defendant, in bringing the cattle to Kansas City and there leaving them in the stock yards, constitutes such negligence as was the proximate cause of the loss to plaintiffs, must be measured, not in the light of subsequent events and as we see them to-day, but what a person of ordinary care, skill and prudence would have
951 done in his own affairs with the knowledge of circumstances and conditions as they were or should have been known to him at the time to exist. At this time it was known the stock yards where the cattle were placed were used for this purpose at all times and at all seasons of the year, and that many millions of cattle had been therein placed with the utmost safety, and that cattle there placed would be properly cared for by the stock yards company and its employes; that in all the history of these yards they had not been overflowed or endangered by overflow, and that the safety of cattle placed therein had not been questioned.

"That which never happened before and which in its character is such as not natural to occur to a prudent man to guard against its happening at all, cannot, when in the course of years it does happen, furnish good ground for a charge of negligence in not foreseeing its possible happening and guarding against the remote contingency of its happening." Railroad Co. v. Columbia, 65 Kan. 390.

The officers of the defendant company, on Saturday the 30th day of May, after investigating the conditions around Kansas City and after considering the information on the subject of the rise in the Kansas river, moved the company's own property and the property in its charge for shipment, consisting of fourteen hundred loaded cars of freight, upon higher ground

no higher than that where the cattle in question were left, with perfect assurance of safety from the flood, which property and most of the company's most expensive equipment were inundated. So far as shown in this case, all others acted in the same manner. Late that night and during the succeeding day the flood rose rapidly to more than ten feet higher than ever before known. The property of all alike was inundated and destroyed, and plaintiff's cattle were, by the stock yards company, placed in the overhead viaducts to prevent them drowning in the stock yards. In such location and on account of the flood conditions, the height of the water, the swiftness of the current, the floating debris, the lack of equipment, they were
952 not and could not be properly cared for, and the loss thus accrued. It may be conceded that the cattle need not have been brought into Kansas City in the first instance, or, being, in, that they could have been removed in the cars in which they arrived, or in others, or on foot. Guided by events that followed, as now seen by us, to-day, the cattle undoubtedly should and unquestionably would have been removed from their place of peril. That these circumstances and acts of the defendant company furnished the occasion for the loss is unquestionable; but that the direct and proximate cause of the loss and damage was the unprecedented and unexpected flood and attendant disaster that came wholly without anticipation on the part of the defendant company or the plaintiffs and their agents accompanying the stock, is shown by all the testimony in the case.

It was a serious loss and great hardship upon plaintiffs, but in my judgment it must be borne by them as like losses are borne by others with property unfortunately situated in this unhappy valley in that illfated time.

It therefore follows on the main case, the request for instructions to the jury to return a verdict for the defendant must be sustained, and the like request of plaintiff must be denied. This will be done.

953 And thereupon the court, on the motion of the defendant gave final judgment in favor of the defendant and against these plaintiffs.

And thereupon and at the same time, on the application of said plaintiffs, leave was given by the court by an order duly entered of record, giving to the plaintiffs sixty (60) days from this date, within which to enter and file a bill of exceptions in this cause.

Wherefore the plaintiffs pray the court to settle and allow this its bill of exceptions herein and to do all and singular the

acts, rulings, decisions and orders of the court in the premises, and that the same may be signed and made a part of the record herein.

Now Therefore, the court doth find the foregoing to be a correct and true Bill of Exceptions taken and filed in behalf of the plaintiffs herein, and doth now sign the same and order that the same be made a part of the record in these causes.

Given Under The Hand of the Judge of said court, before whom said proceedings were had on this 12th day of May A. D. 1905.

JOHN C. POLLOCK, Judge.

Indorsed: In the Circuit Court of the United States for the District of Kansas, First Division. Empire State Cattle Company et al., Plaintiffs, vs. Atchison, Topeka & Santa Fe Railway Company, Defendant, No. 8155. Bill of Exceptions. Filed May 12, 1905. Geo. F. Sharitt, Clerk.

954 In the United States Circuit Court for the District of Kansas, First Division.

Empire State Cattle Company, a corporation, W. W. Waite, E. F. Waite, W. H. Frost, P. H. Kellogg, C. L. Millet, and J. D. Carr, Plaintiffs,
No. 8155. vs.
Atchison, Topeka & Santa Fe Railway Company, Defendant.

Journal Entry.

Come again, this 12th day of May, 1905, said parties plaintiffs and defendant by their attorneys, and thereupon plaintiffs tender to the court a bill of exceptions herein, and the defendant having examined the same, said bill of exceptions is approved and duly certified, signed and filed and hereby ordered to be made and the same is hereby made a part of the record in this cause, and thereupon said bill of exceptions is filed with the Clerk.

And thereupon at the same time plaintiffs file herein their assignment of errors in this cause. And thereupon plaintiffs tender to the court a writ of error to the United States Circuit Court of Appeals for this Circuit, duly approved and allowed by the Judge of this court, and at the same time plaintiffs tender to the court a citation on said writ of error which citation is signed by the Judge of this court.

And thereupon at the same time said plaintiffs tender to the Court their bond for costs on their writ of error herein in the sum of $500.00 which bond is by the court examined and approved and ordered to be filed.

JOHN C. POLLOCK, Judge.

955 Indorsed: 8155. Empire State Cattle Co. et al. vs. A. T. & S. F. R. W. Co. Journal Entry. Filed May 12, 1905. Geo. F. Sharitt, Clerk.

956 In the Circuit Court of the United States for the District of Kansas First Division.

Empire State Cattle Company et al., Plaintiffs,
No. 8155. vs.
The Atchison, Topeka & Santa Fe Railway Company, Defendant.

Assignment of Errors.

The plaintiffs in this action, in connection with this petition for writ of error, make the following assignment of errors which they aver occurred upon the trial of the cause, to-wit:

1. The court erred in rejecting the evidence offered by the plaintiffs of Gardiner Lathrop, S. W. Moore and W. A. Coombs, by which plaintiffs offered to show that the remnant of the cattle in controversy, after the subsidence of the flood, were in charge and control of defendant railway company; that on or about June 10, 1903, and for several days prior thereto, a number of conferences were held between the plaintiffs and their counsel on one part, and Mr. Coombs, the assistant general live stock agent of the defendant, and Mr. Lathrop, of counsel for the defendant, in reference to the disposition by the defendant of the remnant of plaintiffs cattle; that the defendant, through its said agent, Coombs, and its attorneys, recognized and admitted that the remnant of the shipments of cattle in question, was in their charge and control, that they requested the plaintiffs to receive and accept these cattle at Kansas City; that defendant, through its said agents and counsel, as well as the plaintiffs, in said conferences recognized and admitted that the remnant of said cattle were so weakened and debilitated that they were not then in a condition to be further shipped to their destination, and that it was necessary, in order to avoid further loss, to pasture the cattle somewhere until they attained enough strength to enable them to endure shipment to their destination.

957 2. The court erred in refusing to give, at the conclusion of all of the testimony, the instruction and charge tendered and requested on behalf of the plaintiffs that under all of the evidence the jury should find that the defendant was liable, and to find for the plaintiffs.

3. The court erred, after the refusal of said peremptory instruction, in refusing to give and charge the jury at plaintiffs request, instructions numbered as follows, and in refusing to give each of them, to-wit: Instructions numbered one, two three, four five six, seven eight, nine, ten eleven, twelve and thirteen.

4. The court erred in sustaining the motion and request of defendant Railway Company, to direct and in directing the jury to render a verdict for the defendant and against the plaintiffs.

5. The court erred in its opinion, shown in the record, in saying "It therefore follows, on the main case, the request for instructions to the jury to render a verdict for the defendant must be sustained, and the like request of the plaintiff must be denied. This will be done."

Wherefore, the plaintiffs pray that writ of error be granted and citation duly issued to the defendant, and that the judgment of the Circuit Court of the United States for the District of Kansas, First Division in this cause, be reversed and that said Circuit Court be directed to grant a new trial of said cause.

BOTSFORD, DEATHERAGE & YOUNG,
Attorneys for Plaintiffs.

Indorsed: No. 8155. Empire State Cattle Company et al., Plaintiffs, vs. Atchison, Topeka and Santa Fe Railway Company, Defendant. Assignment of Errors & Petition for a Writ of Error. Filed May 12, 1905. Geo. F. Sharitt, Clerk.

958 In the United States Circuit Court for the District of Kansas, First Division.

Empire State Cattle Company, a corporation, W. W. Waite, E. F. Waite, W. H. Frost, P. H. Kellogg, C. L. Millet and J. D. Carr, Plaintiffs,
No. 8155. vs.
Atchison, Topeka & Santa Fe Railway Co., Defendant.

Bond for Costs on Writ of Error.

Know All Men By These Presents, That we the Empire State Cattle Co., a corporation, W. W. Waite, E. F. Waite, W. H. Frost, P. H. Kellogg, C. L. Millet and J. D. Carr, as

principals and American Bonding Company of Baltimore as sureties acknowledge ourselves to owe and to be indebted to the Atchison, Topeka & Santa Fe Railway Co. in the sum of $500.00 lawful money of the United States to the payment of which well and truly to be made we jointly and severally bind ourselves, our successors, heirs, executors and administrators firmly by these presents, sealed with our seals and dated this 16th day of Feb'y, 1905.

The above and foregoing obligation is made subject to the following conditions. Whereas, lately at the Session of the Circuit Court of the United States for the District of Kansas, First Division, in a suit pending in said Court between the said principals as plaintiffs and said Atchison, Topeka & Santa Fe Railway Co. as defendant, a final judgment was rendered against said plaintiffs and in favor of said defendant and said plaintiffs have obtained a writ of error to reverse the judgment in the aforesaid suit in said Circuit Court and a citation directed to said Atchison, Topeka & Santa Fe Railway Company is to be issued citing and admonishing it to appear at a session of the United States Circuit
959 Court of Appeals for the Eighth Circuit:

Now, Therefore, the condition of the above obligation is such that if said above bounden principals shall pay and answer all costs that may be awarded against them if they fail to make their plea and appeal good, then the above obligation shall be null and void, otherwise to remain in full force and effect.

THE EMPIRE STATE CATTLE CO. [Seal]
By W. H. Frost, Prest. [Seal]
W. H. FROST, [Seal]
W. W. WAITE, [Seal]
per J. S. Botsford, Agt.
E. F. WAITE, [Seal]
per J. S. Botsford, Agt.
P. H. KELLOGG, [Seal]
per J. S. Botsford, Agt.
C. S. MILLETT, [Seal]
per J. S. Botsford, Agt.
J. D. CARR, [Seal]
per J. S. Botsford, Agt.
AMERICAN BONDING COMPANY
OF BALTIMORE.
By Wash Adams, Vice-Prest. [Seal]
Attest: HARRY S. WALKER,
Asst. Secty. [Seal]

Approved this 12th day of May, 1905.

JOHN C. POLLOCK,
Judge Dist. Court of Kas. presiding in U. S.
Circuit Court of Kas. First Div.

Indorsed: 8155. Empire State Cattle Co. et al. vs. A. T. & Santa Fe R. W. Co. Bond for costs on writ of error. Filed May 12, 1905. Geo. F. Sharitt, Clerk.

960 United States of America,
District of Kansas—ss.

I, Geo. F. Sharitt, Clerk of the Circuit Court of the United States of America, for the District of Kansas, do hereby certify the foregoing to be a full, true and correct copy of the record and proceedings in said court in Case No. 8155 wherein Empire State Cattle Company, a corporation, W. W. Waite, E. F. Waite, W. H. Frost, P. H. Kellogg, C. L. Millet and J. D. Carr are plaintiffs and The Atchison, Topeka & Santa Fe Railway Company, a corporation is defendant.

I further certify that the Original Citation and the Original Writ of Error are hereto attached and returned herewith.

The Seal of the Circuit Court of the United States District of Kansas 1862.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at my office in Topeka, in said District of Kansas, this 1st day of June, A. D. 1905.

GEO. F. SHARITT, Clerk.

Filed Jun. 24, 1905. John D. Jordan, Clerk.

961 In the United States Circuit Court of Appeals for the Eighth Circuit.

Empire State Cattle Company et al., Plaintiffs in Error,
No. 8155. vs.
Atchison, Topeka & Santa Fe Railway Company, Defendant in Error.

Minnesota & Dakota Cattle Company, Plaintiff in Error,
No. 8157. vs.
Atchison, Topeka & Santa Fe Railway Company, Defendant in Error.

Stipulation.

It is agreed by the several parties to both of the above causes that said causes were tried together in the trial court, as appears from the records therein, and that the bills of exceptions in said two causes are precisely the same, and it is further agreed that to save unnecessary costs of printing herein, the entire record in one cause, The Empire

State Cattle Company case, including the bill of exceptions therein may be printed, and that in the other cause, the other one of the above causes not so printed in full, the record proper therein may be printed omitting from the printing the bill of exceptions therein, and that this stipulation may be printed in connection with the record proper therein in lieu and in place of the bill of exceptions therein.

And it is further agreed that both of said causes may be heard and argued togethed in said Circuit Court of Appeals on the record, including the bill of exceptions printed in one of the above causes in full, and that the Court may determine both of said causes on said printed record in full of said cause and on the printed record in the other cause the same as if the said two records had been printed in full.

Dated this 18" day of May, 1905.

BOTSFORD, DEATHERAGE & YOUNG,
Attorneys for Empire State Cattle Co. et al.
R. E. BALL,
Attorney for Minnesota & Dakota Cattle Co.
A. A. HURD, O. J. WOOD,
ANGEVINE & CUBBISON,
Attorneys for Atchison, Topeka & Santa Fe Railway Company.

961a No. 2276. Nos. 8155 & 8157. Empire State Cattle Co. et al. vs. A. T. & S. F. R. R. Co. Minnesota & Dakota Cattle Co., No. 2277, vs. A. T. & S. F. R. R. Co. Stipulation as to contents of record and hearing of cause. Filed Jun. 24, 1905. John D. Jordan, Clerk.

962 In the United States Circuit Court of Appeals. Eighth Circuit.

Empire State Cattle Company, a corporation, W. W. Waite, E. F. Waite, W. H. Frost, P. H. Kellogg, C. L. Millett and J. D. Carr, Plaintiffs in Error,

vs.

Atchison, Topeka & Santa Fe Railway Company, a corporation, Defendant in Error.

Stipulation.

It is stipulated and agreed by and between the above named parties, by their attorneys and solicitors, that the following parts of the Record and Transcript in the above entitled cause are not necessary for the consideration of the errors assigned in said cause and need not be printed:

(1) The summons in said cause and the return of service thereof on the defendant, at pages 12 and 13 of said transcript.

(2) The motion to make the petition more definite and certain at page 14 of said transcript.

(3) The memorandum of decision on said motion to make more definite and certain by the trial Court at pages 15-16 and 17 of said transcript.

(4) The order at page 18 of said transcript of the trial Court overruling the motion of the defendant to make the petition more definite and certain.

(5) The stipulation respecting the filing of replies at page 30 of the transcript.

(6) The stipulation at pages 34 and 35 of said transcript relating to the taking of depositions in said cause.

(7) The notice to defendant's attorneys relative to the settling of the bill of exceptions in said cause at pages 50 and 51 of said transcript.

(8) Notice of plaintiff to defendant relative to the said bill of exceptions at pages 52 and 53 transcript.

(9) The motion of plaintiff at pages 54-55-56 of said transcript relative to the signing and settling of said bill of exceptions.

(10) The motion of plaintiff relative to said bill of exceptions at page 57 of said transcript.

963 It is further stipulated that the following portions of said transcript shall be printed:

(1) The citation issued on the writ of error, dated May 12-1905, with acknowledgment of service thereon of the attorneys of said defendant in error, with the indorsements on the back of said citation.

(2) The writ of error issued in this cause with the return and other indorsements on the back of said writ of error.

(3) The petition of plaintiffs in error as plaintiffs in said cause against said defendant in error as defendant in said cause, at pages 5-6-7-8-9-10-11 of said transcript.

(4) The answer of said defendant in said cause at pages 19-20-21 and 22 of said transcript. And in printing said answer there shall also be printed with it the 3 contracts marked Exhibits A, B and C filed with said answer being at pages 23-24-25-26-27 and 28 of said transcript, and in printing said contracts A, B and C all the matter on the face and back of said contracts both in printing and writing shall be printed. And the filing of said answer with said contracts shall also be printed as appears on page 29 of said transcript.

(5) The reply of the plaintiffs at pages 31-32 and 33 shall also be printed.

(6) The record entries of said trial Court from which this cause comes to this Court at pages 36-37-38-39-40-41-42-43-44-45-46-47-48 and 49 of said transcript shall also be printed.

In printing the matter contained on page 46 of said transcript the date appearing on said page as Saturday, January 25th, 1905, shall be printed Wednesday, January 25th, 1905.

(7) The orders of the trial Court from which this cause comes to this Court at pages 58-59 extending times for making and filing bill of exceptions in this cause, shall be printed.

(8) The bill of exceptions in this cause extending from page 60 to page 953 of the said transcript, inclusive, shall be printed in full literally.

(9 The journal entry of the trial Court at pages 954-955 of said transcript shall also be printed.

(10) The assignment of errors of said plaintiffs pages 956-957 of said transcript shall also be printed.

(11) The bond for costs of said plaintiff in error at pages 958-959 of said transcript.

(12) The certificate of the Clerk of the trial Court certifying said transcript at page 960 of said transcript.

(13) The stipulation of counsel in this cause and also the counsel in the other cause of Minnesota & Dakota Cattle Company, plaintiff in error vs. said Railway Company, defendant in error, dated May 18th-1905, in regard to the printing of only one bill of exceptions in these causes, which stipulation shall be here printed in full.

964 (14) At this point this stipulation shall be printed in full.

Dated this June 19th, 1905.

BOTSFORD, DEATHERAGE & YOUNG,
Attorneys for Plaintiffs in Error.
A. A. HURD, ANGEVINE & CUBBISON,
Attorneys for Defendant in Error.

965 No. 2276. Empire State Cattle Company et al., Pltffs. in Error, vs. Atchison, Topeka & Santa Fe R. W. Co., Deft. in Error. Minn. & Dakota Cattle C. vs. Same. Stipulation as to Printing Record. Filed Jun. 24, 1905. John D. Jordan, Clerk.

966 In the United States Circuit Court of Appeals. Eighth Circuit.

Empire State Cattle Company et al., Plaintiffs in Error,
No. 2276. vs.
Atchison, Topeka & Santa Fe Railway Company, Defendant in Error.

Minnesota & Dakota Cattle Company, Plaintiffs in Error,
No. 2277. vs.
Atchison, Topeka & Santa Fe Railway Company, Defendant in Error.

Stipulation.

It is stipulated in the above causes that the photograph or photographs in the bill of exceptions or record in said causes, need not be printed, and that this stipulation may be printed in lieu of said photograph or photographs.

BOTSFORD, DEATHERAGE & YOUNG,
Attys. for Plff. in Error,
Empire State Cattle Co.

R. E. BALL,
Attys. for Plff. in Error,
Minn. & Dak. Cattle Co.

ANGEVINE & CUBBISON,
Attys. for Deft. in Error.
Atchison, Topeka & Santa Fe Ry. Co.

No. 2276. Empire State Cattle Co. et al., Plffs. in Error, vs. Atchison, Topeka & Santa Fe Ry. Co. No. 2277. Minnesota & Dakota Cattle Co., Plff. in Error, vs. Atchison, Topeka & Santa Fe Ry. Co. Stipulation as to Omitting Photographs from Printed Record.

Filed July 31, 1905. John D. Jordan, Clerk.

967 (Clerk's Certificate to Printed Record.)

United States Circuit Court of Appeals,
Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing printed record of six hundred sixty-four pages in the case of the Empire State Cattle Company, a corporation, et al., Plaintiffs in Error, vs. The Atchison, Topeka and Santa Fe Railway Company, No. 2276, was printed under my supervision and is identical with the printed record upon which said cause was heard and decided in the Circuit Court of Appeals.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals, at office in the City of St. Louis, Missouri, in the Eighth Circuit, this twenty-eighth day of November, A. D. 1906.

[Seal] (Signed) JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

1 Pleas and proceedings in the United States Circuit, Court of Appeals for the Eighth Circuit, at the May Term, 1906, of said Court, begun and held at the United States Court House in the City of St. Paul, Minnesota, on the first Monday in May, to-wit; the seventh day of May, A. D. 1906, before the Honorable Walter H. Sanborn, the Honorable William C. Hook and the Honorable Elmer B. Adams, Circuit Judges.

Attest:

[Seal] (Signed) JOHN D. JORDAN,

Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it Remembered, that heretofore, to-wit: on the twenty-fourth day of June, A. D. 1905, a transcript of record, pursuant to a writ of error directed to the Circuit Court of the United States for the District of Kansas, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein the Empire State Cattle Company, a corporation, et al., were Plaintiffs in Error, and The Atchison, Topeka and Santa Fe Railway Company was Defendant in Error, which said transcript of record was filed and docketed in said Circuit Court of Appeals as No. 2276.

That thereafter the following proceedings were had in said cause, in said Circuit Court of Appeals, viz:

2 (Appearance of Counsel for Plaintiffs in Error.)

On the twenty-seventh day of June, A. D. 1905, the appearance of counsel for plaintiffs in error was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

Empire State Cattle Company, et al., Plaintiffs in Error,
No. 2276. vs.
The Atchison, Topeka & Santa Fe Railway Co.

The Clerk will enter my appearance as Counsel for the Plaintiffs in Error.

JAMES S. BOTSFORD,
B. F. DEATHERAGE and
ODUS G. YOUNG.

Endorsed: U. S. Circuit Court of Appeals, Eighth Circuit. No. 2276. Empire State Cattle Company, et al., Plaintiffs in Error, vs. The Atchison, Topeka & Santa Fe Railway Company. Appearance. Filed Jun. 27, 1905, John D. Jordan, Clerk. James S. Botsford, B. F. Deatherage, Odus G. Young, Counsel for Plaintiffs in Error.

(Appearance of Mr. R. F. Walker as Counsel for Defendant in Error.)

And on the third day of July, A. D. 1905, the appearance of Mr. R. F. Walker, as counsel for the defendant in error, was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

Empire State Cattle Company, et al., Plaintiffs in Error,
No. 2276. vs.
The Atchison, Topeka & Santa Fe Railway Company.

The Clerk will enter my appearance as Counsel for the Defendant in Error.

3 R. F. WALKER.

Endorsed: U. S. Circuit Court of Appeals, Eighth Circuit. No. 2276. Empire State Cattle Co., et al., Plffs. in Error, vs. Atchison, Topeka and Santa Fe Ry. Co. Appearance. Filed Jul. 3, 1905, John D. Jordan, Clerk. R. F. Walker, Counsel for Deft. in Error.

(Appearance of Mr. Gardiner Lathrop and Mr. C. Angevine, as Counsel for the Defendant in Error.)

And on the nineteenth day of December, A. D. 1905, the appearance of Mr. Gardiner Lathrop and Mr. C. Angevine, as counsel for the defendant in error, was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

Empire State Cattle Company, et al., Plaintiffs in Error,
No. 2276. vs.
The Atchison, Topeka & Santa Fe Railway Company.

The Clerk will enter my appearance as Counsel for the Defendant in Error.

GARDINER LATHROP,
C. ANGEVINE.

Endorsed: U. S. Circuit Court of Appeals, Eighth Circuit. No. 2276. Empire State Cattle Co., et al., Plaintiffs in Error. vs. The Atchison, Topeka and Santa Fe Railway Company. Appearance. Filed Dec. 19, 1905, John D. Jordan, Clerk. Gardiner Lathrop, C. Angevine, Counsel for Deft. in Error.

(Argument Commenced.)

And on the eighteenth day of December, A. D. 1905, in the record of the proceedings of said Circuit Court of Appeals is an entry in said cause, in the words and figures following, to-wit:

4 United States Circuit Court of Appeals, Eighth Circuit.

December Term, 1905.

Monday, December 18, 1905.

Empire State Cattle Company, et al., Plaintiffs in Error,
No. 2276. vs.
The Atchison, Topeka and Santa Fe Railway Company.

In Error to the Circuit Court of the United States for the District of Kansas.

and

The Minnesota and Dakota Cattle Company, Plaintiff in Error,
No. 2277. vs.
The Atchison, Topeka and Santa Fe Railway Co.

In Error to the Circuit Court of the United States for the District of Kansas.

These causes having been called for hearing in their regular order, argument was commenced by Mr. James S. Botsford in behalf of the plaintiffs in error, but the hour of adjournment having arrived before the conclusion thereof, the further hearing of these causes was postponed until tomorrow morning.

(Order of Submission.)

And on the nineteenth day of December, A. D. 1905, in the record of the proceedings of said Circuit Court of Appeals is an order of submission in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

December Term, 1905.

Tuesday, December 19, 1905.

Empire State Cattle Company, et al., Plaintiffs in Error,
No. 2276. vs.
The Atchison, Topeka and Santa Fe Railway Company.

5 In Error to the Circuit Court of the United States for the District of Kansas.

and

The Minnesota and Dakota Cattle Company, Plaintiff in Error,
No. 2277. vs.
The Atchison, Topeka and Santa Fe Railway Company.

In Error to the Circuit Court of the United States for the District of Kansas.

These causes having been called this day for further hearing, argument was continued by Mr. James S. Botsford for the plaintiffs in error and by Mr. Gardiner Lathrop and Mr. C. Angevine for the defendant in error and concluded by Mr. R. E. Ball for plaintiffs in error.

Thereupon the causes were submitted to the Court upon the transcripts of record from said Circuit Court and the briefs of counsel filed herein.

(Opinion.)

And on the ninth day of July, A. D. 1906, an opinion of said United States Circuit Court of Appeals was filed in said cause, in the words and figures following, to-wit:

6 United States Circuit Court of Appeals,
Eighth Circuit.

No. 2276.—May Term, A. D. 1906.

Empire State Cattle Company, a corporation, et al., Plaintiffs in Error,
vs.
The Atchison, Topeka and Santa Fe Railway Company, Defendant in Error.

In Error to the Circuit Court of the United States for the District of Kansas.

Mr. James S. Botsford (Mr. Buckner F. Deatherage and Mr. Odus G. Young were with him on the brief) for the plaintiffs in error.

Mr. Gardiner Lathrop and Mr. C. Angevine (Mr. Robert Dunlap, Mr. Wm. R. Smith and Angevine & Cubbison were with them on the brief) for the defendant in error.

Before Sanborn, Hook and Adams, Circuit Judges.

This was an action by the Cattle Company and others to recover from the Railway Company damages alleged to have been sustained by a wrongful deviation and the negligence of the defendant in respect of a shipment of 778 head of cattle over its lines resulting in the death of part of them and injury to the others. The acts and omissions of the defendant which were complained of were in connection with and in view of an unprecedented flood in May, 1903, in the Kansas and Missouri Rivers. The defendant received the cattle May 25, 1903, in Texas, for transportation over its lines to Atchison, Kansas, and thence over connecting lines to South Dakota. It was claimed that the defendant was negligent and acted wrongfully in the following particulars:

1. In detaining the cattle at Strong City, Kansas, south of the Kansas river, from May 27th to the 29th, and in not forwarding them on the 27th across the river at Topeka and thence to Atchison where they could have been delivered to a connecting carrier without interference from the rising waters.

2. After keeping them at Strong City until the 29th of May in not then detaining them longer until the subsidence of the flood would permit of their further transportation in safety.

3. In their deviation from the route contracted for to Kansas City at the mouth of the Kansas river between which point and Atchison the defendant had no connecting line.

4. In endeavoring to head off the flood by landing and depositing the cattle in pens on the bank of the Kansas river near its mouth when it knew of the flood and its continued rise from May 27th to the 30th.

5. In failing to move the cattle from their position of peril at Kansas City, after having wrongfully transported and placed them there.

The trial was to a jury and at the conclusion of the evidence

the court directed a verdict for the defendant. This writ of error challenges the action of the court in directing the verdict and in certain other respects to which attention is directed in the following opinion.

Hook, Circuit Judge, after stating the case as above, delivered the opinion of the court.

At the conclusion of the evidence the plaintiffs preferred a written request that the court direct a verdict in their favor and by a separate writing also asked that thirteen other instructions directed to particular features of the case be given to the jury. The defendant likewise asked that a verdict be directed in its favor. After an extended consideration of both requests for a directed verdict the court denied the plaintiffs' and sustained that of the defendant. The special requests of the plaintiffs were denied. A verdict was accordingly returned for the defendant and it had judgment.

It is a familiar rule that if at the conclusion of the evidence in an action at law each party requests the court to direct a verdict in his favor and the court acts upon the invitation thus given and directs the jury to return a verdict for one of them and against the other, the only questions open on appeal are: first, was there substantial evidence supporting the conclusion of the court; and second, did any error of law occur during the trial. This doctrine first found expression in Beuttell v. Magone, 157 U. S. 154, where the court said:

"As, however, both parties asked the court to instruct a verdict both affirmed that there was no disputed question of fact which could operate to deflect or control the question of law. This was necessarily a request that the court find the facts, and the parties are, therefore, concluded by the finding made by the court, upon which the resulting instruction of law was given. The facts having been thus submitted to the court, we are limited in reviewing its action, to the consideration of the correctness of the finding on the law, and must affirm if there be any evidence in support thereof."

This court has applied the rule in the following cases: Western Express Co. v. United States, ...C. C. A. ...., 141 Fed. 28; Phenix Insurance Co. v. Kerr, 64 C. C. A. 251, 129 Fed. 723; United States v. Bishop, 60 C. C. A. 123, 125 Fed. 181.

8 It has also been applied in the seventh circuit—Insurance Co. v. Wisconsin Central Railway Co., ... C. C. A. ...., 134 Fed. 794;

In the fifth circuit—McCormick v. National City Bank, ... C. C. A. ...., 142 Fed. 132; West v. Roberts, 68 C. C. A. 58, 135 Fed. 350; Bradley Timber Co. v. White, 58 C. C. A. 55, 121 Fed. 779;

And in the second circuit—Magone v. Origett, 17 C. C. A. 263, 70 Fed. 778; Merwin v. Magone, 17 C. C. A. 361, 70 Fed. 776; Chrystie v. Foster, 9 C. C. A. 606, 61 Fed. 551. See Sigua Iron Co. v. Greene, 31 C. C. A. 477, 88 Fed. 207.

It is said, however, that by submitting the thirteen requests for special instructions the plaintiffs showed their purpose not to so invoke the action of the court that they would be thereafter precluded from going to the jury. Some warrant for this contention may be found in the cases from the second circuit, in each of which it is recited either in the opinion or in the preceding statement that when the requests by both parties for a directed verdict were made neither of them requested that any question of fact should be submitted to the jury. The qualification, if it be one, suggested by these cases seems to have had its origin in a rule of practice obtaining in the state of New York, in which all of them arose. Sutter v. Vanderveer, 122 N. Y. 652; Kirtz v. Peck, 113 N. Y. 222; Koehler v. Adler, 78 N. Y. 287.

The Court of Appeals of the sixth circuit came to a similar conclusion in Minahan v. Railway, ...C. C. A. ...., 138 Fed. 37, though the case there was peculiarly circumstanced. At the conclusion of the evidence the defendant submitted a request for a directed verdict and the trial court, while passing upon it, indicated that it was about to grant it. It then permitted plaintiff's counsel to interrupt and to present a number of requests for instructions, the first of which was that the plaintiff was entitled to a verdict, the only question for a jury being as to the amount of damages. The others related to matters of law and fact involved in the case. When permission was thus given plaintiff's counsel to file his requests the court assured him he should have the benefit of them. A verdict for the defendant was nevertheless directed. It was held that the rule in question must rest upon the implication of consent and that it was repelled by the request for additional instructions and by the further fact that the trial court was co-operating with plaintiff's counsel in his effort to save the questions so presented.

In Insurance Co. v. Wisconsin Central Railway Co., supra, the Court of Appeals of the seventh circuit, after reciting that both parties moved for a directed verdict, said:

"The record shows that the co rt reviewed the evidence and stated the ultimate facts substantially as we have done and

thereon announced the legal conclusion that the policies were in force. After the court thus virtually ended the case the Insurance Company could not revive its right to demand a jury trial and to predicate error on the court's refusal to submit the cause to the jury."

9 We are of the opinion that where both parties invoke the action of a trial court by requests for a directed verdict and the request of one of them is accompanied, as in this case, or followed by requests for other instructions to the jury, such other requests do not by themselves amount to a withdrawal of the one for a directed verdict. The request for a directed verdict is first in insistence upon the attention and action of the court. It searches the entire case for the legal sufficiency and effect of the evidence, and as long as it remains before the court to be acted upon it takes precedence. If granted the others serve no purpose. The question should not be determined wholly by a presumed intention of the party to waive or not to waive a submission of the facts to the jury. Regard must be had to the legal import of his action, the position in which he has placed the court, what he has asked it to do and the effect of its decision so invoked. When at the conclusion of the evidence the parties move for a directed verdict each of them asserts to the court that there is no disputed question of fact that can operate to deflect or control the conclusion of law that upon all of the evidence he is entitled to prevail. There is in such a case a request by each of them that the court announce its finding of the ultimate fact and give effect to its conclusion of law by direction to the jury. There is a joinder in the issue and when the court has accepted and acted upon the invitation and has rendered its decision practically disposing of the case, it is then too late for the defeated one to say that his intention to go to the jury is shown by other requests for instructions.

It is true that the Supreme Court held in Beuttell v. Magone, supra, that a request by each party for a peremptory instruction was not equivalent to a stipulation waiving a jury and a submission of the cause to the court within the intendment of sections 649 and 700 Rev. Stats., but it was so held with reference to the contentions there made; first, that there being no written stipulation the decision below could not be reviewed upon writ of error; second, that even if the request of both parties in open court be treated as a written stipulation, the correctness of the decision below could not be examined because it was in the form of a general finding on the whole case. The court while making the distinction nevertheless announced the rule heretofore indicated.

If both parties should join in a writing in the nature

of a demurrer to the evidence each saying in his own behalf in express terms that there is no disputed question of fact for the jury and that under the law he is entitled to the verdict and judgment, and asking the court to review the evidence to ascertain the ultimate fact and to them declare the resulting conclusion of law, and the court being so requested acts thereon and directs a verdict for one and against the other, we take it that the mere presence, without more, of written requests of the latter for special instructions would not destroy the action of the court and make it an idle and ineffectual proceeding. And yet the conditions supposed are in legal effect those of the case at bar.

Passing to the questions open to review. It cannot be denied that there was substantial evidence supporting the conclusion of the trial court. It is sufficient to say, without setting it forth at large, that there was much evidence on behalf of the defendant tending to prove its defense to each charge of negligence and wrong asserted by the plaintiffs. With this conclusion our investigation of the facts can proceed no further.

But four assignments of error are relied on by the plaintiffs. In one it is said that the trial court erred "after the refusal of said peremptory instruction, in refusing to give and charge the jury at plaintiff's request instructions numbered from 1 to 13 inclusive." Under repeated decisions of this court applying the eleventh rule this assignment presents no question challenging the attention of the court to the merits of the several requests. Of the remaining assignments one asserts that the trial court erred in refusing plaintiff's request for a directed verdict and the other two that it erred in granting the like request of defendant. Taken together, these three assignments present the single question whether, under the circumstances of the case, the court erred in directing a verdict for defendant instead of for plaintiffs when both invoked the action of the court. The limitations upon the scope of our inquiry in such case have already been stated.

The judgment is affirmed.

Filed July 9, 1906.

Sanborn, Circuit Judge, concurring:

The only reason why the request of each party for a directed verdict in his favor estops him from a determination of any question in his case, by a jury, and, when one of the requests is granted, restricts the inquiry in the appellate court to errors of law occurring at the trial and the existence of substantial evidence to support the conclusion of the court

is that these requests demonstrate the fact that each party waives his right to the determination of any question of fact by the jury and requests the court to decide them all. But when a party requests the court to instruct the jury to return a verdict in his favor and at the same time prefers a series of requests for instructions to the jury, the presentation of these requests conclusively shows that he does not intend to waive, and does not waive his right to a determination by the jury of every question of fact which remains in the case. The effect of such a series of requests is to say to the court that in the opinion of the party who prefers it the evidence is so conclusive in his favor that he is entitled to a verdict on the ground that there is no evidence which will sustain a verdict against him, that if the court is of his opinion he requests the direction, but that if the court is of the opinion that the evidence is not of this conclusive character in his favor, then he requests the court to submit the issues to the jury under the other instructions he presents. The series of requested instructions to the jury which generally accompanies a request for a directed verdict has no other office but to indicate that the party who presents them does not waive his right to a trial by jury, but insists upon it if his request for a directed verdict is denied, and if they do not have this
11 effect, they are without meaning, purpose or effect.

No opinion or decision opposed to this view has been cited except McCormick v. National City Bank, 142 Fed. 132, 133, in which no reason for the conclusion is presented and Judge Shelby dissents. In no other case where the appellate court has held that the right to a submission of the questions of fact to the jury was waived by requests for an instructed verdict was the claim made that the accompanying requests for instructions to the jury demonstrated the fact that the party did not intend to waive, and did not waive it. In my opinion, the right to a submission to the jury of every question of fact upon which the evidence is not so conclusive that a verdict but one way could be sustained, is waived only when a request or motion for a directed verdict, without other requests, is made by each party, and is expressly reserved and demanded by presenting, with a request for a directed verdict, requests for other instructions to the jury respecting the issues of fact in the case. The experience of the profession, the practice in the trial courts and the opinions of the appellate courts, in my opinion, uniformly sustain this view. Minahan v. Grand Trunk Western Railway Co., 138 Fed. 37; Chrystie, et al., v. Foster, 9 C. C. A. 606, 61 Fed. 661; Sigua Iron Co. v. Greene, 31 C. C. A. 477, 480, 88 Fed. 207; Kirtz v. Peck, 113 N. Y. 226, 21 N. E. 130; Sutter v. Vanderveer, 122 N. Y. 652, 25 N. E. 907; McCormick v. National City Bank, 142

Fed. 132, 133. I am therefore compelled to dissent from the conclusion of the majority that the question whether or not there was any evidence which would have sustained a verdict for the plaintiffs was not properly preserved and presented for our consideration. But after a careful and deliberate examination of the evidence and the points and arguments of counsel I concur in the result on the grounds that there was no error at the trial prejudicial to the plaintiffs and that the evidence was insufficient to sustain a verdict in their favor.

Filed July 9, 1906.

12 (Judgment.)

And on the ninth day of July, A. D. 1906, in the record of the proceedings of said Circuit Court of Appeals is a judgment in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals. Eighth Circuit.

May Term, 1906. Monday, July 9, 1906.

Empire State Cattle Company, a corporation, W. W. Waite, E. F. Waite, W. H. Frost, P. H. Kellogg, C. L. Millet and J. D. Carr, Plaintiffs in Error,
No. 2276. vs.
The Atchison, Topeka and Santa Fe Railway Company.

In Error to the Circuit Court of the United States for the District of Kansas.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Kansas, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said Circuit Court, in this cause, be, and the same is hereby, affirmed with costs; and that The Atchison, Topeka and Santa Fe Railway Company, have and recover against the Empire State Cattle Company, a corporation, W. W. Waite, E. F. Waite, W. H. Frost, P. H. Kellogg, C. L. Millet and J. D. Carr the sum of twenty dollars for its costs herein and have execution therefor.

July 9, 1906.

13 (Motion of Plaintiffs in Error for Order enlarging time to file Petition for Rehearing.)

And on the third day of August, A. D. 1906, a motion of Plaintiffs in Error for an order enlarging the time to file a petition for a rehearing was filed in said cause, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Eighth Circuit.

Empire State Cattle Company, et al., Plaintiffs in Error,
No. 2276. vs.
Atchison, Topeka & Santa Fe Railway Company, [Defendants] in Error.

Motion of Plaintiffs in Error for Extension of Time to File Petition for Rehearing.

Now come the plaintiffs in error in the above entitled cause and show the Court that the judgment and decision of the Court therein was rendered on the 9th day of July, 1906; that plaintiffs in error are advised that the term of court at which the judgment in the above cause was rendered, will be finally adjourned August 31st, 1906, and the next term thereafter will convene on the first Monday in September, 1906, at Denver, Colorado; that the decision and judgment of this Court is rendered at a time when the Judges of the Court are on vacation, and the plaintiffs in error desire additional time to consider the opinion and decision of the Court.

Therefore the plaintiffs in error move the Court for leave to file a petition for rehearing in this cause at any time during the term of this Court beginning on the first Monday in September, at Denver, Colorado.

JAMES S. BOTSFORD,
B. F. DEATHERAGE and
ODUS G. YOUNG,
Attorneys for Plaintiffs in Error.

14 Endorsed: No. 2276. The Empire State Cattle Co., et al., Plaintiffs in Error, vs. The Atchison, Topeka and Santa Fe Railway Company. Motion Plaintiffs in Error for order enlarging time to file Petition for Rehearing. Filed Aug. 3, 1906, John D. Jordan, Clerk.

(Order enlarging time to file Petition for Rehearing until November 1, 1906.)

And on the seventh day of August, A. D. 1906, in the record of the proceedings of said Circuit Court of Appeals is an order enlarging the time to file a petition for rehearing to November 1, 1906, in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

May Term, 1906. Tuesday, August 7, 1906.

Empire State Cattle Company, et al., Plaintiffs in Error,
No. 2276. vs.
Atchison, Topeka & Santa Fe Railway Company.

In Error to the Circuit Court of the United States for the District of Kansas.

On motion of the Plaintiffs in Error in the above entitled cause, the Court having duly considered the same, it is ordered that the time for plaintiffs in error to file a petition for rehearing, if they be so advised, be extended, so that the same may be filed at any time prior to the 1st day of November, 1906.

August 7th, 1906.

(Petition for Rehearing.)

And on the twentieth day of September, A. D. 1906, a petition of Plaintiffs in Error for a Rehearing was filed in said cause, in the words and figures following, to-wit:

—IN THE—

United States Circuit Court of Appeals

EIGHTH CIRCUIT.

EMPIRE STATE CATTLE COMPANY, ET AL.,
Plaintiffs in Error,
vs.
THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, *Defendant in Error.*

No. 2276.

Error to the Circuit Court of the United States for the District of Kansas.

PETITION OF PLAINTIFFS IN ERROR FOR A REHEARING.

To the Honorable Judges of the Circuit Court of Appeals, Eighth Circuit:

The above named plaintiffs in error respectfully petition this Honorable Court that the order and judgment heretofore entered affirming the judgment of the Circuit Court of the United States for the District of

Kansas, be set aside and a rehearing of this cause be granted, for the reasons and on the grounds following, to-wit:

I.

The Court in its opinion overlooked the fact that the petition of the plaintiffs in the above cause on which this suit has been prosecuted asserted liability of the defendant herein on two separate and independent grounds. First, that the defendant was liable by reason of the deviation of the shipment from the Topeka to Atchison route, to Kansas City. Second, that the defendant was liable on the several grounds of negligence charged in the petition.

The cases cited in the opinion of the Court in this cause were all cases where the plaintiff sought to recover on a single ground of liability and that ground of liability involved a question of fact for trial by a jury. As appears from the opinions in this cause, the opinion of this court is the only one which recognizes the rule decided by the court in this cause as proper in cases where the plaintiff rests his claim of liability on a single proposition and that a proposition of fact. The decision of the Supreme Court of the United States and the decisions of the other courts of appeal cited in the opinion in this cause, all seem to recognize that, even in cases where the plaintiff's case rests on a single proposition of fact; the asking of a peremptory instruction does not waive the right to have the case submitted to a jury, if at the time of the submission of the peremptory instruction the party also submits instructions to be given to the jury, if the peremptory instruction is denied.

But if the rule adjudged by the court in its opinion in this case is erroneous and unjust as applied to a case where the plaintiff rests his case on a single proposition

of fact, how much more would that result be true in the case at bar? In this case the plaintiffs, from the beginning to the end of their case, rested their claim of liability of the defendant on two propositions, one a proposition of law and the other a proposition of fact.

The question of liability based on the deviation arising as it did upon the undenied fact of deviation without plaintiffs' consent, presented a question of law pure and simple. That question was one for decision by the court. That is, while the whole case on both propositions was a case for determination by the jury, the question of liability on the ground of deviation was one for decision by the court on a peremptory instruction to the jury given or denied by the court.

The questions of liability on the ground of negligence, presented by plaintiffs in their other instructions, all presented questions for decision by the jury. Therefore the case of plaintiffs required of necessity from its very nature a decision of one branch by the court and a decision of the other branch by the jury. Of course, if there had been a favorable decision to plaintiffs on the issue of law arising on the question of deviation, it would have been unnecessary to submit the questions of fact to the jury, except the amount of damages, but before judgment in the case under any possible circumstances could be lawfully pronounced against the plaintiffs, they were entitled to hearings and decisions by the two tribunals of court and jury on both issues. Plainly and undeniably, if the issue of law was decided against the plaintiffs on the question of deviation, they were still entitled to the judgment of the jury on the remaining question of fact arising on the issues of negligence. The only proper way in which the court could decide the issue of law arising on the question of deviation, was by giving or refusing plaintiff's peremptory

instruction to the jury. The court decided that issue by refusing plaintiffs' peremptory instruction, and it is said now that the court acted properly in refusing to submit the issues of fact to the jury because plaintiffs precluded themselves from the right to have the case submitted to the jury on the issues of negligence because of their prayer for a peremptory instruction on the issue of law, on the question of deviation.

We submit that this does not follow. We repeat that before judgment could rightfully be pronounced in the trial court against plaintiffs they had a right to the trial of both issues by the appropriate tribunals. To say that in a case where plaintiff claims a right to recover on two separate, distinct grounds, judgment must be given against him on both grounds upon an unfavorable decision against him, on either ground, states a proposition which, as it seems to us, finds no support in the law. In effect, it would be giving judgment against a party without due process and without a hearing.

The court in this case says it is precluded from considering and determining whether plaintiffs offered sufficient evidence to take the case to the jury on the issues of negligence because they asked the court to decide the questions of law arising on the issue of deviation, by their peremptory instruction. This is in effect giving judgment against the plaintiffs on the issues of negligence, without a hearing or decision by either the court or a jury of those issues. It is true that the trial court, in passing on the peremptory instruction asked by plaintiffs, decided that the evidence in the case did not warrant a submission to the jury of the issues of negligence, but while that is true, this court holds, although in full possession of the entire case on this writ of error, that this court cannot consider the questions of

law arising on the refusal of the trial court to submit the cause to the jury on the issues of negligence because plaintiffs asked a peremptory instruction devoted to obtaining the judgment of the court on the issue of deviation. This, in effect, is a judgment by this court affirming the action of the trial court in holding that the case could not be submitted to the jury on the issues of negligence without a hearing and decision by this court on that branch of the case. We submit, that this is in effect a judgment and decision without a hearing and is in effect a denial of due process.

The point in this case that plaintiffs' case rests on two propositions and that therefore they had the right to ask a peremptory instruction and the other thirteen instructions to the jury at the same time, is distinctly presented at pp. 54-55 of our brief and argument in this case, and since that point is entirely overlooked in the decision of the court, it seems to us that on this ground alone the court should grant a rehearing, set aside its judgment of affirmance and affirm the liability of the carrier on the ground of deviation, or hold that the case should have gone to the jury on the issues of negligence.

II.

Briefly summarized the acts of negligence on the part of the Railroad Company, amply proven by the evidence cited and set forth in the statements of the cases (Original Brief pp. 1-52 and 145-169), are:

(a) Its act of bringing these cattle to Kansas City at all, under the existing conditions.

(b) Its act of holding them at Kansas City, one train from Friday evening, May 29th, and the remainder from Saturday morning, the 30th, until overtaken by the flood Sunday.

684

(c) Its refusal to allow the Burlington to take out the shipments when advised that it was ready and offered to do so. This is a fact *undisputed* and in our judgment should be held negligence as a matter of law.

(d) Its act in itself throwing down the arrangement once made with the Missouri Pacific to take the cattle, *an undeniable fact,* (Rec. 179-195, Brief 152 *et seq.*), which in our judgment constitutes negligence as a matter of law. It will be noted from the evidence of General Manager J. E. Hurley that not all of the correspondence between defendant and the Missouri Pacific was produced, though called for by the notice.

(e) Its act, through its agent, the Stock Yards Company, in crowding the cattle into the overhead viaducts instead of taking them to the highlands.

This in our judgment nearly approached negligence as a matter of law.

There are other acts of negligence, but for the purpose of this point they need not be specified.

We respectfully ask a rehearing for the reason that the foregoing facts should work a reversal under any decision of the question of practice referred to. Sufficient of them in our judgment should be held negligence as a matter of law to meet the exaction of the rule announced by the court, and none of them we submit ought to be judicially declared to be such acts and omissions as are free from negligence, as a matter of law.

III.

The court in its decision in this case has also overlooked the decision of the other question, being the question of law distinctly presented in this case, that the carrier by the deviation of the shipment assumed all consequences of such deviation and made itself absolutely

liable. This proposition of law which runs through the entire case and which is discussed from pp. 119 to pp. 143 of our brief, and affirmed and supported by an unbroken line of authorities, is entirely overlooked in the opinion of the court in this case. In that part of our brief there is a full citation of the authorities on the proposition that where, as in this case, there is a deviation of the shipment without the consent of the shipper, the carrier assumes all responsibility and consequences, and is absolutely liable. The decision of that question fairly arose under the peremptory instruction asked by the plaintiffs, with or without a prayer for the other instructions to the jury. This court nowhere in its opinion makes any response to that proposition of law.

On this ground we submit that the court should grant a rehearing.

James T Botsford
Robert E Ball
Buckner F Deatherage
Odus G Young

Attorneys for Plaintiffs in Error.

We hereby certify that in our opinion the foregoing motion and petition for a rehearing is well founded in law and should be sustained.

James T Botsford
Robert E Ball.

Of Counsel.

686

22 (Order Denying Petition for Rehearing.)

And on the sixteenth day of November, A. D. 1906, in the record of the proceedings of said Circuit Court of Appeals is an order denying the petition for a rehearing in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

September Term, 1906.

Friday, November 16, 1906.

Empire State Cattle Company, et al., Plaintiffs in Error,
No. 2276. vs.
The Atchison, Topeka and Santa Fe Railway Co.

In Error to the Circuit Court of the United States for the District of Kansas.

This cause came on this day to be heard upon the petition for a rehearing filed by Counsel for the Plaintiffs in Error.

On Consideration Whereof, it is now here ordered by this Court, that said petition for a rehearing of this cause be, and the same is hereby, denied.

November 16, 1906.

23 (Clerk's Certificate.)

United States Circuit Court of Appeals,
Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing twenty-two pages contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of said Circuit Court of Appeals (except the transcript of the record from the Circuit Court of the United States for the District of Kansas), in a certain cause in said Court wherein the Empire State Cattle Company, a Corporation, et al., are Plaintiffs in Error, and The Atchison, Topeka and Santa Fe Railway Company, is Defendant in Error, as full, true and complete as the originals of the same now remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals, at office in the City of St. Louis, Missouri, in the Eighth Circuit, this twenty-eighth day of November, A. D. 1906.

[Seal] (Signed) JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

In the Supreme Court of the United States.

File No. 20498. Case No. 533.

EMPIRE STATE CATTLE COMPANY ET AL., Plaintiffs,
vs.
ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, Defendant.

Stipulation.

Whereas, in the above entitled cause the plaintiffs filed an application in the Supreme Court of the United States for a writ of certiorari therein; and

Whereas, in connection with the plaintiffs' application for said writ a certified copy of the transcript of the record was duly filed in the Supreme Court of the United States and nine uncertified copies of the transcript of the record in said cause were also filed, so that the complete record of said case is already on file in the Supreme Court of the United States; and

Whereas, said Court on the 22nd day of January, 1907, issued its writ of certiorari removing the above entitled cause from the Circuit Court of Appeals of the Eighth Circuit;

Now therefore, it is stipulated by and between the parties in this case, that the certified transcript of the record that *are* already on file in the Supreme Court of the United States may be taken and treated as the return to said writ, and that the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit may, in lieu and instead of a transcript of the record as required by said writ, send to the Supreme Court a copy of this stipulation, and that said cause may proceed and be heard with the same force and effect as if the said Clerk of said Court of Appeals had duly certified the record of said cause in obedience to the writ of certiorari issued therein. It being the intention of this stipulation that the records already filed in connection with the application of plaintiffs for the writ, shall be taken and treated as a full return to said writ, and that the cause shall be heard and considered as if a return to the writ had been made.

JAMES S. BOTSFORD AND
R. E. BALL,
Attorneys for Plaintiff.
GARDINER LATHROP,
ROBERT DUNLAP,
Attorneys for Defendant.

(Endorsed:) File No. 20498. Case No. 533. Empire State Cattle Company *et al.*, Plaintiffs, *vs.* Atchison, Topeka and Santa Fe Railway Company, Defendant. Stipulation as to Return to Writ of Certiorari. Filed Feb. 7, 1907, John D. Jordan, Clerk.

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains a full, true and complete copy of the stipulation as to return to writ of certiorari in the case of Empire State Cattle Company *et al.*, Plaintiffs in Error, *v.* The Atchison, Topeka and Santa Fe Railway Company, No. 2276, as full, true and complete as the original of same remains on file and of record in my office.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals, at office in the City of St. Louis, Missouri, in the Eighth Circuit, this eighth day of February, A. D. 1907.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Eighth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Empire State Cattle Company, W. W. Waite, E. F. Waite, W. H. Frost, P. H. Kellogg, C. L. Millet, and J. D. Carr, are plaintiffs in error, and The Atchison, Topeka & Santa Fe Railway Company is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the Circuit Court of the United States for the District of Kansas, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 22d day of January, in the year of our Lord one thousand nine hundred and seven.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Return to Writ.

UNITED STATES OF AMERICA, *Eighth Circuit, ss:*

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of Empire State Cattle Company *et al.*, Plaintiffs in Error, *v.* The Atchison, Topeka and Santa — Railway Company, is a full, true and complete transcript of all the pleadings and proceedings upon which said cause was heard and of all the proceedings and record entries in the Circuit Court of Appeals in said cause.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in St. Louis, Missouri, this eighth day of February, A. D. 1907.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

[Endorsed:] File No. 20,498. Supreme Court of the United States. No. 533, October Term, 1906. Empire State Cattle Co., *et al.*, *vs.* The Atchison, Topeka & Santa Fe Railway Co. Writ of Certiorari and Return. Filed February 11, 1907.

—IN THE—

Supreme Court of the United States

EMPIRE STATE CATTLE COMPANY, a Corporation, W. E. WAITE, E. F. WAITE, W. H. FROST, P. H. KELLOGG, C. L. MILLETT and J. D. CARR, *Petitioners,*

vs.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, *Respondent.*

PETITION

FOR THE ISSUE OF THE WRIT OF CERTIORARI HEREIN, TO THE UNITED STATES CIRCUIT COURT OF APPEALS OF THE EIGHTH CIRCUIT.

Petitioners, for the purpose of obtaining a writ of *certiorari* herein, represent as follows, to-wit:

This suit was brought by petitioners as plaintiffs against respondent as defendant, in the Circuit Court of the United States for the District of Kansas, First Division, on November 13, 1903. It is an action at law to recover Fifteen Thousand Dollars damages, for the death of a portion, and injury to the residue, of 798 head of

cattle belonging to plaintiffs, which were shipped over defendant's railway through the State of Kansas. The cattle were purchased by the plaintiffs, in Texas, and were shipped over defendant's road, destined to go to the pastures of plaintiffs in South Dakota.

The petition averred and the proof at the trial showed, that the plaintiff cattle company was a corporation created by the laws of South Dakota and that the other plaintiffs were residents and citizens of South Dakota, and that the defendant railway company was a corporation created by the laws of the State of Kansas, having its chief office at Topeka, in the First Division of the State of Kansas, in which this suit was brought.

The case was tried by the said circuit court, with a jury. The trial continued for a period of nine days, from January 16, 1905, to January 25, 1905, and the trial was had on the petition of plaintiffs, the answer of defendant, and the reply thereto, of the plaintiffs.

The case of the plaintiffs, both in the Circuit Court and in the Circuit Court of Appeals of the Eighth Circuit, was prosecuted by them upon the theory of the liability of the defendant to plaintiffs, on two grounds. First, that the death of and injury to plaintiffs' cattle resulted from the deviation by defendant of the shipment, without plaintiffs' consent, from the line on which the cattle were routed to go; and, second, that the death of and loss to plaintiffs' cattle resulted also from the different negligences of the defendant specified in the petition of plaintiffs.

At the conclusion of the trial, plaintiffs asked the court to give, and presented to the court, fourteen different instructions to the jury. Those instructions may be found from pages 637 to 644 of the Record.

The first instruction (p. 637) was a peremptory instruction which the plaintiffs prayed the court to give,

instructing the jury peremptorily to return a verdict in the case for the plaintiffs. This instruction was founded upon the proposition maintained by plaintiffs that defendant was absolutely liable to plaintiffs on the facts of the case, as a matter of law, for the death and loss of plaintiffs' cattle, by reason of the deviation of the shipment from the routed line without plaintiffs' consent; and the prayer in this peremptory instruction proceeded upon the theory that that branch of the case, on the undeniable and conceded facts of the case, presented a question of law for decision by the court.

The other thirteen instructions presented at the same time with said peremptory instruction and to be found from page 638 to 644 of the Record, were instructions asking the court, in the event that the peremptory instruction should be denied, to submit to the jury the issues of negligence in the case. All of the thirteen instructions referred to, asked the court to submit the issues of negligence to the jury. It was, of course, understood by the court, as well as by counsel, that, if the peremptory instruction based on the unlawful and wrongful deviation, was given, it would not be necessary to consider those other instructions.

At the same time plaintiffs presented those several instructions, defendant asked a peremptory instruction to the jury. The court gave the defendant's peremptory instruction to the jury, to return a verdict for the defendant, and denied each and all of plaintiffs' said instructions. To those several rulings, plaintiffs excepted at the time.

The jury, under the instructions of the court, gave a verdict for the defendant (p. 644, Record) and a final judgment was given for the defendant (pp. 26-27, Record).

Afterwards plaintiffs filed a Bill of Exceptions in the case, which extends from p. 29 to p. 656 of the printed Record.

The pleadings in the case may be found from p. 3 to p. 21 of the Record.

A history of the trial of the case will be found from p. 21 to p. 28 of the Record.

The final judgment in the case, in the Circuit Court, was given January 25, 1905.

Within due time the cause was duly removed by a writ of error, citation and by filing an assignment of errors to the United States Circuit Court of Appeals of the Eighth Circuit.

The case was heard in the Circuit Court of Appeals in December, 1905, and was decided by that court July 9, 1906, by an affirmance of the verdict and judgment of the Circuit Court. (*Empire State Cattle Co.* v. *A., T. & S. F. Ry. Co.*, 147 Fed. Rep., 457.)

Afterwards, on August 9, 1906, said Circuit Court of Appeals made an order extending the time to November 1, 1906, within which plaintiffs could file their petition for a rehearing in said cause.

Afterwards, on September 20, 1906, plaintiffs filed their petition for a rehearing in said cause, after serving the same on counsel of defendant, and said petition for a rehearing having been served and filed, in accordance with the rules of said United States Circuit Court of Appeals, was considered by that court and denied, November 17, 1906; and, by the denial of said petition for a rehearing, said judgment of affirmance of said Court of Appeals of the said judgment of the said Circuit Court in said cause became final.

Said petitioners further show to the court, as will appear from the opinion of said Circuit Court of Appeals, (147 Fed., 457), that said judgment of affirmance by said Court of Appeals was based upon the ground adjudged in its opinion by said Circuit Court of Appeals, that, because plaintiffs, at the conclusion of the trial of

said cause in said Circuit Court, presented to and requested said Circuit Court to give a peremptory instruction to the jury to return a verdict for plaintiffs, plaintiffs were precluded from the right to have considered said other thirteen instructions, although presented at the same time of and with said peremptory instruction in the event that said Circuit Court should deny said peremptory instruction asked by plaintiffs.

Petitioners say they are advised that said ruling of the Circuit Court of Appeals in its opinion affirming the judgment in this cause, is the first and only time that it has been adjudged by any American court, state or federal, that a party to a suit, who asks the giving of a peremptory instruction to a jury and at the same time asks the giving of other instructions to the jury submitting the issues to the jury in the event that the peremptory instruction thus asked shall be denied, is precluded, by the asking of such peremptory instruction under those circumstances, from having the other instructions considered, if the peremptory instruction is denied. Petitioners say they are advised that it is the general practice as understood by the members of the American bar, generally that where, as in this case, instructions are asked, one of which is a peremptory instruction to the jury and the others submitting the issues to the jury, for the court, in the event of the denial of the peremptory instruction, to consider the other instructions for the submission of the issues to the jury; and petitioners in that view, submit that the decision in this cause by said Circuit Court of Appeals is contrary to the general practice which prevails in the federal and state courts in like cases.

Petitioners show to the court, as appears from the opinion of said Circuit Court of Appeals, that said opinion is contrary to a decision of this court and to the decisions in like cases of other Circuit Courts of Appeal

and is also contrary to the decisions of the Court of Appeals of the State of New York, cited in said opinion in this case.

Said petitioners, in order to enable this court to see how the issues of deviation and negligence in this case arose, submit in this, their petition for a writ of *certiorari,* the following statement of facts:

On May 25, 1903, petitioners were the owners of the 798 head of cattle in controversy at Hereford, Texas, which they shipped from said Hereford for transportation, by rail, from that point to Evarts, South Dakota; that said shipment was made from said Hereford, Texas, over three lines of railway, to-wit, from said Hereford to Amarillo, Texas, over the Pecos & North Texas Railway; from Amarillo to Atchison, Kansas, over defendant company's railway, and from Atchison, Kansas, to Evarts, South Dakota, over such connecting line of railway as should receive said cattle from said defendant railway company at said Atchison, Kansas.

Said 798 head of cattle, in the cars in which they were shipped, were delivered to defendant at said Amarillo, Texas, for shipment over defendant's railway north to Atchison, Kansas, to be there delivered by it to said connecting railway company, and said defendant, on May 25, 1903, accepted from plaintiffs said 798 head of cattle for shipment from said Amarillo, Texas, to said Atchison, Kansas.

Said 798 head of cattle were transported by defendant, as such common carrier, from Amarillo, Texas, to Strong City, Kansas, which is a station on said defendant's line of railway between said Amarillo, Texas, and Atchison, Kansas.

In said State of Kansas where said defendant's railway crosses said state, in passing from Amarillo, Texas, to Atchison, Kansas, there are three cities situate on said

railway, viz: Strong City, Kansas, Emporia, Kansas, and Topeka, Kansas. The general course of defendant's railway across said State of Kansas, in passing from Amarillo, Texas, to Atchison, Kansas, is from southwest to northeast. Strong City, Kansas, is southwest, or southwesterly, from Topeka, and Emporia, Kansas, is between Strong City, Kansas, and Topeka, Kansas.

Said cattle of petitioners were unloaded by defendant into defendant's pens, at said Strong City, Kansas, on May 26, 1903, for the purpose of being fed and watered and of obtaining rest, as provided by the law of Congress in such cases. Petitioners' cattle were so unloaded on the night of May 26, 1903, and were ready to be reloaded and for the transportation to be continued and the transit resumed on the next morning of May 27, 1903.

During the entire month of May, 1903, there were continuous rains night and day, in the valley of the Kaw river, which flows from Eastern Colorado to Eastern Kansas, east, across the State of Kansas, and which empties into the Missouri river, at Kansas City, Missouri. The watershed of the Kaw river extends from the southern portion of Nebraska across the northern part of Kansas, to a point about ten miles south of said Kaw river.

Said rains created in the valley of said Kaw river an unprecedented flood, which commenced to rise about May 15, 1903.

Notwithstanding said 798 head of cattle had been fed and watered and had time to rest so that they were ready to be reloaded and were ready for the transportation and carriage thereof to be resumed and continued on the morning of May 27, 1903, defendant railway company, by reason of the rise of said flood, detained said cattle on its, the defendant's own motion, at said Strong City, in the pens of defendant, from the said morning of

May 27, 1903, until noon, May 29, 1903. Said May 27, 1903, was on Wednesday, and said flood, as we will see further on, reached its climax Saturday night, May 30, 1903. After so detaining said cattle at Strong City from Wednesday morning to Friday noon, May 29, 1903, and after loading, unloading and reloading said cattle two or three times at Strong City by defendant railway company, defendant continued the transportation and transit of said cattle Friday noon, May 29th, 1903, and said cattle were by defendant then hauled from Strong City, Kansas, to Emporia, Kansas, which last city is southwest of Topeka, Kansas, and is on the uplands some considerable distance from the valley of the Kaw river at Topeka.

As already stated, said 798 head of cattle were routed to go over defendant's railway northeasterly, passing through said Strong City, Kansas, Emporia, Kansas, and across the Kaw river at Topeka, and thence northeasterly to Atchison, Kansas, which is situate on the Missouri river. (Opinion of trial court, Record, p. 645, 135 Fed. Rep., 135.)

On the arrival of the cattle at Emporia during the afternoon of Friday, May 29, 1903, it was and had been for six hours and more known by the defendant's officers and servants, that the line on which these cattle were routed to go to Atchison, crossing over the Kaw river at Topeka, was flooded and had been flooded from two o'clock that morning, so as to be impassable; that defendant's line from Topeka to Kansas City had been likewise flooded so as to be impassable and the transit and transportation of said cattle at said Emporia was by defendant, its officers, agents and servants, without plaintiff's consent, deviated from their route and transit over defendant's line northeast to Topeka and Atchison, to another line of defendant, known as the "Ottawa cut-off"

and which cut-off extended from Emporia to Kansas City, by way of Ottawa, Olathe and Holliday, and from Holliday over its line from Topeka to Kansas City, Missouri.

In this connection, it should be stated that the defendant had and has no railway running from Kansas City to Atchison, Kansas. The only railway owned or operated by defendant, either in 1903 or since, north or east from Kansas City, is its line from Kansas City to Chicago.

The transit and transportation of said cattle which were thus deviated at Emporia, Kansas, were so deviated for the purpose of transporting the same over said cut-off of defendant, to Kansas City, Missouri, which was sixty miles and more east of Topeka, Kansas, and distant that far from the line of defendant's railway on which, by the shipping contract of the parties, said cattle were routed to go in their passage to South Dakota.

After the deviation of said cattle at said Emporia, Kansas, over said other line, defendant ascertained that it could not get to Kansas City over its own line; and, on the arrival of the train containing the cars which carried petitioners' cattle, at Olathe, Kansas, during the night of Friday, May 29, 1903, defendant, finding that it could not get to Kansas City over its own line in consequence of the fact that all of its lines west of Kansas City, including said cut-off, were flooded, transported said train of cars containing petitioners' said cattle in a roundabout way to said Kansas City from said Olathe, over the tracks of the St. Louis & San Francisco Railway Company. In this way defendant succeeded in transporting said train of cars conveying petitioners' said cattle from the uplands over which said cattle had been transported up to that time, to the valley and mouth of the Kaw river at Kansas City, where said defendant, without obtaining pe-

titioners' consent, unloaded said cattle in the shipping pens at the Kansas City Stock Yards, alongside of and at the mouth of said Kaw river. Said cattle were unloaded in said stock yards on the morning of Saturday, May 30, 1903. On Sunday, May 31, 1903, the said flood which had so continued during a large part of said month of May, 1903, in the valley of said Kaw river, rose to such heights as to flood said stock yards, and said cattle, having been left without any further attention by defendant railway company after the deposit by it of said cattle in said stock yards, were, by the agents and employees of said stock yards company, driven out of the pens in said stock yards, on said Sunday, up into the overhanging viaducts and chutes which passed through and over said stock yards. This was done by the officers and employees of the Stock Yards Company, for the purpose of preventing said cattle from being drowned in said stock yards. Said cattle remained in said overhanging chutes and said viaducts several days, during which time, in consequence of the impossibility of feeding and watering said cattle, a large number of them died and the balance were very seriously damaged.

The petition of the plaintiffs in the case, after fully stating the foregoing facts, and other facts, summed up therein the grounds of liability claimed against the defendant, as follows:

"1. Defendant did not exercise due and reasonable care, but was negligent in the detention of said cattle at Strong City, Kansas, from May 27th, 1903, to May 29th, 1903, and in not carrying and transporting on May 27th, 1903, said cattle from said Strong City, Kansas, to Atchison, Kansas, by way of Topeka, Kansas, so that said cattle might have been by defendant, at said Atchison, Kansas, delivered to a continuing and connecting carrier at that point.

2. Defendant did not exercise due and reasonable care in the transportation and carriage of said cattle, but

was negligent in not detaining said cattle at Strong City, Kansas, on said May 29th, 1903, until the said unprecedented flood in said Kaw river had subsided, so that the transit of said cattle might be safely resumed without liability to damage or injury thereto.

3. Said defendant did not exercise due and reasonable care, but was negligent and acted wrongfully and without plaintiffs' consent in the deviation of the shipment by said defendant to Kansas City, from which last point and city, defendant had and has no connecting line extending to Atchison, Kansas.

4. Defendant did not exercise due and reasonable care in the transportation and carriage of said cattle by carelessly and negligently endeavoring to head off the flood of said Kaw river by landing and depositing said cattle in the pens on the bank of said Kaw river, at the mouth thereof several days after the rise and increase of the flood of said Kaw river, and plaintiffs say that defendant by its agents and servants in charge of the transportation of said cattle of plaintiffs had actual knowledge of said flood from said May 27th, 1903, and well knew of said flood, and of the continued rise and increase thereof on said May 30, 1903, when said defendant so deposited said cattle of plaintiffs in said pens by the side of said Kaw river at the mouth thereof.

5. That defendant having wrongfully transported said cattle to Kansas City as aforesaid, carelessly and negligently failed and neglected to move or cause to be moved the same from their position of peril aforesaid at Kansas City, Missouri, as it had reasonable time and opportunity to do, before the arrival at said Kansas City of said flood, but the same were overtaken by said flood."

At the trial of the case in the Circuit Court, Mr. Connor, who has charge of the United States Weather Bureau office at Kansas City, Missouri, testified that the rainfall which produced the Kaw river flood of May, 1903, commenced in April, 1903; that there was a slight cessation of the rain early in May and another cessation from about the 15th to the 18th of May, 1903, and with

that exception the rains were continuous through May, night and day. (p. 300, Record.)

The defendant, during 1903 and ever since, has had its chief offices at Topeka, Kansas, which is about sixty miles west of Kansas City, and Mr. Connor testified that a flood in the Kaw river at Topeka would, in the regular course of the flow of water, reach Kansas City in about thirty hours.

Mr. T. B. Jennings, who had charge of the United States Weather Bureau at Topeka, Kansas, testified that the rainfall the first twenty days of May, 1903, averaged about four inches, in the western part of the Kaw water shed; that from the 21st to the 28th of May, 1903, the rainfall in that region averaged another four inches, and that on May 28, 1903, came the tremendous rainfall in that region, which was about five and one-fourth inches, at Salina, Kansas. He said, "We got a month's rainfall during the first twenty days of May, we got an average May rainfall, then during the next 7 days that was re-May rainfall, then during the next seven days that was repeated, and on the 28th we had the tremendous downpour in the central counties, extending from Saline county northeastward into Marshall." (p. 129, Record.)

Another witness in the case (p. 223, Record) was W. E. King, Assistant City Engineer of Topeka, Kansas, who testified that he took observations of the rise of the Kaw river at Topeka, and that on the morning of May 28, 1903, at 8:30 o'clock, the Kaw river was then 16.88 feet, or eleven inches, above low water mark; that the Kaw river continued to rise after that; that he kept men stationed at that point until the crest of the flood; that he had a thirty minutes continuous report from May 28, at 8:30, to June 6, at 10:30; that the crest of the flood was reached at 9 p. m. on May 30, and that between 8:30 the morning of the 28th, and 9 p. m. of May 30, the water rose ten and one-tenth feet.

The testimony of Theron S. Cafferty (p. 225, Record), and of C. T. McLellan (p. 292, Record), who were division officers of defendant company, shows that defendant's roads in Kansas, from Topeka to Atchison, from Topeka to Kansas City and from Holliday to Kansas City, were all flooded from an early hour on the morning of Friday, May 29, 1903, and that all those lines of defendant, over one of which this train of cars would have to go in going to Kansas City, or northwardly, were flooded, as already stated, from an early hour on the morning of Friday, May 29, 1903, and that those facts were well known, not only by those division officers of defendant company, but by Superintendent Hurley and all the general officers of the defendant company; that so extraordinary and perilous were the flood conditions on all of defendant's lines in the State of Kansas on said Friday morning, May 29, 1903, that attention was given to those conditions by Superintendent Hurley and the other general officers of the defendant, and that the movements of the train in question carrying petitioners' said cattle, were directed personally by Superintendent Hurley and the other general officers of the company, and the facts show that for six hours before said Friday noon, May 29, 1903, when said transit was resumed from said Strong City, said lines were and had been so flooded as to make it impossible for the defendant to reach the valley of the Kaw river or to cross the same, or to reach said Kansas City over any of the said lines of defendant. The evidence at the trial, which fully sustains all the averments of the petition and shows the foregoing facts, proves that the defendant company in starting said shipment from Strong City and in deviating the same from said Emporia, knowingly and wilfully went into the mouth of the flood, at its climax.

In support of the first specification above named, that defendant was negligent in detaining petitioners'

said cattle at said Strong City from Wednesday morning May 27, 1903, to Friday noon, May 29, 1903, reliance at the trial was placed on the testimony of the witnesses W. H. Frost (p. 37, Record), G. W. Cloyd (p. 31, Record), and J. D. Carr (p. 116, Record). By the testimony of those gentlemen it was shown that at the same time of the purchase and shipment of those 798 cattle out of Texas, another train load of cattle was bought by plaintiffs and shipped, in like manner. The shipping contracts and the billing and routing of that other train load of cattle, which contained 763 head of cattle of the same class and character of cattle as the 798 head of cattle in controversy, were in all respects the same as the shipping contracts and the billing of the 798 head of cattle in controversy. The only difference between the other train load, which was in charge of Cloyd, was that it was about four or five hours ahead of the train load containing the cattle in controversy. Said other train load of 763 head of cattle was likewise stopped at Strong City, for feed and water and rest, but the transit and transportation of said other train load of cattle was resumed and continued by defendant, Wednesday evening, May 27, 1903, from said Strong City, and said other train load of cattle was hauled by defendant over its said line through Emporia and Topeka, to Atchison, Kansas, and there delivered by defendant to the connecting carrier, and by the connecting carrier continued north, so that said other train load reached its destination in South Dakota on Monday, June 1, 1903.

The evidence shows that both those train loads of plaintiffs' were in the stock yards at Strong City, from Tuesday night until Wednesday evening, when, as already stated, said other train load was hauled out and its transit and transportation continued by defendant to its destination. The history of said other train load of

cars, as given above, shows that defendant was negligent in not continuing from said Strong City, on said Wednesday, May 27, 1903, the transit and transportation of the train load of cattle in controversy.

Defendant was likewise negligent respecting the second of the above specifications, in leaving said Strong City on said Friday noon. As already stated, all of defendant's lines in Kansas were flooded early that Friday morning, and the testimony of Assistant Engineer King, of Topeka, shows that on Friday there was a tidal wave of water passing down the Kaw, which had accumulated from the rains described by said Jennings and had reached at that time the City of Topeka and which, according to the testimony of Weather Bureau Superintendent Connor, was certain to reach Kansas City within thirty hours after its passage by Topeka on said Friday. It was therefore reckless, if not madness, for defendant, having detained petitioners' cattle at said Strong City over two days, to attempt to reach or get across the Kaw River after awaiting the arrival of the very climax of the flood, especially by such attempt at the mouth of that river.

The third specification, that defendant was negligent in endeavoring to get across the Kaw river by taking the cattle over its cut-off from Emporia, was sustained by the evidence.

The fourth specification of negligence was also sustained by the evidence.

The fifth specification of negligence, that defendant carelessly and negligently failed and neglected to move, or cause to be moved, said cattle from their position of peril in said stock yards, was sustained by the evidence.

One of the witnesses in the case was William M. Kendrick (Record, p. 283), who was the live stock agent at Kansas City of the C., B. & Q. R. R. Co., and who

testified that his company could have taken petitioners' cattle out of Kansas City, north across the Kaw River, on the afternoon of Saturday, May 30, 1903; that he offered to defendant to take and transport the cattle in controversy, but that the defendant company refused and neglected to deliver the cattle to the said "Burlington" Company for that purpose; that as evidence of the fact that said Burlington Company could have taken petitioners' cattle out of and across said Kaw River, northerly, out of Kansas City on said Saturday afternoon. Mr. Kendrick testified that on said Saturday evening, May 30, 1903, 35 cars of cattle were shipped out of Kansas City north across said Kaw River by said Burlington Railroad Company (Record, pp. 227-228).

Another witness in the case was W. C. Sparks (Record, p. 345), who testified that he was a member of the firm of Sparks Brothers, who were engaged in the mule business at Kansas City and had a mule yard a block south of the Kansas City Stock Yards, where petitioners' cattle were penned, and that on Sunday morning, May 31, 1903, Mr. Sparks' company drove out of their said mule yards, between six hundred and seven hundred head of mules, up out of the Kaw valley south, up to and on the uplands immediately south of Kansas City, and that in this way their mules were saved from the flood; and the testimony of Mr. Sparks shows that the same could have been done on that Sunday morning by defendant company, with respect to petitioners' said cattle in said stock yards, and that that was the wise and prudent course to have taken concerning petitioners' cattle instead of driving them up into said overhanging viaducts and chutes where petitioners' cattle were certain to and did suffer and die from starvation and want of water.

Another witness in the case was L. A. Allen (Record, p. 226), who testified that there were plenty of men

and instrumentalities in and around the stock yards in Kansas City on that Sunday morning, by whom the cattle of petitioners could have been driven out of said stock yards.

The testimony in the case shows that said cattle of petitioners in the stock yards and the cattle of the plaintiff, Minnesota & Dakota Cattle Company, in the other companion case, presented also to this court for the writ of *certiorari*, constituted about all the cattle that were in the stock yards at said Kansas City on said Sunday, May 31, 1903.

Another witness in the case was one G. A. Roberts (Record, pp. 522-523), who was the live stock agent of the defendant company at Kansas City, whose testimony shows that defendant and its agents and officers gave no attention to the cattle of the petitioners after they were thus deposited Saturday morning, May 30, 1903, in said stock yards, by the defendant railway company.

Another witness in the case was one A. W. Coombs (Record, p. 580), who was the Assistant General Live Stock Agent of defendant company at Kansas City, and who testified also that the officers of defendant company gave no attention to these cattle after they were deposited Saturday morning in said stock yards.

Another witness in the case was one Sharp, who was the superintendent of defendant's terminals at Kansas City, and whose testimony shows that he and General Superintendent Hurley were engaged Saturday and Saturday afternoon in moving from the defendant's yards at Argentine a large number of cars and engines out of danger from the rising flood, but that neither of those officers, nor any of the other officers of defendant, paid any attention to petitioners' cattle which had been by defendant thus deposited in said stock yards.

Petitioners submit that the opinion of the Circuit Court of Appeals in this case is opposed to the decisions of the New York Court of Appeals, cited in said opinion of said U. S. Court of Appeals. Thus, in *Kurtz* v. *Peck*, 113 N. Y., 222, it was adjudged that:

"Where, upon a jury trial, each party asks that a verdict be directed in his favor and neither asks to go to the jury on the questions of fact, the court is authorized to find upon the facts."

The above language clearly indicates that the court, in that case, held that if a party asks for a peremptory instruction and at the same time asks, in the event of the denial of that instruction, to go to the jury upon questions of fact, the party is not precluded by his peremptory instruction.

The same ruling was made by the same court, in *Sutter* v. *Vanderveer*, 122 N. Y., 652.

In the case of *Koehler* v. *Adler*, 78 N. Y., 287, the New York Court of Appeals, in an opinion delivered by Chief Justice Church and concurred in by the full bench of that court, used the following language:

"The action was for money loaned, and the verdict was directed by the court. The defendant alleges error in not submitting the case to the jury. At the close of the evidence the plaintiff asked the court to direct a verdict in his favor, and the defendant then requested a like direction in his favor. The court stated that he thought the plaintiff entitled to the direction. The counsel for defendant then asked to go to the jury upon the question whether the debt in suit was ever contracted at all. This was denied, and an exception taken. Upon these facts we think that the defendant was entitled to go to the jury if the case warranted it. If nothing further had been done after both parties asked a direction of a verdict, it would be assumed that they intended to waive the right of submission to the jury, and consented that the court should decide the questions of law and fact in-

volved. But after a request, and a refusal to direct a verdict, there is no absolute inconsistency in asking to submit questions of fact to the jury. It is not proper, ordinarily, to direct a verdict if there is any material question of fact which ought to be submitted, and it is error to make the direction in such a case. Parties may consent, however, that the court may pass upon all questions both of fact and law, and if they do they will be bound, and when both parties ask a direction this court will presume such consent. In this case the presumption is repelled by an express request to go to the jury upon a question of fact."

Said opinions of the New York Court of Appeals are in harmony with the understanding of the profession and the practice which everywhere prevails, both in the state and federal courts, by which practice a party may submit a series of instructions to the court, one of which is peremptory in its character and the others of which are asked by the party submitting the instructions, in the event that the peremptory instruction is denied.

Petitioners are advised that great surprise will be experienced on the part of the bar, if this rule contended for by them in this case is permitted to be overturned by an affirmance of the decision of the Court of Appeals in this case. The opinion of the Court of Appeals in this case is also opposed to the express decision of the Circuit Court of Appeals of the Second Circuit, in the case of *Sigua Iron Co.* v. *Greene,* 88 Fed., 207; 31 C. C. A., 477. The decision of the Circuit Court of Appeals in that case, as will be seen from the opening paragraphs of Circuit Judge Lacombe's opinion, is squarely in favor of the proposition we contend for and is decisive against the decision of the Court of Appeals in this case. Between the Circuit Court of Appeals in the Second Circuit, in that case, and the Circuit Court of Appeals in this case, there is a direct and irreconcilable conflict.

In the case of *Merwin* v. *Magone,* 70 Fed., 776; 17 C. C. A., 361, the court in its opinion by Judge Shipman, said:

"It will be observed that neither party raised a question of fact, and each asked for a direction in his favor. In such a case, the finding is conclusive if there is any evidence to sustain it."

To the same effect is *Magone* v. *Origet,* 70 Fed., 778; 17 C. C. A., 363.

So, in the decision of the Circuit Court of Appeals of the Second Circuit, in the case of *Chrystie* v. *Foster,* 61 Fed., 551; 9 C. C. A., 606, that court, in its opinion by Judge Wallace, said:

"Where the defendant excepts to the direction of a verdict for the plaintiff, but makes no request to go to the jury, he cannot be heard to assail the judgment upon the ground that there were questions of fact for the jury. *Provost* v. *McEncroe,* 102 N. Y., 650, 5 N. E., 795. Where both parties move for the direction of a verdict, and neither requests any question of fact to be submitted to the jury, they concede that there is no question of fact, and that the case turns wholly upon the questions of law, which are to be determined as though the facts were undisputed."

The opinion of the court is also opposed to the opinion and decision of the Circuit Court of Appeals of the Sixth Circuit, in the case of *Monahan* v. *Grand Trunk Western Ry. Co.,* 138 Fed., 37.

In the opinion in that case, which was delivered by Circuit Judge Severens, the court said:

"The second question propounded by counsel is based upon the following facts: At the close of the production of evidence the counsel for the defendant preferred a request to the court that the jury be directed to return a verdict for that party. This request having been discussed by the counsel for the respective parties, the

court was proceeding to give its opinion and instructions to the jury, and seemed to indicate, as plaintiff's counsel thought, a purpose to sustain the defendant's request for a positive direction in its favor. Thereupon the court permitted an interruption to allow the plaintiff's counsel to put on file certain requests to instruct the jury, and assured the counsel that he should have the benefit of them, and then, after giving its views at length, directed a verdict for defendant. The requests filed by plaintiff were eighteen in number, the first being as follows:

'(1) Under the pleadings and proofs, you are instructed that your verdict must be for the plaintiff, and the only question for you is as to the amount of damages.'

"The others related to particular matters of law and fact involved in the issue. The court did not comply with any of these requests. The plaintiff excepted to the ruling of the court upon defendant's motion for directing the verdict in its favor, and to the refusal of the court to give the instructions requested in his behalf. Counsel for defendant now urge that the request of each of the parties for a peremptory instruction by the court had the effect of a joint withdrawal of the issues of fact from the jury and a submission of them to the court for its determination, and that, the court having decided them in favor of the defendant, both parties are concluded by the finding, citing *Beuttell* v. *Magone*, 157 U. S., 154, 15 Sup. Ct., 566, 39 L. Ed., 654. In that case there was no disputed question of fact, and it only remained for the court to state to the jury what the facts were, and what the law applicable to those facts was. And what the court there held in effect was that the court might state the facts as agreed, and not submit them to the jury. The language of Mr. Justice White, taken apart from the case before the court, might justify the conclusion which the counsel draws from it. But it would seem that the decision cannot be regarded as furnishing a rule for cases where the evidence is conflicting, and where the party whose request is refused has coupled with his request other requests directed to particular aspects of the case, which repel the implication

that the party had consented to a submission of the facts to the court. And in all the cases in which the case of *Beuttell* v. *Magone* has been cited in the appellate courts the conditions were the same; there was no disputed question of fact, and there were no special requests. *Merwin* v. *Magone*, 70 Fed., 776, 17 C. C. A., 361; *Magone* v. *Origet*, 70 Fed., 778, 17 C. C. A., 363; *Bradley Timber Co.* v. *White*, 121 Fed., 779, 58 C. C. A., 55; *United States* v. *Bishop*, 125 Fed., 181, 60 C. C. A., 123; *Phoenix Ins. Co.* v. *Kerr*, 129 Fed., 723, 64 C. C. A., 251, 66 L. R. A., 569.

"In *Beuttell* v. *Magone* it is expressly stated that such request made by the respective parties is not the equivalent of a submission of the case to the court without the intervention of a jury, within the intendment of Rev. St., sections 649, 700 (U. S. Comp. St. 1901, pp. 525, 570). The rule must therefore rest upon an implication of consent. Can any implication of consent be fairly drawn when, as here, the party couples his request for a peremptory instruction in his favor with further requests for instructions on the questions of law applicable to certain assumed facts which the jury may find? The presentation of requests for instructions in that form necessarily imports that the party expects that, if his first request is refused, the case will go to the jury, and that the court will give his other requests, or such of them as the court thinks are proper. For, if his request for a peremptory instruction is given, the others are futile. May not a party ask for a peremptory instruction in his favor, without depriving himself, if the court thinks he is not entitled to it, of the right to have the jury pass upon the evidence and determine the issue? No valid reason is perceived why he should pay the penalty of losing a constitutional right by invoking the opinion of the court *pro hac vice* upon the preliminary question. It is, we believe, a common practice of the state and federal courts in Michigan and elsewhere in this circuit, when the party wishes to obtain the opinion of the court upon the question whether there is any evidence which could fairly be relied upon to defeat his claimed right, and, if the opinion of the court should be that a question for the jury is presented, then to ask that appropriate in-

structions be given them to guide their deliberations, to present all his requests in a body, and the courts understand that to be the purpose, and conform to it. This was the course pursued here, and we do not think we should be justified in extending the rule stated in *Beuttell* v. *Magone* to a case thus differently circumstanced. In the case before us it is apparent that the judge did not suppose he was intrusted with the ultimate finding of facts in the case. It appears that, before the plaintiff's requests were filed, the court had already indicated to the plaintiff's counsel that it was about to give a direction in favor of the defendant, and had already determined that the plaintiff was not entitled to recover. The court also stated that it would give to the plaintiff the benefit of his requests. But these could be of no benefit if the case was to be concluded by the judge's opinion on the facts. All this indicates that the court was co-operating with the plaintiff's counsel in his effort to save the questions presented by his requests."

So far as we have been able to observe, it is true of all of the cases, state and federal, in which this question of waiver where both parties have joined in asking a peremptory instruction alone, arose that each case presented a single issue on the part of the plaintiff, and that an issue of fact triable by the jury; and, as we have seen, save and except the decision of the Court of Appeals in this case, in each of that class of cases involving a single issue alone, the rulings have been that where either party at the time of presenting a request for a peremptory instruction also presented a series of instructions to be given to the jury in the event of the denial of the peremptory instruction, the party thereby did not waive the right to go to the jury on the issues of fact.

But in the case at bar, there were and are two issues tendered by the plaintiffs. In the case at bar, from the beginning of the case as made by the petition, the plaintiff claimed a liability on the part of the defendant rail-

way carrier upon two grounds, one on the ground of deviation, without plaintiff's consent, of the shipment from its line running to Topeka and Atchison, to Kansas City, from which point it had no line to Atchison, the other the grounds of negligence aforesaid.

We contended in the Court of Appeals, that the authorities are practically unbroken to the effect that where a shipment is deviated by the carrier, as in the case at bar, without the consent of the shipper, the carrier assumes by such deviation absolute responsibility, and the act of God is no defense in that class of cases.

In our brief in the Court of Appeals in this case, in support of the proposition of absolute liability of the defendant carrier, on the ground of deviation, we cited the following authorities:

Crosby v. *Fitch*, 12 Conn., 410, l. c. 419, 420. 423;
R. R. Co. v. *Beck*, 125 Pa. St., 620;
Phillips v. *Bingham*, 26 Ga., 617;
R. R. Co. v. *Cole*, 68 Ga., 623;
Cassilay v. *Young*, 4 B. Mon., 265;
Sager v. *R. R. Co.*, 31 Me., 228, l. c. 238;
R. R. Co. v. *Washburn*, 22 O. St., 324;
Ex. Co. v. *Smith*, 33 O. St., 511;
Brown Co. v. *R. R. Co.*, 63 Minn., 546;
Hedricks v. *Steamship Co.*, 18 La. Ann., 353;
Hastings v. *Pepper*, 11 Pick., 41;
Proctor v. *R. R. Co.*, 105 Mass., 512;
Ry. Co. v. *Allison*, 59 Tex., 193;
Johnson v. *Ry. Co.*, 33 N. Y., 610, l. c. 611;
Goodrich v. *Thompson*, 44 N. Y., 324;
Maghee v. *R. R. Co.*, 45 N. Y., 514;
Keeney v. *Ry. Co.*, 47 N. Y., 525;
Robertson v. *Nat. S. S. Co.*, 14 N. Y. Sup., 313;

Seavey Co. v. *Union Trans. Co.*, 106 Wis., 394;
Ry. Co. v. *Brichetto*, 72 Miss., 891;
R. R. Co. v. *Odil*, 96 Tenn., 61;
Mer. Dis. Tr. Co. v. *Kahn*, 76 Ill., 520;
Vol. 1. Am. & Eng. Enc. Law (2nd Ed.), 594;
Vol. 5 Am. & Eng. Enc. Law (2nd Ed.), 422, 426;
Hutchinson on Carriers, Secs. 190, 191;
Lawson on Bailments, Sec. 127;
Vol. 6 Cyc. of Law & Procedure, 383, 384;
Marsh v. *Un. Pac. R. R. Co.*, 9 Fed. Rep., 873;
Ins. Co. v. *LeRoy*, 7 Cranch., 26;
Hostetter v. *Park*, 137 U. S., 30, l. c. 40;
Constable v. *Steamship Co.*, 154 U. S., 51, l. c. 66.

In the Court of Appeals, in our brief in this case, we contended in support of the proposition that in cases like this where the act of God is claimed to be the cause of the result, the carrier is still liable if it is guilty of contributory negligence, operating in connection with the act of God to cause the injury, and in support of that proposition in our brief in the Court of Appeals, we cited the following authorities:

Sweezy v. *Philadelphia*, 64 Pa. St., 106;
Helbling v. *Cemetery Co.*, 201 Pa. St., 171;
Morrison v. *Davis*, 20 Pa. St., l. c. 176, 177;
Williams v. *Grant*, 1 Conn., 487;
Wallace v. *Clayton*, 42 Ga., 443;
R. R. Co. v. *White*, 88 Ga., 805;
Merritt v. *Earle*, 29 N. Y., 115, l. c. 116f;
Michaels v. *R. R. Co.*, 30 N. Y., 564, l. c. 570;
Bibb Broom Corn Co. v. *A. T. & S. F. Ry. Co.*, 102 N. W. Rep. (Minn. Sup. Ct.), p. 709;
R. R. Co. v. *Curtiss*, 80 Ill., 324;

Wald v. *R. R. Co.*, 162 Ill., 545;
Blodgett v. *Abbott*, 72 Wis., 516;
Nelson v. *Ry. Co.*, 72 Pac. Rep. (Mon. Sup. Ct.), 643, l. c. 651;
Steamboat Co. v. *Tiers*, 24 N. J. Law Rep., 697;
R. R. Co. v. *David*, 6 Heisk, 261;
McGraw v. *R. R. Co.*, 18 W. Va., 361;
Smith v. *Ry. Co.*, 91 Ala, 455, l. c. 456;
Coosa Steamboat Co. v. *Barclay*, 30 Ala., 12, l. c. 127;
Nugent v. *Smith*, 1 C. P. Div., 19 and 423;
Vol. 1 Am. & Eng. Enc. Law (2nd Ed.), 595;
Vol. 5 Am. & Eng. Enc. Law (2nd Ed.), 234;
Hutchinson on Carriers, Secs. 181, 187, 188;
Vol. 6 Cyc. Law & Proced., 377, 384;
Strauss v. *Ry. Co.*, 17 Fed. Rep., 209, l. c. 212;
Caldwell v. *Sou. Ex. Co.*, 4 Fed. Cas. No. 2303, p. 1036.
Thompkins v. *Duches of Ulster*, 24 Fed. Cas. No. 14087a, p. 32;
Southern Pac. Co. v. *Schoer*, 52 C. C. A., 269, l. c. 274;
Newport News Co. v. *U. S.*, 9 C. C. A., 579;
Clark v. *Barnwell*, 12 How., 272; l. c. 280;
Holladay v. *Kennard*, 12 Wall., 254;
Gleason v. *R. R. Co.*, 140 U. S., 433;
The Majestic, 166 U. S., 376, l. c. 386.

Petitioners further represent, that their counsel in the Court of Appeals in this case, in their brief in support of the proposition that the question of what was the proximate cause of the loss in this case and whether it was the carrier's negligence or whether it was solely the act of God, as claimed by the carrier, were questions of fact for trial by the jury, and in support of that proposition the case of *Milwaukee & St. Paul* v. *Kellogg*, 94

U. S., 469, was cited. And in the brief of counsel of petitioners in the Court of Appeals, in support of the proposition that the questions of negligence in this case were questions of fact to be decided by the jury, the following cases were cited:

R. R. Co. v. *Stout,* 17 Wall., 657, l. c. 653;
Ry. Co. v. *McDonald,* 152 U. S., 662, l. c. 275;
Marande v. *R. R. Co.,* 184 U. S., 173.

It is thus seen that in this case two issues were involved, both in the Court of Appeals and in the trial court, which, as already stated, were the issues of the carrier's liability on the grounds of deviation and negligence. The liability of the carrier in this case on each of those grounds stands separate and wholly apart from its liability on the other ground. The carrier in this case might be liable on the ground of deviation and not liable on the ground of negligence, or it might be liable on the grounds of negligence and not be liable on the ground of deviation. The carrier in this case might be liable on both grounds. The decision in this case of either question of liability, namely, deviation or negligence, is not in the nature of things a decision of the other question.

The question of liability on the ground of deviation was a law question, pure and simple. In this case the deviation was without plaintiffs' consent and without any consultation with plaintiffs. And the question of liability of the defendant carrier in this case on the ground of deviation, being a law question, pure and simple, there was no other way for the petitioners in the trial court to reach and obtain a proper determination of that question except to ask, as they did ask, a peremptory instruction to the jury based on that legal proposition of liability.

Since the questions of negligence were questions of fact, triable by the jury, there was no way under the law,

since there was not a waiver of the jury trial in the case, for a decision of the questions of negligence except by the jury. Therefore petitioners in asking the court to give a peremptory instruction to the jury, on the basis of liability founded on deviation and at the same time asking the court to give certain instructions on the propositions of negligence, was simply asking the court to pass upon all of the law questions in the case.

As we have already seen, in the case of *Beuttell* v. *Magone,* 157 U. S. 154, and in the other Court of Appeals cases cited in the opinion of the court in this case, there was but a single issue, but if the rule adjudged by the Court of Appeals in its opinion in this case is erroneous and unjust as applied to a case where the plaintiff rests his case on a single proposition of fact, how much more would that result be true in the case at bar, where the liability is claimed on two grounds.

It is undoubtedly true, petitioners say, that while a decision of the case in favor of the plaintiffs on the ground of deviation would absolve the court from the necessity of a decision on the question of negligence, still judgment against the plaintiffs cannot be given in this case without a decision against them of both questions of deviation and negligence. Petitioners had the right to the trial of both issues by the aforesaid tribunals of judge and jury before a final judgment could be given against them. The trial court in this case assumed to decide and did decide both issues of deviation and negligence against the petitioners.

Our contention in the Court of Appeals was, that the decision of the trial court on the question of deviation was against the unbroken authorities applicable to the question of deviation in such cases, and that the trial court, in taking the case from the jury on the questions of negligence, usurped the province of the jury.

However, the Court of Appeals practically refused to decide either question of deviation or negligence, because, as held by the Court of Appeals, petitioners had lost their rights as litigants in the case by asking the trial court to decide all the law questions in the case arising on both issues. If the rule sanctioned by the Court of Appeals in this case becomes the rule applicable to all such cases, it would seem that the result would follow that because a litigant in the trial court asks the court to decide all the law questions in the case, the Court of Appeals on becoming possessed of the case will be prevented from saying anything more in an opinion in the case than if without any consideration of the case the word "affirmed" only were written therein.

In view of the conflict between the decision of this Court of Appeals in this case and the other decisions referred to, state and federal, we submit that in harmony with the decision of this court in *Forsythe* v. *Hammond*, 166 U. S., 506, the writ of *certiorari* prayed for by this petition is the proper remedy to settle the conflict made by this decision. If the decision of the Court of Appeals in this case on this question of practice is correct and is important to every litigant and lawyer in this country, this court ought, we submit, to grant this writ of *certiorari* and on the hearing of this case overrule the decisions of the other Circuit Courts of Appeals with which the decision in this case is in conflict. If, on the other hand, this court is of opinion that the decisions referred to of the other Circuit Courts of Appeals and of the Court of Appeals of New York are correct, then we submit that this court on the hearing of this case should so decide, in order to settle the conflict. A duly certified copy of the entire record in this cause in said Court of Appeals, and the number of uncertified copies required by the rules of this court, accompany this petition and are filed herewith as a part of this petition.

Petitioners pray this court to grant the writ of *certiorari* herein to said Circuit Court of Appeals of the Eighth Circuit and on the hearing and decision of this case by this court that this court will reverse the decisions and judgments of the said Circuit Court and of the said Circuit Court of Appeals herein and remand this case to the Circuit Court for a new trial on both the issues of deviation and negligence.

James S. Botsford
and R. E. Ball

.....

Attorneys for Petitioners.

State of Missouri, County of Jackson, ss.

James S. Botsford, being duly sworn, on his oath states, that he is one of the attorneys of petitioners in this case, and has been in both the Circuit Court and the Court of Appeals; that he has read the foregoing petition and that the matters set forth therein are true, as he verily believes.

James S. Botsford

Sworn to and subscribed before me this 14th day of December, 1906.

My commission expires November 24, 1908

Vinnie A. Thomas

Notary Public.

IN THE

Supreme Court of the United States.

EMPIRE STATE CATTLE COMPANY, a corporation; W. E. WAITE, E. F. WAITE, W. H. FROST, P. H. KELLOGG, C. L. MILLETT and J. D. CARR, *Petitioners,*	No. .....
vs.	
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *Respondent,*	

ANSWER IN OPPOSITION TO PETITION OF PETITIONERS FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

For answer to the petition of petitioners for a writ of *certiorari* proposed to be made to this Honorable Court, the respondent, The Atchison, Topeka and Santa Fe Railway Company, respectfully represents and shows as follows:

It is obvious from the elaborate petition filed that petitioners seek to have a review by this court of some six hundred pages of evidence, much of which the trial court admitted in its opinion was irrelevant and im-

material to the issues, and it is apparent that it is the main desire of petitioners to have the judgment of this court upon the sufficiency of the evidence in the record to sustain the verdict and judgment in the trial court in addition to the views of the trial court and that of the Court of Appeals upon such question. This application is based mainly upon the ground that the decision of a majority of the Court of Appeals as to the effect of a submission of a case under the evidence to the court in a common law action is contrary to the rulings of other circuits.

While in suits in equity and admiralty causes the practice in the Federal courts throughout the United States is required to be uniform, and rulings in respect to such practice may, therefore, be important, yet it is well known that in trials at common law in the Federal courts, by virtue of the Act of Congress upon that subject (Sec. 914, U. S. Rev. Stat.), the practice is to accord as nearly as possible with the practice which obtains in the State courts of the State in which such Federal court may be sitting. There can, therefore, be no uniformity of practice throughout the Union in respect to trials at common law. We understand, of course, that the Act of Congress does not require the Federal courts to conform in all respects to the practice in the State courts in respect to common law cases, yet it is well known that the practice of the Federal courts in respect to such cases does differ, and differs materially, in the different circuits. The point involved is, therefore, not one which concerns practitioners throughout the United States, and is not one of general importance.

In re Woods, Petitioner, 143 U. S., 202.

It is quite obvious that if the contention of our adversaries were sustained upon the grounds claimed as an inducement for the issuance of the writ of *certiorari*, the same pretext would be frequently resorted to in a vast number of common law cases, and this court would be overwhelmed with reviewing not important questions of law but rather the merits of causes as disclosed by the evidence introduced. Obviously, this court must rather be concerned to know that substantial justice has been administered, than that some technical rule of practice has been correctly laid down or followed.

So far as the evidence or the merits in the case at bar are concerned, it is quite obvious that petitioners have had already the consideration of those courts which Congress intended such litigants should have.

Petitioners are not, however, even fair or candid in the statement of the record and the points involved. The ruling of the Circuit Court of Appeals, affirming the instruction of the trial court, directing a verdict for the defendant, is reported in the case of *Empire State Cattle Company et al.* v. *The Atchison, Topeka and Santa Fe Railway*, 147 Fed., 457, from which it appears that in the concurring opinion of Judge Sanborn, he was of opinion that the direction of the verdict under the evidence was correct, and that there was no prejudicial error committed.

It is a well settled rule in the Federal courts that it is the duty of the trial judge to direct a verdict in favor of a party when, if the verdict were against such party as rendered by the jury, it would be the duty of the court to set the same aside and grant a new

trial, and, therefore, the court may withdraw a case from the jury altogether and direct a verdict for plaintiff or defendant, as the one or the other may be proper, where the evidence is undisputed or of such conclusive character that the court in the exercise of a sound judicial discretion would be compelled to set aside a verdict in opposition to it.

Southern Pacific Company v. *Pool*, 160 U. S., 440.

Marande v. *Railroad Company*, 184 U. S., 191, and

Bowditch v. *Boston*, 101 U. S., 18.

This is the undoubted rule in the Eighth Circuit, where the case was tried:

Christenson v. *Metropolitan Street Ry. Co.*, 137 Fed., 708.

The direction of the trial court being correct, under the above well settled rule, it should not be disturbed.

The record, however, in the case under consideration discloses on page 637, the following:

"And thereupon upon the conclusion of all the evidence in the case, the plaintiffs prayed the court to instruct the jury as follows:

"'The court instructs the jury to *find the issues for the plaintiffs'*; which instruction the court refused to give, and to which action, ruling and decision of the court in refusing to give said instruction, the plaintiffs at the time duly excepted."

The defendant requested a similar instruction in its favor. (See record, pp. 27 and 26, for requests for peremptory instructions filed, submitted and overruled.) It is obvious from the "Memoranda of decision on request for peremptory instructions," found

on pages 645 to 655, and which is made a part of the record in the bill of exceptions, that the two instructions were submitted together and disposed of by the court. On page 655 of the record it is stated at the end of the decision:

"It therefore follows on the main case, the request for instructions to the jury to return a verdict for the defendant must be sustained, and the like request of plaintiffs must be denied. This will be done. And thereupon the court, on the motion of the defendant, gave final judgment in favor of the defendant and against these plaintiffs."

It, therefore, appears from page 637 of the record that the plaintiffs asked the court to direct the jury to find the issues for plaintiffs, and *after* this instruction or motion had been refused, as shown by the memoranda of decision, that "*thereupon* the plaintiffs prayed the court to give to the jury the following instructions" (Rec., p. 638), and there are then set out some thirteen instructions requested, the refusal to give any one of which instructions was not properly assigned as error for the consideration of the Court of Appeals, and must, therefore, be regarded as having been abandoned, or that each request was incorrect or erroneous and therefore properly refused.

It, therefore, fairly appears from the record that plaintiffs did not ask to go to the jury upon any special question of fact until after the cause had been submitted to the court and the court had plainly found the issues against plaintiffs and directed a verdict.

Moreover, owing to failure to properly assign error, there was not for the consideration of the Court of Appeals any request of plaintiffs to submit the case to the jury upon any question of fact.

The third assignment of error (Rec., 658) is as follows:

"The court erred, *after the refusal of said peremptory instruction*, in refusing to give and charge the jury, at plaintiffs' request, instructions numbered as follows and in refusing to give each of them, to-wit: Instructions 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13."

Under rule 11 of the Court of Appeals, as well as under the rule of this court, each error assigned must be specifically set out under a separate assignment so as to advise the opposite counsel and the court of the particular legal points relied upon for a reversal of the trial court.

Van Stone v. *Stillwell & Bierce Mfg. Co.*, 142 U. S., 128.

Supreme Council C. K. of A. v. *Fidelity & Casualty Co. of New York*, 11 C. C. A., 96.

Lloyd v. *Chapman*, 93 Fed., 599, and

United States ex rel. Coquard v. *Indian Grave Drainage District*, 85 Fed., 928 and 932.

It was not obligatory upon the court or counsel for the defendant to search each of these requests and point out error in the same, justifying a refusal of the court to give it. No particular error in refusal to give any one of these special requests was pointed out even in the brief of plaintiffs in error in the appellate court. Thus, it could be readily shown that the fifth request, found on pages 639 and 640 of the record, in regard to alleged deviation of the shipment, is clearly erroneous and was properly refused. The only alleged errors, therefore, properly assigned and which were for the consideration of the Circuit Court of Appeals were refusal of the trial court to give plaintiffs'

peremptory instruction and the giving of defendant's peremptory instruction.

There is, however, as we shall show, no conflict in the decisions of the Federal courts so far as the actual decision is concerned upon this question. Some expressions in the nature of dicta in a few of the cases may, perhaps, show contrary views, but wherever the question has been decided by the courts, such decisions have rather been in harmony with the majority opinion of the Court of Appeals in this case.

From the record it plainly appears that both plaintiffs and defendant submitted the entire case to the court to determine the facts under the evidence and the law applicable thereto as to whether the verdict and judgment should be for the plaintiffs or for the defendant. While plaintiffs urged in their petition several grounds of negligence, there was but one cause of action, and the plaintiffs contended that upon all the evidence they were entitled to a verdict and judgment upon this cause of action, while the defendant contended that the verdict and judgment should be in its favor.

A motion for an instruction to find a verdict for a party has superseded the old practice of a demurrer to the evidence, but is nevertheless analogous thereto.

Merrick's Executor v. *Giddings,* 115 U. S., 305.

Parks v. *Ross,* 11 Howard, 373.

The plaintiffs did not, in their peremptory instruction, submit the case upon any particular point or question, but joined with the defendant in submitting the entire case upon all the evidence to the court.

In *Beuttell* v. *Magone,* 157 U. S., 154, it is said:

"As, however, both parties asked the court to instruct a verdict, both affirmed that there was no disputed question of fact which could operate to deflect or control the question of law. This was necessarily a request that the court find the facts, and the parties are, therefore, concluded by the finding made by the court, upon which the resulting instruction of law was given. The facts having been thus submitted to the court, we are limited in reviewing its action, to the consideration of the correctness of the finding on the law, and must affirm if there be any evidence in support thereof."

See, also, *Johnson's Admr.* v. *Chesapeake & Ohio Ry. Co.,* 21 S. E., 238.

Having thus submitted the case to the court to determine the facts from the evidence, and the court having acted upon such request and decided the questions of law and fact, plaintiffs were not in a position to insist that such submission should be ignored or withdrawn, and that the case should then be submitted to the jury to determine some particular question of fact. Such was the ruling of the Circuit Court of Appeals, for the Seventh Circuit, in *Insurance Company* v. *Wisconsin Central Railway Company,* 134 Fed., 794 and 798. See, also, *Nashville, C. & St. L. Ry. Co.* v. *Sansom,* 84 S. W., 615 and 616. Such also was the ruling of the New York Court of Appeals in *Howell* v. *Wright,* 25 N. E., 912. In none of the cases from the Federal courts cited by petitioners has a different decision been made.

In *Sigua Iron Co.* v. *Greene,* 31 C. C. A., 477, motions by both parties for a verdict were denied and the court, over the exception of one party, submitted

a single issue of fact to the jury. In *Merwin* v. *Magone,* 17 C. C. A., 361, and in *Magone* v. *Origet,* 17 C. C. A., 363, the direction of a verdict by the trial court was affirmed. The same is true of the case of *Chrystie* v. *Foster,* 9 C. C. A., 606.

The case of *Minahan* v. *Grand Trunk W. Ry. Co.,* 138 Fed., 37, is distinguishable. There, in an action where the facts were not conceded, plaintiff interrupted the court as it was passing on a motion to direct a verdict for the defendant, and asked leave to file certain requests to charge the jury, one of which was a request for a peremptory instruction for plaintiff. The court permitted such requests to be filed and assured counsel that he should have the benefit of them, it was held that this did not amount to a submission of the issues of fact to the court so that plaintiff was precluded from objecting to an adverse finding thereon. Plaintiff in that case plainly indicated that the case was not intended to be submitted to the court for its decision only upon the peremptory instruction, and it appeared that the evidence was quite conflicting on material points. Moreover, the court is at pains to point out that its decision was in accordance with the practice of Michigan, where the case was tried.

A request to go to the jury must specifically point out the question of fact upon which its judgment is desired. It is settled even in the New York courts that a request must be in such form that the judge may properly charge in the terms of the request, without qualification.

Carpenter v. *Stillwell,* 11 N. Y., 61 and 79.
Winchell v. *Hicks,* 18 N. Y., 565.

Van Akin v. *Caler,* 48 Barbour's Supreme Court Rep., 60 and 61.
Waters v. *Marrin,* 13 Daly's Reports, 57.

Therefore, even according to the rule of practice in the New York courts, whose decisions are relied upon by petitioners, where both parties ask for the direction of a verdict, a motion by one of them to withdraw his request and to go to the jury on all the questions in the case will not be granted.

Groves v. *Acker,* 33 N. Y. Sup., 406; 85 Hun., 492.

By having failed to assign error in the refusal to give any one of the thirteen specific instructions afterwards requested by plaintiffs, plaintiffs must be deemed to have abandoned any question in regard to the same and certainly to have waived their right to predicate any error upon the refusal of the trial court to give any one of such instructions. They cannot, therefore, now claim that they were entitled to go to the jury upon any particular question of fact, since it does not appear, and they were not able to show, that any specific request in respect to the submission of any such question of fact was properly made. The result now is that they are simply claiming that, after the court overruled their peremptory request and directed a verdict in favor of the defendant, the court erred in not submitting the case generally to the jury. There was, therefore, no question before the Court of Appeals, and there can be none before this court in respect to any improper refusal of the trial court to submit to the jury at the request of the plaintiffs some particular

question of fact for its determination. As, under this rule, no such request was up for consideration of the Court of Appeals, there can be none for the consideration of this court on an application for a writ of *certiorari*. It is to be presumed that the action of the lower courts was rightful.

A rather extended presentation is made by petitioners of what some of the evidence purports to show. Here, again, we regret we are called upon to say that in many instances but half the truth is stated, which is as misleading as a positive misstatement. In some instances conclusions are stated wholly unwarranted and unjustified by anything in the record. We do not deem it proper to refer to the evidence in detail. The facts stated in the opinion of the trial court, found in the record on pages 645 to 655, inclusive, were conclusively established by the uncontradicted evidence in the case.

The action was to recover damages for the alleged negligence of the defendant by reason of which plaintiff's cattle, which were being transported, were overcome and damaged while in the Union Stock Yards at Kansas City, Missouri, by what the plaintiffs stated, in their petition, was an unprecedented flood in that vicinity or locality. Recovery is based in the petition upon several grounds of alleged negligence, as follows (Rec., pp. 7 and 8):

"Plaintiffs further state that it was the duty of said defendant as such railway company and common carrier to *exercise due and reasonable care* in the carriage and transportation of said cattle from Amarillo, Texas, to said Atchison, Kansas, but that defendant was guilty of *negligence* in the following particulars, to-wit:

"(1) Defendant did not exercise due and reasonable care, but was negligent in the detention of said cattle at Strong City from May 27th, 1903, to May 29th, 1903, and in not carrying and transporting on May 27th, 1903, said cattle from said Strong City, Kansas, to Atchison, Kansas, by way of Topeka, Kansas, so that said cattle might have been, by defendant at said Atchison, Kansas, delivered to the continuing and connecting carrier at that point.

(2) Defendant did not exercise due and reasonable care in the transportation and carriage of said cattle but was negligent in not detaining said cattle at Strong City, Kansas, on said May 29th, 1903, until the said *unprecedented* flood in said Kaw river had subsided so that the transit of said cattle might be safely resumed without liability to damage or injury thereto.

(3) Said defendant did not exercise due and reasonable care, but was negligent and acted wrongfully and without plaintiffs' consent in the deviation of the shipment of said cattle by defendant to Kansas City from which last point and city defendant had and has no connecting line extending to Atchison, Kansas.

(4) Defendant did not exercise due and reasonable care in the transportation and carriage of said cattle by carelessly and negligently endeavoring to head off the flood of said Kaw river by landing and depositing said cattle in the pens on the bank of said Kaw river at the mouth thereof several days after the rise and increase of the flood of said Kaw river. And plaintiffs say that defendant, by its agents and servants in charge of the transportation of said cattle of plaintiffs had actual knowledge of said flood from said May 27th, 1903, and well knew of said flood and of the continued rise and increase thereof on said May 30th, 1903, when said defendant so deposited said cattle of plaintiffs in said pens by the side of said Kaw river at the mouth thereof.

(5) That defendant having wrongfully transported said cattle to Kansas City, as aforesaid, carelessly and negligently failed and neglected to move or

cause to be moved the same from their position of peril, aforesaid, at Kansas City, Missouri, as defendant had reasonable time and opportunity to do before the arrival at said Kansas City of said flood, but the same were overtaken by said flood.

(6) Defendant did not exercise due and reasonable care, but was negligent in not properly or sufficiently feeding or watering said cattle before loading the same at said Strong City, Kansas, and while said cattle were in the viaducts at Kansas City.

Plaintiffs further state that said several injuries, damages and losses to and of said cattle hereinbefore specified and set out were each and all caused by the *said several negligencies and want of due and reasonable care* in the transportation and carriage of said cattle by defendant."

It was set up in defendant's answer (Rec., 9-10-11), and admitted under the pleadings under the Kansas practice, that the cattle in question were being transported in pursuance of the written live stock contracts made by The Pecos & Northern Texas Railway Company on behalf of itself and connecting carriers from Hereford, Texas, to Evarts, South Dakota (Rec., 12 to 19.) In these contracts no route was specified. The initial line simply undertook to carry over its road and deliver to some connecting carrier, and each carrier receiving the stock was to carry over its road and deliver to some succeeding connecting carrier. Each company was relieved from any injury or loss sustained by reason of delay in the transportation. The provisions of these contracts were to inure to the benefit of each carrier which should receive and transport the shipments. (Rec., 12 to 19.) The Pecos & Northern Texas Railway extended from the point of shipment, Hereford, Texas, to Amarillo, Texas, where

it connected with the railway operated by The Southern Kansas Railway Company of Texas, whose line of road extended to Higgins, Texas, on the state line between Texas and Oklahoma. There the railway of the defendant connected with the Southern Kansas Company's line. One of the defendant's lines extended by way of Strong City, Emporia and Topeka, in Kansas, to Atchison, Kansas; another of its lines extended from Topeka, down the Kaw river, to the Union Stock Yards in Kansas City, Missouri; and a cut off extended from Emporia by way of Ottawa to the Union Stock Yards in Kansas City. At such stock yards its rails connected with the railroad of the Missouri Pacific Railway Company, among others, whose railroad extended by way of Atchison, to Omaha and other points and by other connections the stock could have been transported that way to Evarts, South Dakota, or the stock might have been transported by way of Atchison where a connection was formed with the Burlington Railroad and others extending to said Evarts. Under normal conditions the defendant, for its own benefit, would have transported, as it would have preferred to do, the cattle by way of Topeka and Atchison and made delivery to the Burlington road at Atchison. (Rec., 173-174, 203.) There is no evidence to show, however, that any such line or route was indicated or requested by the shippers or plaintiffs, and it appears to have been merely a route selected by the carriers themselves for their own convenience. (Rec., 120.) The endorsement found on the back of the live stock contract, "Hereford, Texas, to Atchison, Kansas," was evidently placed thereon

by the agent of the initial carrier on behalf of the carriers themselves. It is not in or a part of the contract of carriage. (Rec., 12-19.) In the "way-bills" issued by the initial carrier, and which were intended to be delivered to its train agents and those of the succeeding carriers, the line of transportation is designated by way of Amarillo and Atchison (Rec., 120); but these way bills were not delivered to the shippers, being merely made out by the carriers for the guidance of their own agents. They were not bills of lading or akin thereto. The evidence, therefore, did not show any instructions from the shippers as to the route to be taken, and the agreement between the carriers and the shippers specified no route. There was no agreement to transport by any particular lines or routes. (Rec., 12-19.) The shippers evidently were only interested in the through rate which was the same by several lines, and in a reasonable expeditious transportation under the circumstances.

As the shipment moved, the defendant had arranged with the Burlington road to receive the same at Atchison. (Rec., 41.) When the shipment arrived at Strong City, however, defendant received word from the Burlington road that it would be unable to receive it at Atchison, on account of washouts beyond that point upon its own line. (Rec., 34, 35, 179, 448, 183, 185.) There were no adequate stock yards at Atchison at which such a large shipment could be held any length of time. (Rec., 199.) Thereupon defendant, in order to expedite the shipment, began negotiations with other railroads to receive the shipment and, among others, the Missouri Pacific at Kansas City. (Rec., 185, 186, 187, 188, 193, 194.) Before negotia-

tions were closed, the Burlington road advised defendant that its line was again open and it could receive the cattle at Atchison. (Rec., 182 and 452.) It then transpired, however, that a part of defendant's line of railroad between Topeka and Atchison was flooded with water so as to be impassible (Rec., 196), and another washout had occurred upon the Burlington road. (Rec., 196.) Defendant then closed, as it supposed, negotiations with the Missouri Pacific Company to receive the cattle at the Union Stock Yards in Kansas City and to transport the same by way of Atchison and deliver to some connecting carrier at the end of its line, to be carried to Evarts, South Dakota. (Rec., 185, 186, 188, 187, 188, 189, 193, 192, 194.)

As a part of its line of railroad between Topeka and Kansas City was also now under water (Rec., 201) defendant loaded the shipment finally on May 29th and began to transport the same by way of the Ottawa cut off. (Rec., 203, 204.) Agents of the plaintiffs in charge of the shipment were becoming impatient at the delay and wanted the shipments sent around the flooded area. (Rec., 73, 74.) When the stock reached Olathe it was found necessary to use the railroad tracks of the St. Louis & San Francisco Railroad Company so as to run the shipment into the stock yards at Kansas City (Rec., 208 and 211) where the cattle arrived on the 30th of May (Rec., 473, 474, 494, 520, 629, 630, 632, 633, 634), and the same were deposited in the pens set apart for the use of the Missouri Pacific Railway Company. (Rec., 551, 475, 522, 509, 648, 649.) The stock was then in the custody of the agents of the Union Stock Yards Company. (Rec., 533, 542.)

The mere flooding of portions of defendant's tracks west of Kansas City was not unprecedented. The low portions of such tracks had been flooded before during high rises in the river. This did not indicate any danger at the Stock Yards. These Stock Yards had never been known to have been flooded before by any rise in the river.

An extraordinary rain fall, commencing on May 28th, in middle western and northern Kansas, accompanied with the saturated condition of the soil by previous rains, caused a flood in the Kansas river to manifest itself at Kansas City on the night of May 30th and 31st so as to reach an extraordinary and unprecedented height, and resulted in a rise of the river at that time to a height unknown before. Up to that time everyone supposed that the Stock Yards and the tracks in that vicinity were and would be safe. They were safe in that vicinity on the 30th, as Mr. Kendrick, an agent of the Burlington road, testified for plaintiffs that that railroad received and moved stock at these Stock Yards on May 30th (Rec., 284) northward and would have been willing to receive this stock and move the same up the Missouri river by way of Atchison, though, of course, it then appeared, as is clearly shown by the record, though not stated by petitioners, that defendant company had made arrangements with the Missouri Pacific to receive the shipments at the Union Stock Yards and move the same out, and the shipment was waiting on the Missouri Pacific, so that the defendant company could not make different arrangements at that time with the Burlington road.

On the night of the 30th and the morning of the 31st the Kansas river at this point rose so high as to submerge a portion of the stock yards (Rec., 603, 596) so that the agents of the Stock Yards Company found it necessary to drive the cattle upon the viaduct in these yards to prevent the cattle drowning. The water rose to a height of eight feet in the yards, and, contrary to all expectations, remained, submerging the stock yards for several days, thereby causing the loss complained of. At no previous flood known of had the waters of the Kansas river ever submerged the stock yards. (Rec., 552, 564, 576, 529, 596.) The flood waters in that locality were not only unprecedented but wholly unexpected, entailing a loss of millions of dollars of property located in what is known as the "bottoms" in that vicinity. It has become historic, so the court might have taken judicial notice of it. It was passed upon by the Kansas City Court of Appeals in *Moffatt* v. *U. P. Rld.*, 88 S. W. R., 117. (Rec., 565, 558, 559, 604, 555, 560, 570, 91.) In the light of what had been known up to that time, the agents of defendant in charge of this transportation acted not only in the best faith, but with due diligence and with what everyone would then have supposed to have been for the best interests of the plaintiffs. Those in charge of the stock for the plaintiffs at no time made any objections or gave any different directions. On the contrary, Frost, the president of the Empire Company complained of the delay (Rec., 74), and asked the defendant to run the cattle around the flooded area (Rec., 74), which left available only the line by way of Kansis City. Viewed in the light of what afterward transpired and of knowledge acquired by subsequent

events, of course, either a dull school boy or an astute lawyer could very easily point out that if some other course had been pursued the damage would not have been occasioned.

It is now claimed that if the cattle had been held longer at Strong City or Emporia, the damage would not have occurred, and that the defendant was negligent in not so doing. It is also complained that defendant was negligent in delaying the cattle for a couple of days at Strong City while it was negotiating with some connecting carrier to receive the shipment at the end of one of its lines. It is also now claimed that the heavy rains at the head waters of the Kansas river 400 to 500 miles from its mouth had so saturated the ground during the early part of the month that when, toward the end of the month, a down pour occurred all the water ran off into the rivulets and into the river, and the defendant should have been able to calculate with mathematical nicety and certainty, with a knowledge of the geological conditions and the varied contour of several hundred miles of territory, that the flood waters would have risen at the stock yards at Kansas City to a height never known before.

The flood which did the damage and which is alleged to have been unprecedented occurred suddenly and is characterized by our opponents as in the nature of a tidal wave. It came on in the night time and was at its height on the morning of May 31st.

Great liberality was allowed in the admission of evidence, much of which the trial court regarded as having no bearing upon the issues. The fact that it

was shown that one man had driven a pack of mules out of mule pens somewhere in that vicinity through the city to the uplands was not at all important, because these cattle could not have been driven out of the pens and through the crowded streets, and the viaducts in the stock yards seemed to be the safest place after all, as any one might well suppose that the flood would recede as rapidly as it came on.

See

Grier v. *St. Louis Merchants Bridge Terminal Ry. Co.*, 84 S. W., 158.

The agents of the Stock Yards Company used all the foresight and diligence that could have been expected under the circumstances. Millions of dollars worth of property in the locality was destroyed by the flood because the same had not been removed. (Rec., 565, 558, 559, 604, 555, 560, 570, 91.)

It is incorrect for plaintiffs to say that the shipping contract of the parties specified transportation over the defendant's railroad by way of Atchison rather than by way of Kansas City, or that there was any deviation from the shipping contract. The fact that defendant used certain tracks of the St. Louis & San Francisco Railroad Company in transporting the shipment from Olathe, Kansas, to Kansas City, Missouri, was wholly immaterial, since, in any event, no loss or damage occurred while the cattle were being transported that way. It appeared that that was the only available route then open when the stock reached Olathe to get it to the stock yards at Kansas City. At the stock yards it got upon its own line of railroad.

The statement of petitioners, that "the defendant company in starting such shipment from Strong City and in deviating the same from said Emporia *knowingly and willfully* went into the mouth of the flood at its climax," is wholly unwarranted by and directly contrary to the evidence in the case. The statement that the different agents of the defendant gave no care to the stock while it was in the stock yards is, of course, misleading. It was not necessary that the General Manager, or certain other agents of the defendant railway company, should be looking after this stock, because the cattle were being cared for and attended to by the agents of the Union Stock Yards Company and were receiving all the care that could be given them under the circumstances. Defendant had the right to suppose, as this was the usual and customary place for making deliveries to the Missouri Pacific Railway Company, that the stock would be cared for by the agents of the Union Stock Yards Company on behalf of itself as well as the Missouri Pacific Railway Company. Petitioners seem to think that their shipment was the only one on the railroad or which required any attention. This is but an illustration of the mode of argument adopted by our opponents.

So, also, the statement that this shipment and the shipment in the companion case of the Minnesota & Dakota Cattle Company were the only ones in the stock yards at the time is incorrect, and directly contrary to the evidence (Rec., 258) and to the allegation in plaintiffs' petition, that their cattle were mingled with other stock upon the viaduct during the flood.

The foregoing will suffice to show that the defense, that the damage was occasioned by an act of God,—an unprecedented and unusual flood, for the consequences of which the defendant could not be held liable, and that this was the proximate cause of the loss suffered, was virtually admitted in the statements in plaintiffs' petition, and was conclusively proved by the evidence in the case. The grounds urged by plaintiffs were, therefore, untenable. The ground of alleged wrongful deviation was a straw afterward seized upon in the hope of sustaining their case. Until plaintiffs were confronted with the Federal decisions they fondly hoped that the detention of the cattle at Strong City for a couple of days was negligent, and that the same was the proximate cause of the animals being subsequently overtaken by the flood at Kansas City, and, therefore, the cause of the damage. Such detention was not even negligent under the circumstances; but, even if negligent, it was not the efficient or proximate cause of the damage. It was merely one of a series of independent events which resulted in succeeding events bringing the shipment in the vicinity of an unexpected disaster. It might just as logically be claimed that if a man walking along the street were struck by lightning, the cause of his death would be his walking along the street. The rule is well settled that such antecedent negligent delay, which may have resulted in the goods being subsequently brought in proximity of an unprecedented flood, cannot be regarded as the proximate cause of the damage, but is altogether too remote.

Railroad Company v. *Reeves*, 10 Wallace, 176.
St. Louis, etc., Ry. v. *Commercial Ins. Co.*, 139 U. S., 237.

See also

Volume 7, Rose's Notes in U. S, Reports to Reeves' case, pages 297 and 298.

Hutchinson on Carriers, 2nd Edition by Mechem, Sections 193, 194 and 195.

Vol. 5, American & English Encyclopaedia of Law, 2nd Edition, pages 259 and 260.

The same ruling was made with reference to this very flood, concerning a similar loss at Kansas City, by the Kansas City Court of Appeals in *Moffatt Com. Co.* v. *U. P. R. R.*, 88 S. W., 117; and in *Woolsey Stahl Hay Co.* v. *Mo. Pac. Rly.*, 88 S. W., 1134.

See also,

Morrison v. *Davis*, 20 Pa. St., 171.

Denny v. *N. Y. Cent. R. R. Co.*, 13 Gray., 481.

Hoadley v. *Northern Trans. Co.*, 115 Mass., 304.

McClary v. *Sioux City Railroad*, 3 Neb., 44; 19 Am. Rep., 631.

Michigan Cent. R. R. v. *Burrows*, 33 Mich., 6.

Daniels v. *Ballantine*, 23 Oh. St., 532.

Clark v. *Pacific Railroad Co.*, 39 Mo., 184.

Herring v. *Chesapeake, etc., R. R.*, 45 S. E., 322; same case, 101 Va., 778.

Gilson v. *Delaware, etc., Canal Co.*, 65 Vt., 213; same case, 36 Am. St. Rep., 838 and 839 and notes, s. c., 26 Atl., 70.

The Startle, 115 Fed., 560.

13 American & English Encylopaedia of Law, 2nd Edition, page 722.

There was no case here presented of concurring

negligence of the defendant still potential and existing at the time of the operation of the act of God, so that it might be contended that such negligence was an existing, present and efficient cause also of the damage and without which the damage would not have occurred, as was the case of *The Majestic,* 166 U. S., 376, cited by our opponents, where baggage was flooded with water which came through a defective or broken port hole of the steamer, and which the evidence showed was not securely covered and had not been examined. As the carrier knew that a storm upon the sea, which was likely to occur, would cause water to flow through a defective port hole, it was held that care should have been taken to see that the vessel was seaworthy in that respect.

When it was shown or admitted that the damage was caused by an unpresedented flood of this character, the burden was then shifted to the plaintiffs to show some subsequent negligent or wrongful act of defendant which intervened so as to be the direct or proximate cause.

Railroad Company v. *Reeves,* 10 Wallace, 176.

Nashville & Chattanooga R. R. Co. v. *David,* 6 Heisk., 261; s. c., 19 Am. Rep., 594.

Washburn—Crosby Co. v. *William Johnston & Co., Ltd.,* 125 Fed., 273.

Cau v. *Texas & Pacific R. Co.,* 194 U. S., 427.

4 Elliott on Railroads, p. 2348, sec. 1516, note 3.

The conduct of the defendant is to be judged solely in the light of that which was apparent to an ordinary

person at the time it acted and not by that *ex post facto* wisdom obtained by what afterward transpired and which could not have been expected because admitted to have been unprecedented.

Grier v. *St. Louis Merchants Bridge Ter. Ry. Co.*, 84 S. W., 158.

American Express Company v. *Smith*, 33 Oh. St., 511; s. c., 31 Am. Rep., 561.

Libby v. *Maine, etc., Ry. Co.*, 20 L. R. A., 812.

Baltimore. etc., R. R. Co. v. *School District*, 96 Pa. St., 65; s. c., 42 Am. Rep., 529.

In a case cited by our opponents (*Wallace* v. *Clayton*, 42 Ga., 443), which is based on a provision of the Georgia Code, requiring common carriers to "use extraordinary judgment," it was nevertheless said:

"There was not a moment after the flood got beyond the highest ever known before when they did not have the right to suppose that the limit of the overflow would soon be reached, and the higher it rose the more unnatural it became, the more contrary to human experience, the more baffling to the prudence of the prudent."

See also

American, etc., Co. v. *Talbot*, 141 Mo., 674; s. c., 42 S. W., 679 and 683.

Norris v. *Savannah, etc., Railroad Co.*, 11 Am. St. Rep., 355; 23 Fla., 182; s. c., 1 So., 475.

Smith v. *Western Railway*, 91 Ala., 455; s. c., 8 So., 754.

Long v. *Pennsylvania R. R. Co.*, 147 Pa. St., 343; s. c., 23 Atl., 459.

Gulf, etc., Railroad v. *Compton*, 38 S. W., 220.

International, etc., Railroad Co. v. *Bergman,* 64 S. W., 999.

Norfolk, etc., R. R. Co. v. *Marshall's Admr.,* 90 Va., 837; s. c., 20 S. E., 823.

Davis v. *Railroad Co.,* 66 Vt., 297; s. c., 29 Atl., 313.

When the Burlington road first declined to receive the shipment at Atchison and when, afterwards, a part of defendant's line between Topeka and Atchison became submerged and, therefore, impassable, defendant might have been held negligent if it had not used its other available line to Kansas City for the purpose of making delivery there to some connecting carrier.

See

Receivers of M., K. & T. Ry. Co. v. *Olive et al.,* 23 S. W., 625.

B. & O. R. R. v. *O'Donnell,* 32 N. E., 476.

The obligation to carry by a particular line or route is essentially a matter of contract. If a shipper gives specific instructions as to the route or the mode of carriage, and the carrier accepts the shipment without a specific agreement, he undertakes to carry in accordance with the instructions given. It is entirely a matter of agreement, as stated by Chief Justice Shaw in *Hastings* v. *Pepper,* 11 Pick. (Mass.), 41 and 43:

"As the carriage is a *matter of contract,* as the owner has a right to judge for himself, what position is best adapted to carrying goods of this description with safety, and to direct how they shall be carried, and as the carrier has a right to fix his own rate for the carriage or refuse altogether to take the goods, with such directions, the court are all of opinion, that if a car-

rier accepts goods for carriage, thus marked, he is bound to carry the goods in the manner and position required by notice."

So it was held in that case that if the carrier disregarded specific instructions of the shipper, the burden would be upon him to prove that the loss or damage was not attributable to the breach of contract, but was occasioned solely by the act of God, or a public enemy, or the act or fault of the owner himself.

See, also,

Post v. *Southern Ry. Co.*, 103 Tenn., 184; s. c., 52 S. W., 301.

A special contract, however, on the part of the carrier, different from that imposed by the common law, cannot be inferred from doubtful expressions or loose language, but only from clear or definite evidence.

Myrick v. *M. C. R. R. Co.*, 107 U. S., 102, 107.
Dixon v. *Columbus, etc., Ry.*, 4 Bissell, 137; s. c., vol. 7 Fed. Cases, p. 751, case No. 3929.

Under the written contract, the defendant, having two lines over which the cattle might be transported and delivered to a connecting carrier, in the route to destination, one terminating at Atchison and the other at Kansas City, it had the right to select such line of its own to fulfill its agreement as, under the circumstances during the transportation, appeared to it to be reasonably safe. Under the written contract in this case, as no route was agreed upon and specified therein, plaintiffs could not have been permitted to show that any special route was agreed upon, as that would be an attempt to add to the obligations of the con-

tract. Under the contract, each carrier had the right to select and forward over any line or route which appeared reasonably safe and expeditious.

White v. *Ashton*, 51 N. Y., 280, 284.

Hinckley v. *N. Y. C. & H. R. R.*, 56 N. Y., 429, 433, 434.

Snow et al. v. *Ind. R. R. Co.*, 109 Ind., 422; 9 N. E., 702.

C., I. & L. R. v. *Woodward*, 72 N. E., 558 (Supreme Court of Indiana, 1904).

Ind. R. R. v. *Remy*, 13 Ind., 518.

Patten v. *U. P. R. R.*, 29 Fed., 590.

Post v. *Southern Ry.*, 103 Tenn., 184; s. c., 52 S. W., 301.

Hutchinson on Carriers, 2nd Ed., sec. 126a.

Long v. *Railroad Co.*, 50 N. Y., 76.

Hudson Canal Co. v. *Coal Co.*, 8 Wallace, 276 288.

There was no wrongful deviation of the shipment, as claimed. Questions of wrongful deviation generally arose in cases of marine insurance. Such insurance was generally effected upon a cargo with reference to a known route or passage between the points designated, such route or passage being the one generally traveled by ships, and therefore considered safe. Under such contract of insurance, the insurance company had the right to claim that its liability did not attach if, without reasonable excuse, the carrier departed from a well known and usually safe course into a course known to be circuitous and likely to be more dangerous. A shipper when taking out marine insurance would have the same right to insist that if he lost or was

likely to lose the insurance by reason of a wrongful or unreasonable deviation by the carrier, the carrier should have known that such a result would follow from his breach of contract of transportation, and should, therefore, be held liable for the loss sustained. Where the shipper had effected no insurance, however, in view of any route, it would seem apparent that he would have to show that the damage claimed was one which the carrier ought to have anticipated or contemplated as likely to result if it broke its contract of carriage.

In *Hostetter* v. *Park*, 137 U. S., 30, it is said on page 40, citing a number of cases:

"A deviation is defined to be 'a *voluntary* departure, *without necessity* or *reasonable cause*, from the regular and usual course' of a voyage, in reference to the terms of a policy of marine insurance; but it is no deviation, in respect to such a voyage, to touch and stay at a port out of its course, if such departure is within the usage of the trade."

In *Constable* v. *The National Steamship Co.*, 154 U. S., 51, it was held that the landing of a cargo at a different pier than that owned or controlled by the steamship company and designated as its pier in its bill of lading was not a deviation so as to render the steamship company liable for a loss by fire at such other pier. The only reason given for taking the cargo to such other pier was that there was no room at the pier of the defendant steamship company. It was also held that libellants, having taken no steps on the faith of the cargo being unloaded at defendant's pier, were not prejudiced by the change. On page 66 it is said:

"It is claimed, however, that the berthing of this

ship at a pier other than her own was in legal effect a deviation which rendered the company an insurer of the cargo discharged at such pier without notice, until its actual delivery to the consignee. In the law maritime a deviation is defined as a '*voluntary* departure *without necessity,* or *any reasonable cause,* from the regular and usual course of the ship *insured.*"

In Ray's Negligence of Imposed Duties, Freight Carriers, p. 317, it is said:

"There is a class of cases in which an agent is justified, by an unexpected emergency, in deviating from his instructions where the safety of the property requires it. * * * But while a deviation cannot be made for the mere convenience of the carrier, without rendering it liable for the injury which may result; yet, such deviation from the instructions of the shipper may be made in the case of an unforeseen necessity and a necessary change of route or means of transportation is justifiable, as forwarding perishable freight by rail, where a storm prevents a boat from proceeding on its voyage."

In *International, etc., Railway Co.* v. *Wentworth,* 27 S. W., 680, a deviation from the stipulated route was held justifiable, on account of floods.

See, also,

Foster v. *G. W. Rly. Co.,* L. R. (1904), 2 Q. B. Div., 306.

Patrick v. *Ludlow,* 3 Johns. Cas., p. 10; s. c., 2 Am. Dec., 130.

Reade v. *Comm. Ins. Co.,* 3 Johns., 352; s. c., 3 Am. Dec., 495.

Regan v. *Grand Trunk Ry. Co.,* 61 N. H., 579.

In *The Propellor Niagara* v. *Cordes,* 21 Howard, p. 7, Mr. Justice Clifford, on pp. 24 and 25, said:

"A deviation from the direct route may be excusable if rendered necessary to execute repairs for the pres-

ervation of the ship, or the prosecution of the voyage, or to avoid a storm, or an enemy, or pirates. * * * As agent of the owner, the master is bound to carry the goods to their place of destination in his own ship, unless he is prevented from doing so by some cause arising from irresistible force over which he has no control and which cannot be guarded against by the watchful exertions of human skill and prudence. When the vessel is wrecked or otherwise disabled in the course of the voyage and cannot be repaired without too great delay and expense, he is at liberty to tranship the goods and send them forward so as to earn the whole freight; and if another vessel can be had in the same or a contiguous port, or at one within a reasonable distance, *it becomes his duty under such circumstances to procure it and transport the goods to their place of destination,* and in that event he is entitled to charge the goods with the increased freight arising from the hire of the vessel so procured."

See, also,

Phelps, James & Co. v. *Hill,* L. R. (1891), 1 Q. B. Div., 610 and 611.

5 Am. & Eng. Ency. of Law, 2nd Ed., 424 and 425.

In the authorities cited by our opponents there was either a departure from the express instructions of the shipper and without apparent necessity therefor, or the route taken was known to be more dangerous than the usual route and the emergency did not arise while the property was in transit.

It is well settled in the law of agency that where a deviation from instructions is due to necessity or an unforeseen emergency, not itself due to the agent's default, the agent, using his best judgment to carry out the objects of the agency, will not be held responsible,

although it should subsequently develop that another course would have been preferable. Acts done in a *bona fide* effort to save perishable property come within this rule. Where the instructions are obscure or ambiguous, an agent using his honest and diligent discretion in the interpretation of them, will not be held responsible if he makes a mistake.

1 Am. & Eng. Ency. of Law, 2nd Ed., 1063 and 1064.

Many of the authorities simply hold that where the carrier disregards the instructions of the shipper and thereby breaks his contract, he assumes the obligations of a common carrier, or the common law liability of such carriers, and he cannot claim the exemptions of the special contract.

See

4 Elliott on Railroads, Sec. 1515.

It must be remembered, however, that Frost, the president of the Empire Company asked the defendant to run around the flooded area. (Rec., 74.) Other agents of plaintiffs in charge of trains made no objections to the course pursued.

But at common law the carrier would be excused for damages caused by an act of God, as that is something which could not be reasonably expected or provided against.

The rule is well settled in *Morrison* v. *Davis,* 20 Pa. St., 171, on p. 175, which was cited and relied upon by this court in *Railroad Company* v. *Reeves,* 10 Wallace, 176, as follows:

"The general rule is, that a man is answerable for

the consequences of a fault only so far as the same are natural and proximate, and as may, on this account, be foreseen by ordinary forecast; and not for those which arise from a conjunction of his fault with other circumstances that are of an extraordinary nature."

Where the wrong complained of is merely an inadvertent or thoughtless omission of duty, or a mere negligent act without any wilful intent to inflict injury, the defendant in such case should only be held responsible for those results which might reasonably have been foreseen by a man of ordinary intelligence and prudence. In such case he could not be expected to anticipate that an extraordinary, unprecedented and unexpected calamity might intervene to cause a damage which might have been rendered thereby possible by reason of a condition or situation brought about without design to inflict injury on his part.

See

Missouri Pacific Ry. Co. v. *Columbia,* 65 Kans., 390; s. c., 69 Pac., 338.

Cleghorn et al. v. *Thompson et al.,* 62 Kans., 727; s. c., 64 Pac., 605.

1 Sutherland on Damages, 3rd Ed., Sec. 16.

1 Shear. & Red. on Negl., 4th Ed., Sec. 28, p. 28.

Fleming v. *Beck,* 48 Pa. St., 313.

Hoag v. *Rld. Co.,* 85 Pa. St., 293.

C., St. P., M. & O. Ry. Co. v. *Elliott,* 55 Fed., 949, and 952.

Glassey v. *Worcester Cons. St. Ry.,* 70 N. E., 199.

Stone v. *Boston & A. R. R. Co.,* 171 Mass., 536; s. c., 51 N. E., 1.

Schaffer v. *R. R. Co.,* 105 U. S., 249.

Under the undisputed evidence, the trial court correctly determined as a proposition of law that the delay to the shipment at Strong City, even if negligent, was not the proximate cause of the damage, but that such cause was the unprecedented and extraordinary flood, the extent of which could not have been anticipated and which amounted to an act of God.

The R. D. Bibber, 50 Fed., 841.

Goodlander Mill Co. v. *Standard Oil Co.,* 63 Fed., 400.

Southern Pacific Co. v. *Pool,* 160 U. S., 438 and 440, and cases heretofore cited.

Where but one inference can be reasonably drawn from the evidence, the question of negligence or no negligence is one of law for the court.

District of Columbia v. *Moulton,* 182 U. S., 576 and 579.

Elliott v. *C., M. & St. P. Ry. Co.,* 150 U. S., 245 and 246.

Randall v. *B. & O. R. R. Co.,* 109 U. S., 478 and 482.

Tuttle v. *Milwaukee Railway,* 122 U. S., 189.

Such question was necessarily submitted to the court by each side asking for a peremptory instruction in its favor.

The evidence failed to show any wrongful deviation of the shipment; on the contrary, it showed there was no deviation from the contract of carriage, and none from any instructions of the shipper which could be claimed to have been the cause of the damage. The transportation to the Kansas City Stock Yards was un-

der the circumstances rendered necessary and if the extraordinary flood had not occurred defendant would have been held liable in damages for not adopting such course.

The evidence wholly failed to show any intervening neglect on the part of the Railway Company after the cattle were overtaken by the flood in the Kansas City Stock Yards. There was no question to be submitted to the jury, for it clearly appeared under the evidence and the law that the defendant was not liable. It is not necessary to point out here in detail wherein many of the authorities cited by our opponents are in conflict with rules of law plainly laid down by this court. The judgment in favor of the defendant was right, and no occasion exists for issuing the extraordinary writ of *certiorari* to review the action of the lower courts upon the evidence.

Respectfully submitted,

GARDINER LATHROP,
ROBERT DUNLAP,
Attorneys for Respondent.

A. B. BROWNE,
Of Counsel.

No. [redacted]178.

—IN THE—

United States Circuit Court of Appeals

EIGHTH CIRCUIT.

Office Supreme Court, U. S.
FILED.
DEC 26 1906
JAMES H. McKENNEY,
CLERK.

EMPIRE STATE CATTLE COMPANY, a Corporation, W. E. WAITE, E. F. WAITE, W. H. FROST, P. H. KELLOGG, C. L. MILLETT and J. D. CARR,
Plaintiffs in Error,
vs.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *Defendant in Error.*
No. 2276.

THE MINNESOTA AND DAKOTA CATTLE COMPANY, *Plaintiff in Error,*
vs.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *Defendant in Error.*
No. 2277.

Error to the Circuit Court for the District of Kansas.

Statements, Specifications of Errors, Briefs and Arguments for Plaintiffs in Error.

NOTE:—These two cases are alike, involve the same questions of law and fact, were tried together below, and by agreement are to be heard and submitted together here.

JAMES S. BOTSFORD,
BUCKNER F. DEATHERAGE,
ODUS G. YOUNG,
Attorneys for Empire State Cattle Company, et al. in No. 2276.

R. E. BALL,
Attorney for the Minnesota and Dakota Cattle Company, in No. 2277.

FILED
OCT 21 1905

—IN THE—

United States Circuit Court of Appeals

EIGHTH CIRCUIT.

EMPIRE STATE CATTLE COMPANY, a Corporation, W. E. WAITE, E. F. WAITE, W. H. FROST, P. H. KELLOGG, C. L. MILLETT and J. D. CARR,
Plaintiffs in Error,
vs.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *Defendant in Error.*

No. 2276.

Statement of the Case, Brief and Argument of Plaintiffs in Error,

Empire State Cattle Company, et al.

STATEMENT OF THE CASE.

This case, and the case immediately following it, namely, *The Minnesota and Dakota Cattle Company* v. *The Atchison, Topeka and Santa Fe Railway Company*, No. 2277, were and are companion cases. The two cases were brought at the same time in the lower court and were tried together by the court with the same jury. The

evidence which is set out in the Bill of Exceptions in this case was introduced in both cases, and the evidence and instructions given and refused, with all of the rulings thereon, were the same in the trial court in both cases, and the Bill of Exceptions in this case is identically the same, word for word, with the Bill of Exceptions in The Minnesota and Dakota Cattle Company case. The propositions of fact in the pleadings and arising on the evidence in each case involve the same questions of law and fact as the other. Separate Bills of Exceptions, exactly alike, were filed in the two cases and separate writs of error and citations were sued out and served, and complete transcripts in both cases were brought to this court, but it is the understanding and agreement in this court, as it was in the trial court, that the two cases are to be heard by this court and submitted together. It has been arranged that while there are separate statements and briefs, they will be printed in this one book under the same cover. While the counsel of The Minnesota and Dakota Cattle Company will make a separate statement, brief and argument, following this statement, brief and argument in this case, we have thought it best to make this statement at this point so that the court, in reading this statement, brief and argument in The Empire State Cattle Company case, may have in mind the identical propositions of fact and law in The Minnesota and Dakota Cattle Company case. About the only difference between the case of The Minnesota and Dakota Cattle Company case and this consists in the fact that while the cattle in both cases were shipped out from Texas about the same time, the cattle in The Minnesota and Dakota Cattle Company case were stopped for feed and water at Wellington, while the cattle in this, The Empire State Cattle Company case, were stopped for feed and water at Strong City.

With this preliminary statement of both cases, we will now proceed with the statement of this, The Empire State Cattle Company case.

This is an action at law, tried in the trial court by the court with a jury, and comes to this court by writ of error.

The suit was brought in the lower court by plaintiffs in error, as plaintiffs, against the defendant in error as defendant. The action was brought to recover damages for the negligence and wrong of the defendant respecting a shipment of cattle by plaintiffs over the defendant's railway.

The defense of the defendant was and is that the injury to plaintiffs' cattle while being shipped over defendant's railway was due to the flood at Kansas City in May, 1903, which is pleaded and relied upon by defendant as an act of God, and as an excuse for the injury to plaintiffs' cattle.

At the conclusion of all the evidence, the trial court gave a peremptory instruction to the jury to return a verdict for the defendant, and plaintiffs excepted at the time to the giving of this peremptory instruction, and the jury having rendered their verdict accordingly, and final judgment having been given by the court thereon in favor of defendant, the plaintiffs in due time filed their Bill of Exceptions containing all the evidence and their exceptions, and the case comes to this court by writ of error and citation. (Record, pages 1 and 2.)

The petition of the plaintiffs was filed in the lower court November 13th, 1903. (Record, pages 3 to 8.) The petition states that the plaintiff, Empire State Cattle Company, was and is a corporation, created and existing under the laws of South Dakota, with its principal offices in that state, and that said cattle company, and the other plaintiffs, were and are citizens and inhabitants of

said state of South Dakota; that the defendant railway company was and is a corporation, created under the laws of the state of Kansas, with its principal place of business at Topeka therein, and that the defendant railway company, in 1903, and at the other times mentioned in the petion, owned and operated as a common carrier a railway from Amirillo, Texas, to Atchison, Kansas, by way of Topeka, Kansas, and that as such defendant engaged as a railway company in the transportation for hire of passengers, freight and live stock over said railway.

The petition of the plaintiffs stated the following further facts: That on May 25th, 1903, plaintiffs were the owners of 798 head of cattle, at Hereford, Texas, and the plaintiffs shipped from said Hereford said 798 head of cattle for transportation, by rail, from that point to Evarts, South Dakota; that said shipment was made over three lines of railway, to-wit, from Hereford, Texas, to Amirillo, Texas, over the Pecos & Northern Texas Railway; from Amirillo, Texas, to Atchison, Kansas, over defendant company's railway, and from Atchison, Kansas, to Evarts, South Dakota, over such connecting line of railway as should receive said cattle from said defendant railway company. Said 798 head of cattle were delivered to defendant at said Amirillo, Texas, for shipment over defendant's railway to Atchison, Kansas, and to be there delivered by it to said connecting railway company, and said defendant on May 25th, 1903, accepted from plaintiffs said 798 head of cattle for shipment from said Amirillo, Texas, to said Atchison, Kansas, over its line of railway between those points; and said 798 head of cattle were transported by defendant as such common carrier from Amirillo, Texas, to Strong City, Kansas, which was and is a station on defendant's line of railway between Amirillo, Texas, and Atchison, Kansas, and at said Strong City, Kansas, on May 26th,

1903, said 798 head of cattle were by defendant unloaded to be fed and said 798 head of cattle having been fed at said Strong City, on the night of May 26th, 1903, the same were ready to be reloaded and for transportation and carriage thereof and to be continued on the morning of May 27th, 1903. At and prior to the morning of May 27th, 1903, and in consequence of the continuous rains which had prevailed over Colorado, Kansas, Nebraska, Iowa and Missouri, an unprecedented flood had commenced in the waters of the Kaw and Missouri rivers, extending from the source of the Kaw river to its mouth, and extending down the Missouri river to a point where said Kaw river empties into said Missouri river. That said 798 head of cattle were detained by said defendant at Strong City, Kansas, from the morning of said May 27th, 1903, to May 29th, 1903, and during the time of which detention, defendant twice loaded and unloaded from the cars in which they were being transported said cattle of plaintiffs. That during all of the time of said detention of said cattle at Strong City, Kansas, said flood in both said Kaw and Missouri rivers was daily and hourly becoming higher, as defendant's officers and agents well knew. That on said 29th day of May, 1903, defendant again reloaded said cattle at Strong City, Kansas, and instead of continuing their transportation to said Atchison, Kansas, by way of Topeka, Kansas, on its regular line, deviated on its, the defendant's own motion, the transportation of said cattle by carrying them to Kansas City, and that on the arrival of said cattle at Kansas City, on the morning of May 30th, 1903, defendant, instead of leaving said cattle on the uplands where they would have been safe from the continued rise of the said flood in said Kaw river, deposited said 798 head of cattle in pens along by the side of the said Kaw river and near the mouth thereof, and where, as defendant

and its officers and agents well knew, the waters of said flood in said Kaw river for several days had been continually rising, and at which point in said Kaw river, on said May 30th and 31st, 1903, said flood reached its climax, and extended far back from the ordinary channel of said Kaw river from each side thereof so as to fill and cover the said pens in which defendant so deposited said 798 head of cattle of plaintiffs.

It was further stated in said petition, that on May 31st, 1903, defendant, in order to save said catttle from being drowned, drove the said 798 head thereof into the viaducts extending over said pens and above the waters, which in consequence of said flood had submerged said pens, and that in so driving said cattle into said viaducts, defendant mixed and intermingled said 798 head with 2,200 head of other cattle that were in said pens at said time, and that said 798 head of cattle remained in said viaducts from said May 31st, 1903, to June 7th, 1903; that said waters, so made by said flood, extended from said May 31st to June 7th, back from said pens a distance of three-quarters of a mile and more, and were of a depth from eight to fifteen feet, and that in consequence of said waters, and of the placing of said cattle in said viaducts, it was impossible to feed or water said cattle during said period of seven days; that by reason of the location of said cattle and the mixing of the same with said 2,200 head, it was impossible for either defendant or plaintiffs to sufficiently feed or water said 798 head of cattle; that by reason of said insufficient feeding and watering of said 798 head of cattle 99 head thereof died; that all of said 798 head of cattle, both at the time of their shipment at Hereford, Texas, and at the time they were shipped from Strong City, Kansas, were in good condition, and were each worth the sum and price of $25.00, and that by the death of said 99 head of cattle

plaintiffs sustained a loss of $2,475; that by reason of the driving of said cattle in and on to said viaducts, 8 head thereof were fatally injured and crippled so as to render them totally valueless, whereby the plaintiffs lost the further sum of $200. That after deducting from said bunch of 798 head said 99 head, and said 8 crippled head of cattle, there remained 690 head, but that said 690 head were so injured and damaged by reason of the said insufficient feeding and watering of the same, as to cause a diminution in value of each said 690 head in the sum of $10 per head, so that plaintiffs lost on said 690 head the further sum of $6,900.

The petition of plaintiffs shows further damages, making the entire loss of plaintiffs in excess of $12,000.

The petition further avers that it was the duty of defendant as such railway company and common carrier to exercise due and reasonable care in the carriage and transportation of said cattle from Amirillo, Texas, to said Atchison, Kansas, but that defendant was guilty of negligence in the following particulars, to-wit:

1st. Defendant did not exercise due and reasonable care, but was negligent in the detention of said cattle at Strong City, Kansas, from May 27th, 1903, to May 29th, 1903, and in not carrying and transporting on May 27th, 1903, said cattle from said Strong City, Kansas, to Atchison, Kansas, by way of Topeka, Kansas, so that said cattle might have been by defendant, at said Atchison, Kansas, delivered to a continuing and connecting carrier at that point.

2nd. Defendant did not exercise due and reasonable care in the transportation and carriage of said cattle, but was negligent in not detaining said cattle at Strong City, Kansas, on said May 29th, 1903, until the said unprecedented flood in said Kaw river had subsided, so that

the transit of said cattle might be safely resumed without liability to damage or injury thereto.

3rd. Said defendant did not exercise due and reasonable care, but was negligent and acted wrongfully and without plaintiff's consent in the deviation of the shipment of said cattle by defendant to Kansas City, from which last point and city, defendant had and has no connecting line extending to Atchison, Kansas.

4th. Defendant did not exercise due and reasonable care in the transportation and carriage of said cattle by carelessly and negligently endeavoring to head off the flood of said Kaw river by landing and depositing said cattle in the pens on the bank of said Kaw river, at the mouth thereof several days after the rise and increase of the flood of said Kaw river, and plaintiffs say that defendant by its agents and servants in charge of the transportation of said cattle of plaintiffs had actual knowledge of said flood from said May 27th, 1903, and well knew of said flood, and of the continued rise and increase thereof on said May 30th, 1903, when said defendant so deposited said cattle of plaintiffs in said pens by the side of said Kaw river at the mouth thereof.

5th. That defendant having wrongfully transported said cattle to Kansas City as aforesaid, carelessly and negligently failed and neglected to move or cause to be moved the same from their position of peril aforesaid at Kansas City, Missouri, as it had reasonable time and opportunity to do, before the arrival at said Kansas City of said flood, but the same were overtaken by said flood.

The concluding averments of plaintiffs' petition were, that by reason of the foregoing facts plaintiffs had sustained damage in the sum of $15,000, for which sum, together with costs of this suit, plaintiffs prayed judgment. The foregoing constitutes the substance of plaintiffs' petition.

The answer of defendant, which was filed April 22nd, 1904, contains, first, a general denial of every allegation contained in plaintiffs' petition.

The second paragraph of defendant's answer professes to be a special plea or special statement of facts and circumstances attending this shipment and accompanying the answer was the shipping contracts, marked exhibits "A," "B" and "C," filed therewith, upon which the cattle of plaintiffs were shipped. Said paragraph of defendant's answer shows that said contracts were made with the Pecos & Northern Texas Railway Company, for transportation, as averred in plaintiffs' petition, by that company from Hereford, Texas, to Amirillo, Texas, and said answer admits that defendant received said cattle for shipment over its line of railway to be delivered by defendant to a connecting carrier for transportation and to be delivered at the point of destination, and that paragraph concludes with the plea that the injuries complained of to said cattle were caused by the flood of May 30th, 1903, and that said flood was in its nature unusual, extraordinary and unprecedented, and that the injuries were proximately caused by said flood as an act of God, and was not proximately caused by any negligent act or omission on the part of the defendant railway company in the transportation of said cattle. The concluding paragraph of defendant's answer pleads that plaintiffs wholly failed and neglected to give notice to defendant in writing of plaintiffs' claim for damages to said cattle to any officer of defendant company, as provided in the 8th paragraph of said shipping contract. The answer of the defendant and said shipping contracts may be found in the record from pages 9 to 19 thereof. To said answer plaintiffs filed a reply, denying each and every allegation, averment and matter of whatsoever kind in said answer contained. (Record, pp. 19 to 21.)

Plaintiffs in their reply by way of reply to the last paragraph of defendant's answer, respecting the subject of notice, stated, that on June 8th, 1903, and as said flood was subsiding at Kansas City, and while plaintiff's cattle were still in defendant's possession, and after both plaintiffs and defendant knew that a large number of plaintiffs' cattle had died by reason of the matters set up in plaintiffs' petition, and after plaintiffs and defendant both knew that the residue of plaintiffs' herd had been greatly damaged as mentioned in plaintiffs' petition, but before either plaintiffs or defendant knew the exact number of cattle that died, or either the exact or full extent of the injury to the residue of said herd, plaintiffs delivered to W. A. Combs, assistant general live stock agent of the defendant, at Kansas City, Missouri, a notice in writing, notifying defendant that plaintiffs would claim damages for injuries to said cattle mentioned in plaintiffs' petition, such damages resulting from negligence of the defendant, its officers, servants, agents and employees in the handling and shipping of said cattle.

It was further stated in said reply that thereupon defendant notified plaintiffs that the residue of said herd of cattle could not be safely transported to the point of their destination in South Dakota without being first pastured in some good pasture, so that said cattle could recuperate from their feeble condition, so as to be able to be transported to said destination; that thereafter and on June 10th, 1903, plaintiffs served on said defendant at said Kansas City, through said Combs, as such general assistant live stock agent, a notice and consent that defendant might temporarily, before continuing the shipment of said cattle to said destination, put said cattle, or the residue thereof, upon pasture, and consented that defendant might do so at the expense and risk of defendant, and that in giving such consent, all rights were re-

served to plaintiffs as they existed before said consent was given, that no right under the contract of shipment, and no right to damges either to said cattle, in detail, or otherwise, was waived. It was further stated in said reply that repeated demands were made at Kansas City by defendant through defendant's general attorneys, at said Kansas City, to plaintiffs, to consent to take said cattle from said defendant and relieve defendant from further shipment of said cattle, but that plaintiffs steadfastly declined so to do, and that on or about the first day of July, 1903, defendant took the remnant of said herd to its pastures at Emporia, Kansas, and kept said cattle on its pasture at Emporia, Kansas, until July 15th, 1903, when defendant resumed the transportation of said cattle over its line of railway to the point of destination in connection with the connecting carrier. That at the time defendant resumed the shipment of said cattle from defendant's pasture at Emporia, Kansas, defendant requested plaintiffs to give, and plaintiffs gave, defendant a certain obligation in writing, whereby plaintiffs bound themselves to pay to defendant certain charges which defendant claimed should be paid by plaintiffs if in any proper litigation in court it should be held that plaintiffs were liable to pay said charges for the keeping of said cattle in the stock yards in Kansas City, and in said pastures of defendant at Emporia, Kansas.

It was further stated in reply that, on July 25th, 1903, plaintiffs gave defendant an itemized list of damages claimed by plaintiffs as stated in the petition herein; that plaintiffs prior to said July 25th, 1903, were unable to give defendant said itemized list, but that during all of said period from June 1st, 1903, to July 25th, 1903, defendant had full knowledge of the injuries to plaintiffs' cattle complained of in the petition in this cause, and had frequent and continuous negotiations with plain-

tiffs with reference to said cattle and the damage and injury thereto, and the reply of plaintiffs' concluded with an averment that defendant waived the giving by plaintiffs to defendant of any other notice than those which were given as specified in said reply.

The case was tried by the trial court with a jury in January, 1905, the trial continuing for a period of nine days from January 16th, 1905, to January 25th, 1905 (pp. 21 to 28, Record.)

The bill of exceptions in the case extends from page 29 to page 656 of the printed record, and said bill of exceptions contains all the evidence offered by both parties at the trial (p. 637, Record). Said bill of exceptions also contains thirteen instructions which were prayed by plaintiffs to be given by the court to the jury, and the refusal of the court to give said thirteen instructions and plaintiffs' exceptions thereto (pp. 638 to 644, Record). Said bill of exceptions also contains the written opinion of the learned trial judge, given by him in sustaining defendant's motion for a peremptory instruction to the jury (pp. 645 to 655, Record).

The testimony at the trial below, and set out fully in the bill of exceptions, shows the following facts: A stipulation was read between the parties that said Empire State Cattle Company was, and is, a corporation, created under the laws of the state of South Dakota, and that said cattle company and said other plaintiffs were and are all residents of and citizens of the state of South Dakota, and that defendant was, and is, a corporation duly created and existing under the laws of the state of Kansas, and a resident of that state (Record, pp. 29 and 30).

We will first give in this statement a history of the rise and climax of the flood of May, 1903, and the knowledge of defendant of that flood at and prior to the reception by defendant for shipment of plaintiffs' cattle.

One of the plaintiffs' witnesses at the trial was Mr. Patrick Connor, of Kansas City, Missouri, who in 1903, and for some time prior thereto and since that time had charge of the United States Weather Bureau office at Kansas City, Missouri (p. 300, Record). Mr. Connor testified in substance as follows:

That the Republican and Smoky Hill, Saline, Solomon and Big Blue rivers all empty into the Kaw river, and that said other rivers drain practically the north half of Kansas, and also the southern part consisting of the two lower tiers of counties of Nebraska, and also a small portion of Colorado. That the rainfall which in the aggregate brought the flood of 1903 of the Kaw river and at Kansas City, Missouri, commenced to fall and start in April, 1903; that any rains that saturated the ground would tend to diminish the capacity of the ground to hold moisture, but the chief rains which brought on that flood fell in the month of May. That the rains which fell in the first half of May, 1903, were quite heavy. A tabulated report made by the witness of the rainfall during a portion of the month of May was given in evidence and may be found at page 300 of the record. Mr. Connor testified that the average fall of rain during the first fifteen days of May was much heavier than usual. That the rainfall during the month of May was unusually heavy and that it averaged from two and a half to three inches in the western part, eight to ten inches in the eastern part, in excess of the normal amount that falls during the month of May. That the rains through the month of May, 1903, were quite general throughout the month; that there may have been a cessation of rains about the 15th to the 18th. That there was not much diminution of rain except the first few days in the month of May, probably two or three days, or three or four days, and then a slight cessation around the middle of the

month; that otherwise the rains were continuous, according to the best of his recollection; that the rainfall at nights was the same as in the day times. Said statement furnished by Mr. Connor also shows the stages of the water each morning in May, 1903, at the foot of the Hannibal bridge in Kansas City, which bridge is the one used by the C., B. & Q. Railroad Company. Mr. Connor further testified that during the last eleven days of May, 1903, the enormous quantity of nearly seven inches of rain fell in the central and eastern thirds of Kansas, not scattered downpours, but general rains during that period; that the normal rainfall at Kansas City during May of each year is little more than four and one-half ($4\frac{1}{2}$) inches (page 320, Record). Mr. Connor also furnished a table of the rainfall during May, 1903, at Manhattan, Kansas, on the Kaw river, and his table shows that the total rainfall at that place in May, 1903, was 9.6 inches (pages 317 and 322, Record). That on Tuesday, May 26th, 1903, witness commenced to issue warnings of the rise of the flood, and with these warnings were made between four and five hundred maps, which were sent out daily from his office about 10 o'clock each morning, and that those maps were furnished to large business institutions, and a number of them were mailed within the limits of Kansas City, Missouri, and Kansas City, Kansas, and that the remainder were sent outside of Western Missouri, and over the state of Kansas pretty generally; that nearly all of the business institutions of any consequence had been on the map list of the United States Weather Bureau at Kansas City for years which received maps of this kind, and that the Kansas City Stock Yards Company was one of those cases. The warnings so given by the witness during the flood of 1903 were identified by him and introduced in evidence, and may be found from page 301 to page 303 of the record.

Respecting these warnings Mr. Connor testified it was the wish of his office to give just exactly to the public the cause or causes leading up to the flood and the augmentation or diminution each day, and the consequences are always referred to, the character of the water which obtained over that territory whenever mentioning the flood question as to whether or not rains had occurred and whether or not they were light or heavy. In substance the witness stated in these reports that owing to the tremendous quantity of water which had fallen it would necessarily raise or cause a flood at Kansas City.

Respecting a question asked Mr. Connor how long it would take water at a certain height in the Kaw river at Topeka to obtain the same height at Kansas City, Missouri, Mr. Connor answered, it would not take very long, and that the crest of the flood moved at the rate of two miles and six-tenths per hour in the Kaw river. The distance from Topeka to Kansas City is about sixty miles, and according to this testimony it would take about twenty-four hours for the flood at Topeka to reach the same height at Kansas City.

Mr. Connor further testified that taking into consideration the differences in the height of the valley of the Kaw between Topeka and Kansas City, it would take about thirty hours in the case of a great flood for the flood at Topeka to reach Kansas City.

Mr. Connor further testified that the flood in the Kaw river of 1881 attained a stage of 26 and .2 feet above zero. He further testified that there was practically no flood condition north of St. Joseph in the Missouri river in 1903; that there was not much damage from flood between St. Joseph and Atchison, Kansas; that the flood between Atchison, Kansas, and St. Joseph, Missouri, was moderate; that from Leavenworth south the flood in the Missouri river was more severe. He also

testified of the flood of the year 1904, and that the flood of the latter year was nine or ten feet below the height of the flood of 1903 (Record, 320).

Another witness in the case was T. B. Jennings, who has charge of the United States Weather Bureau of the state of Kansas, with office at Topeka, Kansas. Mr. Jennings has held that position since 1886. His testimony may be found at page 219 of the record.

Mr. Jennings testified that the rainfall for the first twenty days of May, 1903, averaged about four inches, or possibly a little over four inches, through the territory east of Norton and Trego counties, north of Smoky Hill river; then from the 21st to the 28th of May, 1903, it averaged another four inches, and on the 28th of May came the tremendous rainfall, which was about five inches and a quarter at Salina and was evidently considerable more, because that washed out the rain gauge in Abilene and the river was already bank full when this water came. That "we got a month's rainfall during the first twenty days of May, we got an average May rainfall, then during the next seven days that was repeated and on the 28th we had the tremendous downpour in the central counties extending from Saline county northeastward into Marshall. About the normal amount of rain for the month of May fell during the first twenty days.

The territory I have in mind in what I have stated above as to rainfalls during the month of May, is the territory east of Norton and Trego counties and north of the Smoky Hill and Kaw rivers; it is the Kaw river watershed. The Smoky Hill passes through Trego and the Solomon and the forks of the Republican cut through this way, and it is the counties east of that portion of the state. The rainfall that I have described is in the Kaw river watershed; I am giving the rainfall that fell in the territory that flows its waters into the Kaw river

finally; the Kaw draws from ten miles south of the Platte river in Nebraska; draws all the water to ten miles south of the Kaw in Kansas; in other words, the Kaw river watershed is all on the north side of the river. The most of the rainfall the latter part of May occurred on the 28th; there was but little rainfall west of Manhattan after that; we had a rain Sunday, the 31st; it rained up to Sunday here, Sunday the 31st.

We received a request from the Kansas City stock yards on the 29th and 30th to wire them the conditions every three hours; all we could do was to wire them the rise of the river from one period to another because there was no gauge here. The main streams that flow into the Kaw above Topeka are the Blue river, which comes in at Manhattan, the Republican river, which comes in at Junction City, and the Salina and the Solomon; the Solomon comes in at Solomon City; the other streams are mainly creeks; the Smoky Hill and Kaw rivers are one and the same stream; that is they commence calling it Kaw river after the Republican joins the Smoky Hill at Junction City; the Saline and Solomon rivers rise in the western counties of Kansas, Trego and Sheridan counties; the Republican rises in the eastern part of Colorado and the northwestern part of Kansas; the Blue rises up in Nebraska, in the neighborhood of Lincoln, that is it covers quite a block of counties south of Lincoln, Nebraska."

Another witness for the plaintiffs was W. E. King (Record, 223), assistant city engineer, of Topeka, Kansas. Mr. King testified that the rains in the month of May, 1903, were exceptionally heavy; "we had considable work here in the city, and were laid out by the continuous rains. I took the first observation in the rise of the Kaw river at Topeka on the morning of May 28th, at 8:30 o'clock; the Kaw river was then 6.0′ above city

datum; that is a base from which we establish to make calculations; it is an imaginary base that is 10.8′ above low water mark; low water mark is the stage of the river at ordinary times. When I say that the water was 6.08′ above city datum, that means 16 feet and .88 or eleven inches above low water mark on the morning of the 28th at 8:30. The Kaw river continued to rise after that. I kept men stationed at that point until the crest of the flood; I have a thirty minutes continuous report from May 28th at 8:30 to June 6th at 10:30. The crest of the flood was reached at 9 p. m. May 30th; between 8:30 the morning of the 28th and 9 p. m. of May 30th the water rose ten feet and one-tenth."

Another witness for the plaintiffs was Theron S. Cafferty (225, Record), of Topeka, Kansas, and who was roadmaster of the defendant since 1887. Mr. Cafferty testified that he remembered the flood of 1903, in the Kaw river, and when the defendant's railroad from Topeka to Atchison became impassable on account of said flood. He testified that it became impassable on May 29th, 1903; that the last train that went from Topeka to Atchison left Topeka May 29th at 6 a. m., and that that train got as far as Valley Falls, which is a station between Topeka and Atchison, and that witness saw the condition of things there was so bad that he sent this train to Leavenworth and that he came back to Topeka on a hand car; that that train which left Topeka on the morning of May 29th was the last train from Topeka to Atchison until the flood subsided. That the tie-up of all passenger trains, freight trains and stock trains for Atchison at Topeka began on the 29th; that there was no obstruction on that line prior to the 29th from Topeka to Atchison."

Another witness for plaintiffs was W. A. Dyal (290, Record), of Topeka, Kansas. Mr. Dyal testified that

he was in Topeka, Kansas, in May and June, 1903, and remembered the flood. That he was in the scrap iron and metal business at 214-216 North Kansas avenue; that his place of business was five hundred feet from the Kaw river on the south side. "I could not get to our place of business on May 30th. I know the rainfall along the Kaw river at Topeka, and in Kansas, during the month of May, 1903, was very heavy; it began to be heavy along about the 15th of May, I should judge; I should say that the rain continued from the 15th of May on heavy; the river kept rising, the rains after the 15th must have been pretty heavy up the Kaw judging from the way the river came up; the river began to rise at Topeka along about the 15th, possibly as late as the 20th of May; I should say the grade floor of our building was in the neighborhood of 18 or 20 feet above the Kaw river at low water mark; the water reached our grade floor the night of the 29th of May; the height of the water on the 20th of May was high, I couldn't say how high; if I remember right the water did not fall much after it commenced rising; we were preparing to get away, and the river kept up so I staid at home on account of it. I should say it commenced to get high between the 15th and 20th; the flood got four feet higher than our grade floor. It reached that height of four feet above our grade floor I suppose about the 30th, we could not get down there after I left there the night of the 29th about 10 or 11 o'clock, and it was just commencing to get in our grade floor, then the morning of the 30th I could not get there."

Another witness for the plaintiffs was C. T. McLellan (Record, 292), of Topeka, Kansas, who was and is division superintendent of the defendant railway company. His division as such superintendent included the defendant's railway from Argentine to Emporia, by way

of Topeka, and from Holliday to Emporia and by way of Topeka to Atchison and St. Joseph and Wilder to Hawthorne by way of Leavenworth and Alma branch, Burlingame to Alma.

Mr. McLellan testified he remembered the flood of 1903, and that we had frequent rains and some of them heavy in the month of May, 1903; that about the 27th or 28th of May he got reports from the Rock Island office in Topeka by 'phone as to the conditions of the water in the vicinity of Manhattan; that on the 27th of May witness was at Lakeview, on defendant's line of railway, between Lawrence and Topeka, and that these telephone communications to Topeka from Manhattan by way of the Rock Island were telegraphed to witness at Lakeview by his chief clerk in his office at Topeka; that at that time he was protecting the right of way between Lakeview and Lawrence where the river was high; that in consequence of the rains and the flood, the last time the trains passed over defendant's road between Topeka and Lawrence was on the morning of May 29th, 1903, about 4:30 and 5:30 in the morning; that was the last wheel that moved on the track between Topeka and Lawrence during that flood period. No other trains passed over that line until the 8th of June. "A stock train leaving Strong City and coming to Kansas City over that line could not have come over our road by way of Topeka after 5 o'clock Friday morning, May 29th. I was attending personally to the work, looking after flood conditions on the different points of our road between Topeka and Kansas City and I was getting reports from every point on the division where we were threatened. The Kaw river at Topeka, I think, commenced to rise early in May, but the rise was very gradual and slow. I think by the 14th or 15th, middle of the month, the flood was rising slowly; there was not a steady rise,

there was times when it was at a standstill and fell slowly. The rains during the period were very nearly continuous. I tried to keep fully informed from time to time of the state of the weather at Topeka. The track between Lang and Emporia was flooded on the 30th and a portion of the 31st of May. Our trains discontinued running between Topeka and Emporia the morning of May 30th. Lang is on our main line between Emporia and Topeka about eight miles east of Emporia." Being asked up to what time the trains continued to run from Strong City to Emporia and Topeka up to Atchison, the witness answered, "we discontinued train service to Atchison on the morning of the 29th, that the last train that went through was a freight, which left Topeka about 3 o'clock in the morning and reached Atchison about 8 o'clock the same morning. In consequence of the floods, the running of trains was discontinued after the morning of the 29th between Topeka and Atchison, between Topeka and Leavenworth and between Topeka and Kansas City; trains between all those points on our road were discontinued on the morning of the 29th; the running of trains on our road from Wilder to Leavenworth were also discontinued; all of the lines of the Santa Fe system in Kansas, north of the Kaw river, were discontinued on the morning of May 29th; we were still open and operating trains between Holliday and Kansas City. Our lines from Topeka to Atchison became flooded at Valley Falls. The Delaware river, which is one of the tributaries of the Kaw, overflowed the main line at Valley Falls; the Delaware river empties into the Kaw river opposite Lecompton, sixteen miles east of Topeka. The track of our railroad at Topeka was flooded and the track became impassable at noon on the 29th. There was a break across the Kaw river on our road, in the direction of Atchison, at Topeka, and at noon on the

29th I was informed by the office force of our company that they had not been able to put anything over the Kaw at Topeka after train 122, which left Topeka at 3 a. m. that morning. The water was over our road at Holliday all day on the 29th; there is a sag in the track of our road at that point, the roadbed is low and the bank of the river is low. The last train over our road at Holliday was a stock train and went over our road at that point about 10:15 or 10:30 the night of May 29th, east bound; that train came to Holliday by way of the Ottawa cut-off from Emporia to Holliday. After the morning of May 29th there was no trains came east by way of Holliday except by that cut-off."

The witness further testified that the business of the defendant railway company is and during its entire existence has been that of a common carrier engaged in the carrying of passengers and freight for hire.

He further testified that the office of the general superintendent, train master, and of the witness as division superintendent, C. W. Cook as assistant general freight agent, and W. J. Hurley, both at the time of the giving of witness' testimony and in the year 1903, were and had been at Topeka, and that these gentlemen in May and June, 1903, had their offices in the Atchison, Topeka & Santa Fe Building, opposite the capitol in Topeka, Kansas.

Another witness in the case, who testified as a witness for the defendant, was H. W. Sharp (Record, 593), of Kansas City, Missouri, who was general superintendent of terminals of defendant at Kansas City. He testified that Mr. J. E. Hurley, the general superintendent of the defendant railway company, with offices at Topeka, was with witness on Saturday, May 30th, and the night following; that superintendent Hurley went with witness to Argentine, which is a suburb of Kansas

City, about 10 o'clock Saturday morning, May 30th, 1903; that Mr. Hurley and witness started from the Santa Fe freight house at the corner of Hickory and Joy streets, in Kansas City, Missouri, to go to Argentine, on the top of a box car, so that they might see the extent of the water as much as possible; that superintendent Hurley and witness went to Argentine at that time to size up the situation and see the extent of the water and figure on the probable and possible further rise; that they rode on top of the car to get a better and plainer view of the surroundings.

Witness Sharp further testified that Mr. Hurley was in communication with the Santa Fe Topeka offices during Saturday in regard to the flood situation; that the witness saw the telegrams which passed between Superintendent Hurley and the Topeka office in regard to the flood; that witness talked personally with Superintendent Hurley about the flood situation; that the meeting of witness and Superintendent Hurley on Saturday was for the purpose of discussion of the flood situation. "Some parts of our railroad between Topeka and Kansas City were under water at that time. Superintendent Hurley and I staid at Argentine that morning some time, we left Kansas City about 10 o'clock and got back about 12:30 o'clock; the condition at Argentine while we were there was pretty hard; there was about four inches of water over the rail of the main line, just west of the Rex Mills; there was about the same amount of water there was at Argentine. Rex Mills is between Argentine and Kansas City; there was no water at that time at Kansas City on our tracks. Superintendent Hurley and I thought from the information which we had that the crest of the flood had about reached Argentine, and we figured that even in the lowest part of the yard, we believed if we got as much as two feet more, that the contents of the cars would not be damaged; Argentine was our storage yards

and unloading yards for all business passing through Kansas City. Our yards at Kansas City and Argentine both had something over fourteen hundred loads and sixteen hundred empties; most of them were at Argentine. We estimated at 12:30 Saturday, May 30th, that we could stand a further rise of two feet or two and a half feet without injury to the property in our yards."

The witness further testified that along in the evening of the same day, probably along from 6 to 7 o'clock, he first obtained information from Argentine yards as to the dangerous condition of the flood there. Witness says in this connection, the water seemed to be rising right along, still rising slowly and it continued to rise slowly all the evening, until 8 or 9 o'clock in the evening the water was getting up pretty well.

Witness further testified that about 4 o'clock in the afternoon of May 30th they commenced moving out of their yards at Argentine their engines and coaches to the south end of the Kansas City yard right along north of the mule barns of Sparks Brothers. "The place to which we moved those engines and cars from Argentine was the highest land in the Kaw valley available for moving cars and engines."

Said J. E. Hurley, the general superintendent of defendant, was also a witness in the case (Record, 172). Mr. Hurley testified (Record, 196) that the last train between Topeka, Kansas, and Atchison before the high water was train No. 122, which left Topeka at 3 o'clock a. m. May 29th; the track between Strong City and Emporia was not disabled.

There was other testimony in the case in relation to the flood and its continuation during said month of May, 1903, and the knowledge by the defendant, its officers and agents, but we will not [illegible] the statement thereof any further here, but the same will appear incidentally

from the other facts brought out in the testimony and referred to hereafter.

Respecting the first specification of negligence in the plaintiffs' petition, that the defendant did not exercise due and reasonable care, but was negligent in the detention of the cattle at Strong City from May 27th, 1903, to May 29th, 1903, in not carrying and transporting said cattle on May 27th from Strong City to Atchison by way of Topeka so that said cattle might have been by defendant at said Atchison delivered to the continuing and connecting carrier, the testimony was as follows:

One witness for the plaintiffs was W. H. Frost (Record, 37). Mr. Frost was one of the plaintiffs and accompanied the shipment of cattle mentioned in plaintiffs' petition from Hereford, Texas, to Kansas City. Said Frost represented the plaintiffs as owners of said cattle and had a man with him looking after the shipment of the cattle by the name of Albert Newton. Mr. Frost testified that he bought this train load of cattle about one hundred miles south of Hereford, Texas; that there was 798 head in the train; that these cattle were loaded at Hereford, about 9:30 p. m., May 25th, 1903; that the train carrying these 798 head of cattle consisted of 21 cars. That the train carying said cattle was taken over the line of the Pecos Valley railroad from Hereford to Amirillo; that said train reached Amirillo about 11 o'clock in the evening of May 25th; that after remaining at Amirillo about an hour the cars containing said cattle were taken over the line of the Atchison, Topeka & Santa Fe railroad to Strong City, and there unloaded; that said train reached Strong City about 11 o'clock in the evening of Tuesday, May 26th; that said cattle were unloaded at Strong City by a crew in the stock yards of the defendant at that place; that the said cattle were fed and watered the morning of May 27th about 8 or 9

o'clock, and that said cattle could have been loaded out from Strong City at 11 o'clock a. m. on Wednesday, May 27th.

Witness further testified that nothing was done with the cattle at Strong City until the evening of the 27th, when they were reloaded out for transportation; that the train containing the said cars was pulled down on the sidetrack and set on the track awhile and then ordered back; that they were loaded about 4 o'clock that evening and remained on the side track about an hour and then the train was backed up and the cattle unloaded again in the yard. That witness was not consulted at any of the times when the cattle were unloaded or reloaded and unloaded again; that said cattle were reunloaded the second time about 7 o'clock Wednesday evening, May 27th; the cattle were then put back in the yards.

Witness further testified that the cattle were reunloaded again the next day in the forenoon, but that the entire train was not loaded up at that time; that witness thinks that about half of the cattle were loaded up at that time; that they consumed perhaps half an hour in loading up at that time; then the cattle were again put back into the yards. "I was not consulted in the unloading or loading up again by anybody." The cattle were again loaded up on Friday morning of the 29th of May, 1903, about half past 7 o'clock, or 8 o'clock. The cars containing the cattle were loaded and run down on the side track, where they remained about three hours, then they were pulled out about one or half past one that day to go to Emporia.

Thus it will be seen by the testimony of Mr. Frost, one of the plaintiffs in the case, that plaintiffs' cattle were detained at Strong City from Wednesday until Friday. Mr. Frost testified, as we have seen on page 39 of the record, that the cattle had finished being fed and

watered and were ready for transportation to be resumed at 11 o'clock on Wednesday, May 27th, 1903; he testified that the cattle were still held at Strong City until one or half past one of Friday, May 29th (Record, 41), when they pulled out to go to Emporia. This testimony shows therefore, that the cattle were detained two whole days at Strong City, Kansas, and the contention of the plaintiffs is that the defendant company had ample time during that two days by continuing the transit of the cattle to have shipped them out so as to have delivered them to the connecting line at Atchison, and that if that had been done, the cattle would have reached their destination at Evarts, South Dakota, without injury or damage from the flood.

In this connection we desire to call the attention of the court to the testimony of two witnsses, one G. W. Cloyd (Record, 31). Mr. Cloyd's testimony shows that Mr. Frost, whose testimony we have just referred to, at the time he, Frost, bought the train load of 21 cars containing the 798 head of cattle in controversy in this case, bought as a part of the same transaction, another bunch of cattle, which filled up another train load consisting of twenty cars, and the witness Cloyd was in charge of this other train load. As already stated, the two train loads were bought together at the same time by Mr. Frost as parts of one transaction and to make up one entire shipment, but the shipment was divided into two train loads. The train load in controversy was in charge of Mr. Frost, accompanied by Newton, while the other train load was in charge of the witness Cloyd, with one Keiser. The train load in charge of the witness Cloyd left Hereford about 5:30 in the afternoon of May 25th, while as we have seen the train load in charge of Mr. Frost left Hereford about 9 o'clock or 9:30 o'clock the same evening. It is thus seen that the two trains in leaving Here-

ford, Texas, were about four hours apart. Witness Cloyd says that his train load came over the Pecos Valley to Amirillo, which was reached about 8 o'clock the same evening; that they remained at Amirillo about forty-five minutes and that they went from Amirillo with his train to Strong City over the defendant Atchison, Topeka & Santa Fe Ry. Mr. Cloyd further testifies that his train reached Strong City about 5:30 p. m. on the evening of Tuesday, 26th of May, and in this connection it will be remembered that Frost testified that his train reached Strong City about 11 o'clock the same day, and thus it is seen that the two train loads were about the same distance, three and a half or four hours, apart on reaching Strong City that the trains were apart when they left Hereford. The witness Cloyd (Record, 32) further testified that his train remained at Strong City until the evening of Wednesday, 27th, about 8:30. By comparing the testimony of Mr. Frost with that of Mr. Cloyd, it will be seen that the two train loads were at Strong City all day on Wednesday the 27th. Witness Cloyd further testified (Record, 35) that his train, which left Strong City at 8:30 p. m., Wednesday evening, May 27th, went through to its destination at Evarts, South Dakota; that his train was not caught in the flood anywhere. The other witness referred to was J. D. Carr, and one of the plaintiffs in this action (Record, 116). Mr. Carr testified that the first train load of cattle, which was the train load accompanied by the witness Cloyd, and to which we have referred above, was seen by the witness Carr in Sioux City, where he met that train; that he met Cloyd's train on the last Sunday in May (May 31), and that he (Carr) accompanied the shipment of that first train load from Sioux City to Evarts, South Dakota, where that train load arrived uninjured on Monday, June 1st, 1903; that in that shipment there was 763 head of cattle of the

same ages and the same kind of cattle as the cattle in the train accompanied by Mr. Frost, which is the train load in controversy.

It is thus seen from the testimony of Messrs. Frost, Cloyd and Carr that if the train load of 798 head of cattle in controversy in this case had been continued in its transit by the defendant from Strong City, the same as the transit of the other train load in charge of Cloyd was continued from Strong City, by defendant, the train load of cattle in controversy in this case would have reached its destination uninjured and that the death and injury of the cattle by the flood would have been avoided. Cloyd's testimony shows that his train was detained twelve hours or more by reports of high water and then continued from Strong City.

There is no evidence in the record controverting the foregoing facts proven by the testimony of Messrs. Frost, Cloyd and Carr; there is and can be no denial or question on the part of the defendant that if the train load of cattle in controversy had been shipped out from Strong City by the defendant, as the other train load was shipped out, the injury to these cattle would have been avoided. The contention of the plaintiffs is that in view of the shipment out of the train load in charge of Cloyd, the detention of the train load of cattle in controversy at Strong City during the two days they were there was negligence on the part of the defendant and that that negligence either caused or contributed to produce the loss sued for in this action.

The next charge in the petition to which we desire to invite the court's attention, in the statement of facts, is the second charge that defendant did not exercise due and reasonable care in the transportation and carriage of said cattle, but was negligent in not detaining said cattle at Strong City, Kansas, on said May 29th, 1903, until

the said unprecedented flood in said Kaw river had subsided so that the transit of said cattle might be safely resumed without liability to damage or injury thereto.

The contention of the defendant in the trial court was, and the same contention will doubtless be renewed here, that the defendant was not negligent in detaining plaintiffs' cattle at Strong City said two days, said detention having been caused, as it contends, by the flood which as we have already seen was prevailing throughout the watershed of the Kaw river.

In this connection, referring back to the testimony of Messrs. King, Cafferty, Dyal and McLellan, the substance of whose testimony we have already given above, it will be remembered that all of the lines of railway of the defendant which afforded any possible outlet to the train of cattle in controversy were flooded on the morning of Friday, May 29th, 1903. The uncontradicted testimony of Messrs. Frost and other witnesses is that the train load of cattle in controversy did not leave Strong City until Friday noon (Record, 41). The witness Newton also testified (Record, 135) that he accompanied Frost on the train in controversy, and testifies to the same effect that the train load in controversy were reloaded on Friday, the 29th, and run out on the track until about half past one, and that they remained there about two hours and a half, and both Frost and Newton testified that during the two days that the train in controversy was detained at Strong City the railway agent of the defendant at Strong City informed them that the detention was on account of high water along the line of the defendant's railway; and since it is claimed by the defendant that the detention of plaintiffs' train load of cattle in controversy at Strong City for the two days they were held there was in consequence of the flood and high water, and since the uncontradicted evidence of King, Cafferty,

Dyal and McLellan shows that defendant's several lines of railway from Emporia north going both to Kansas City and Atchison were flooded early on the morning of Friday, May 29th, plaintiffs contend that the shipment of the cattle in controversy from Strong City at noon of Friday, the 29th, with a view of encountering the flood in the Kaw river and which flood covered all the lines of railway of defendant, was negligence on the part of defendant.

This contention is emphasized by the consideration of the various telegrams between the general offices of the defendant respecting the transit of the train load of cattle in controversy. Those telegrams are eighty in number and may be found from page 178 to 194 of the record. Those telegrams are classified according to the dates, beginning with the telegrams sent on Tuesday, May 26th, 1903, and continuing down to the last telegram, which was sent on May 30th, 1903. It will be observed by an examination of all of those telegrams that they related solely to the situation of the flood as it affected this shipment of cattle. Three of those telegrams were sent as early as May 26th. An examination of those several telegrams sent from the 26th until the 30th of May will show that the movements of this train in controversy all emanated from the general offices, and under the direction of the general superintendent, Mr. Hurley, and other general officers of the defendant at Topeka, Kansas, and those telegrams show that the situation in regard to the movements of the train in controversy were so exceptional as to call forth from the first arrival of the cattle at Strong City the interposition of the general officers of the defendant company. Twenty-four of those telegrams were sent on Wednesday, the 27th, and when read together show that the defendant, from Tuesday, the 26th, by its general officers at Topeka,

were acquainted with the flood conditions in the Kaw river and along the lines of their railway, and that two days before Friday, the 29th, when this train load was shipped from Strong City, conditions were such as to make it extremely hazardous, dangerous and negligent to move those cattle from Strong City until the flood. which the defendant knew on Wednesday, the 27th, was on, had fully subsided. Thirty-five of those telegrams passed to and from between the general officers of the defendant respecting the flood conditions as affecting the shipment of the cattle in controversy on Thursday, May 28th, 1903, and those telegrams, taken as a whole, show the extreme dangerous situation as it existed on Thursday, May 28th, and that condition was known to the general officers of the defendant railway company. The same observation is true of ten or more of the telegrams which passed to and from the officers of the defendant on Friday, May 29th. These telegrams, taken in connection with the other evidence to which we have referred, make it conclusive, as it seems to us, that defendant in not detaining plaintiffs' cattle at Strong City until the flood had entirely subsided was negligent, and that but for such negligence plaintiffs' cattle would not have been damaged as complained of in plaintiffs' petition.

We will next present the evidence which supports the 3rd specification in plaintiffs' petition, that said defendant did not exercise due and reasonable care, but was negligent and acted wrongfully and wtihout plaintiffs' consent in the deviation of the shipment of said cattle by defendant to Kansas City, from which last point said defendant had and has no connecting line extending to Atchison, Kansas. It will be observed in this third specication two propositions of fact are stated, one that the deviation of the shipment of plaintiffs' cattle to Kansas City was wrongful and the other that such deviation was

negligent. It will be conceded that if that deviation was negligent, defendant was liable to plaintiffs for the injury which ensued, and it will not probably be denied that if independently of the question of negligence the deviation without plaintiffs' consent of the shipment was *per se* wrongful, then defendant is also liable.

Upon the question whether the deviation was wrongful, we call the courts attention, first, to that part of the record which shows that the cattle in controversy were to go from Amarillo, Texas, to Atchison, Kansas, by way of Topeka, and to be there delivered to the C. B. &. Q. railroad for shipment to Council Bluffs, and shipped from there to Evarts, South Dakota, by way of the Chicago, Milwaukee and St. Paul railway, and that the route thus designed, did not contemplate a shipment of cattle under any circumstances to Kansas City.

On this branch of the case we call attention first to the contracts for shipment appended to defendant's answer as exhibits. Copies of those contracts of shipment, will be found between the blank page 12 and page 19 of the record. On the back of each one of the contracts is the following

"Live stock contract, Hereford, Tex.
To Atchison, Kansas,
May 25th, 1903."

This endorsement is on the back of each one of the contracts and the testimony of the witness Newton, who accompanied the plaintiff Frost with these cattle, is to the effect that he saw these contracts at the time the shipment commenced and that the contracts indicated that the cattle were to ge by way of Atchison (Record, 158 to 160). The bills of lading for the train load in controversy, were offered in evidence by plaintiffs, and a copy of one of those bills of lading may be found at page 121 and 122 of the record. The bills of lading

show that the cattle in controversy, were shipped from Hereford, Texas, destined to Evarts, South Dakota, on May 25th, 1903, and that they were routed to go by way of the junction to Amarillo and thence with the Atchison, Topeka & Santa Fe Railroad company and over that line to Atchison, where they were to be taken by the Kansas City, St. Joseph & Council Bluffs railroad which is a part of the Burlington system to Council Bluffs and from thence by the way of the Chicago, Milwaukee & St. Paul, to Evarts, South Dakota. This is the line over which the cattle were routed to go by the bills of lading made by defendant and the bills of lading are in harmony with the endorsements on the back of the contracts which routed the cattle to go by way of Atchison. On this point Mr. Hurley, the general superintendent of defendant company (Record, 173) testified that cattle shipped over its railway from Amarillo, Texas, to go north would pass both Strong City and Emporia, by way of Atchison; that the feeding points on defendant's railway north from Amarillo, Texas, were Wellington, and Strong City, Kansas, and at page 174 Mr. Hurley distinctly testifies that the usual and customary route from Strong City to Atchison, is across the Kaw river at Topeka and that trains pass north from Strong City to Atchison through Osage City, Burlingame, Topeka, Valley Falls and Nortonville to Atchison, Kansas, and that that is the customary route for all trains of live stock, dead freight, passenger, and everything between Amirillo, Texas, to Atchison, Kansas, and was the customary route in 1903. (See also testimony of Mr. Hurley Record, 176).

In that connection on that page, Mr. Hurley also testified that the deviation of the train of cattle, in controversy, in this case, from the customary and usual route by way of Topeka to Atchison, from Emporia to Kan-

sas City, was made by his, Mr. Hurley's order, and the testimony of Mr. Hurley (Record, 195) shows that he, Superintendent Hurley, in making his several orders or telegrams and otherwise directing the movements of plaintiffs' cattle in controversy, and taking them to Kansas City, acted without any communication between him, Hurley, and anybody representing the plaintiffs, and the testimony of both Mr. Frost and Mr. Newton, shows that neither of those persons were consulted in any way by any representative of the defendant company in the movement of the train of cars in controversy. All of the movements of the train of cars in controversy, whether consisting of the loading or unloading of the cattle, or the reloading, or the reunloading, or the movements or detentions, or the deviation to Kansas City, were by the defendant through its general officers, without any consultation or communication with Mr. Frost or any other persons representing the plaintiffs. The testimony of Mr. Frost on this point will be found (Record, 41) and the testimony of Mr. Newton on this point (Record, 156 and 157). There is no testimony in the record contradicting the testimony of Mr. Frost and Mr. Newton, that the defendant's officers did not consult with Mr. Frost or other representative of the plaintiffs in connection with the movement of this train. Upon the proposition that it was within the contemplation of these parties that the cattle were to be shipped from Amirillo to Atchison, by way of Topeka, the learned trial court in its opinion in this case (Record, 653) recognized the route to Atchison as within the route originally contemplated by the parties, and the learned Judge, in his argument on that branch of the case treats the line that was originally in the contemplation of the parties as the line from Strong City to Emporia, thence by way of Topeka to Atchison.

The facts bearing upon the question of negligence of defendant company in deviating the shipment to Kansas

City, are as follows: There is no evidence in the case that the yards of the defendant company at Strong City, Kansas, where plaintiffs' cattle were detained for two days, was an insufficient place at which to hold the cattle until the flood had subsided. And it must be taken as conceded, there was no necessity, in the situation of the cattle at Strong City, which required their removal from that point, and if there was any danger from a flood at Strong City, the defendant company could have escaped that danger by the removal of the cattle to pastures of defendant twenty or thirty miles distant, which were situated near Emporia, Kansas, where the plaintiffs' cattle were taken by the defendant company after the injury and damage to the cattle was inflicted. And it will not be seriously contended by the railway company, that there was any necessity for removing the cattle from Strong City; they had been safely kept at Strong City for two days and could have been as safely kept there for ten or fifteen days longer until the flood had subsided. (See testimony of Superintendent Hurley, Pages 210-211, Record.) At the time of the removal of plaintiffs' cattle fram Strong City, Friday noon, May 29th the flood was on in the Kaw river at Topeka, all of the lines of the defendant company were flooded and the evidence shows that the cattle of plaintiffs were taken to Kansas City, not over any of the defendant's lines, but over the line of the St. Louis & San Francisco Railway Company by Olathe on a roundabout line of transit. The evidence of Messrs. Jennings, King, Cafferty, Dyal and McLellan, to which we have referred repeatedly, in this statement, show that from May 1st, to May 28th, eight inches of water had fallen in the Kaw river water shed, and that on May 28th, there was the tremenduous downpour of five inches, and other testimony shows, that on Friday, May 29th, in consequence of the said downpour of May

28th, there was a tidal wave in the Kaw river at Topeka, of about nine feet. This was the situation when the defendant deviated the shipment of plaintiffs' cattle from Emporia to Kansas City. The defendant by that deviation made the effort to outrun the flood in its descent down the Kaw river from Topeka to Kansas City. Defendant company, and its agents and officers, well knew of the tidal wave at Topeka, and the evidence of Mr. Connor, and the other witnesses, show that that tidal wave which reached Topeka on Friday the 29th, was bound to reach Kansas City within twenty-four or thirty hours thereafter. Thus the uncontradicted evidence shows that the defendant by the deviation, drew and carried the cattle of the plaintiffs into certain danger and destruction by attempting to cross the Kaw river at Kansas City, when everybody knew that the crossing at Topeka was an impossibility, and that within a few hours at best, it would be likewise impossible to cross at Kansas City. The contention of the defendant is, that defendant deviated the shipment to Kansas City, because it had an arrangement with the Missouri Pacific Railway Company, to take the cattle from the defendant company at Kansas City and carry them to Omaha or Council Bluffs, where their transit could be continued to the point of destination. The defendant claims that it had been informed by some of the telegrams, to which we have referred, that the Burlington railroad company, over whose line from Atchison to Council Bluffs the transit of the cattle was originally designed, could not carry the cattle from Atchison, because of the flood conditions above that point, but the Missouri Pacific Railroad from Atchison, to Omaha runs up the same valley that the Burlington runs from Atchison to Council Bluffs. As a matter of fact however, the evidence shows that the defendant company did not have any arrangement with the Missouri Pacific Railroad

company at the time the defendant deviated the shipment of plaintiffs' cattle from Emporia to Kansas City to carry these cattle from Kansas City to Omaha or Council Bluffs. This is shown by the evidence of the witness Douthitt (Record, 267). Mr. Douthitt was the live stock agent of the Missouri Pacific Railway company at Kansas City, and as shown by his testimony any arrangement respecting the transit of these cattle from Kansas City to Omaha by the Missouri Pacific Railway company, would have to be made through him as such live stock agent. Mr. Douthitt, is positive and emphatic that no arrangement was made between the defendant company and the Missouri Pacific Railway company for the transfer of these cattle by the defendant company to the said Missouri Pacific Railway company at Kansas City, for their continued transportation north, and that no arrangement whatever was made for the reception by the Missouri Pacific Railway company of the cattle at Kansas City. The only arrangement made with Mr. Douthitt and the Missouri Pacific Railway company, which he represented, was for the reception of these cattle by the Missouri Pacific Railway company at Atchison. In this connection we invite attention to page 268 where a telegram is copied from C. W. Cook, the agent of the defendant at Topeka, to Witness Douthitt, at Kansas City, and which telegram reads as follows: "Account of washout with Burlington want to deliver Missouri Pacific at Atchison about three trains of cattle for Evarts, S. D. and routed via Council Bluffs, care of C. M. & St. P. Presume you will join accepting north of Atchison same division Burlington accept. Rush answer."

This telegram was sent on May 27th, and on the same day as it appears from page 269 Mr. Douthitt sent back to Mr. Cook at Topeka, the following telegram: (Page 269 Record):

"Yours dated Q 2:52; will move the three trains cattle, Atchison to Omaha accepting division allowed Burlington which I understood is $13 per car; advise when shipment will be delivered our line. N. Douthitt."

We think the evidence of Mr. Douthitt taken in connection with the telegrams printed in the record will show that the defendant's general officers and agents who manipulated the movements of these cattle in this case lost their heads and became so nervous and excited as to be incapable of transacting business at or about the time of the deviation of plaintiffs' cattle from Emporia to Kansas City.

The facts to which we have called the court's attention in this statement in support of the third proposition of the plaintiff's petition that there was a negligent as well as a wrongful deviation of the shipment to Kansas City, support the fourth specification of negligence in plaintiff's petition.

The fifth specification in plaintiffs' petition is as follows: Defendant having wrongfully transported said cattle to Kansas City as aforesaid, carelessly and negligently failed and neglected to move or cause to be moved the same from their position of peril aforesaid, at Kansas City, Missouri, as defendant had reasonable time and opportunity to do before the arrival at said Kansas City of said flood, but the same were overtaken by said flood. This specification is supported by the following evidence at the trial of said cause. Among the witnesses in the case was a Mr. William M. Kendrick. (Record, 283). Mr. Kendrick was the live stock agent at Kansas City of the C. B. & Q. Railroad Company. This was the railroad company which was to take the cattle of the plaintiffs as they were originally routed from Atchison to Council Bluffs: Mr. Kendrick testified that on the arrival of these cattle Saturday morning, May 30th, he took steps to have

them hauled out over the Burlington railroad from Kansas City north to Council Bluffs, but he learned in some way that it was the desire of the defendant company to ship out by the Missouri Pacific Railway company. As will be seen by the testimony of Mr. Douthitt and other witnesses, the defendant company, learned early in the day of Saturday May 30th, that the Missouri Pacific Railway Company would not endeavor to take the cattle over its road, and the testimony of Mr. Kendrick, live stock agent of the Burlington, (Record, 287-288) shows that the Burlington railroad, on that day had plenty of engines and cars with which to haul out these cattle from Kansas City north over the Burlington railroad to Council Bluffs. The testimony of Mr. Kendrick also shows that on Saturday evening May 30th, 35 cars were shipped out of Kansas City on the Burlington. The testimony of Mr. Kendrick on this point is as follows:

Q. Did you send any cattle trains out by the Burlington Saturday?

By Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial.

By the Court: Objection sustained; plaintiffs then and there duly excepted.

Q. Do you know of any trains going out in the part of the yards where these cattle were and clearing the flood on Saturday?

By Mr. Angevine: Objected to by defendant as incompetent, irrelevant and immaterial.

By the Court: Objection overruled, defendant duly excepting.

A. I don't know just where those cattle were yarded, we loaded out cattle there on Saturday evening.

By Mr. Angevine: Defendant objects to the answer as not responsive to the question; sustained.

Q. If they were yarded in what is known as the shipping division?

By Mr. Angevine: Objected to by the defendant; the witness says he don't know.

By the Court: Overruled, defendant duly excepting.

A. We loaded out I think it was two trains if I remember correctly, I think 35 cars Saturday evening.

Q. What time did they go out? A. I don't know exactly, I think between five and six o'clock.

Q. Where were they destined?

By Mr. Angevine: Objected to by defendant as incompetent, irrelevant and immaterial.

By the Court: Objection sustained; plaintiffs then and there duly excepting.

Q. Did they clear the flood?

By Mr. Angevine: Objected to by defendant as incompetent, irrevelant and immaterial.

By the Court: Objection sustained, plaintiffs then and there duly excepting.

Q. What road did they go on? A. Burlington.

Q. Which direction? A. East.

Q. When were they loaded? A. Saturday evening.

Q. What time were they loaded? A. Possibly, I think they left the yard between five and six o'clock.

Q. What time were they loaded? A. About that time, pulled them out as soon as they were loaded.

This evidence was elicited by the plaintiffs for the purpose of showing that the cattle of the plaintiffs in controversy in this case could have been shipped out by defendant Saturday May 30th, 1903, as bearing upon the question of negligence specified in the said 5th paragraph of the plaintiffs' petition recited above. In this connection we invite the attention of the court in its perusal of the evidence in this case to repeated rulings of the trial court sustaining objections to the admission of evidence offered by plaintiffs. The learned trial court did not seem to look with favor on plaintiffs' case

throughout. (The court's remark at page 172 Record, is a sample). However, under the rulings of this court cited hereafter in our brief, we ask that the court in considering the evidence in this case will consider that which was rejected by the trial court as well as that which was admitted. As bearing upon the proposition that the defendant after the arrival of the flood at Kansas City, could still have saved plaintiffs cattle from loss by driving them out of the stock yards, and that defendant was negligent in that respect, we refer to the testimony of W. C. Sparks, page 345 Record. The witness Sparks, was a member of the firm of Sparks Brothers engaged in the mule business at Kansas City, and the yard where that firm kept their mules was at 17th and Genessee streets, and within a block of the shipping division of the stock yards where the plaintiff's cattle were contained in the Kansas City Stock Yords after they were deposited therein. The evidence shows that plaintiffs' cattle arrived in Kansas City on the morning of Saturday, May 30, 1903, and were at once unloaded into the Kansas City Stock Yards, and the testimony of Mr. Sparks shows that between six and seven hundred head of mules in the said yards and barns of Sparks Brothers, within a block of where plaintiffs' cattle were lodged in the stock yards, were driven out of the said yards and barns of Sparks Brothers on Sunday morning May 31st, between 8 and 11 o'clock on that day, and said six or seven hundred head of mules were driven out of the yards six miles south of Kansas City in the country. This testimony proves that if the defendant company had exercised ordinary care, it could have driven the plaintiffs' cattle out of the stock yards up out of the Kaw valley on the uplands where said mules were driven by said firm of Sparks Brothers.

Another witness for the plaintiffs was L. A. Allen

(Record, 226). On page 238 of the record Mr. Allen testified as follows:

Q. Got them out to a place of safety? A. They could all have been driven out or taken out or shipped out in a few hours, all day Saturday.

Mr. Allen was and is a member of a live stock commission firm at Kansas City, Missouri, and was present during the flood of May 1903. Mr. Allen was recalled as a witness (Record, 622) and testified as follows:

Q. State whether or not there was any available way to get these cattle out of the yard on Saturday night and Sunday? A. Yes, sir.

Q. Now state how and in what way that could have been done, what means were available for the purpose? A. They could have been driven out in the country any time during that time.

Q. How long would it have taken to have gotten them from the shipping pens where they were to the highlands? A. 20 or 30 minutes.

Referring to what available means there were to move the cattle out the following testimony was given:

Q. What were they? A. Men and horses.

Q. How many? A. About the yards about 300 horses and three or four hundred men there all of the time; some commission men, some salesmen, some cattle drovers, speculators and traders.

Q. Did they have horses and men which were available for moving cattle? A. There were two stables there which hired horses.

Q. About how many men and horses would have been reasonably sufficient to drive those cattle and handle them through the streets and out to the highlands. A. Eight or ten men.

Q. Could they have handled the cattle so as to prevent their scattering and going all over the city? A. Yes, sir.

As to the extent of the loss and damage and injury to the plaintiffs' cattle by being driven upon the viaducts, the evidence fully sustains the averments in the petition. The cattle were driven up on the viaducts on Sunday May 31st, and in consequence of the inability of anybody to give them water and feed the plaintiffs sustained the injuries by the death and injury to the residue as specified in the petition. The 2200 head mentioned in the petition as having been mixed along with the plaintiffs' cattle as they were driven up on the viaducts, were the cattle of the Minnesota & Dakota Cattle Company which are the subject of controversy in the companion case to this between said Minnesota & Dakota Cattle Company and this defendant. The circumstances attending the driving of these cattle up into the viaducts may be found from the testimony of W. H. Frost, (Record, 37, 123, 298). Albert Newton (Record, 130); L. A. Allen (Record, 226), and Charles Stube (Record, 384). The uncontradicted evidence in the case shows that defendant after depositing said cattle of plaintiffs, without the consent of plaintiffs, in the Kansas City stock yards, on Saturday morning, May 30th, gave them no further attention or care. The defendant seems to have adopted the theory, that the defendant company when it delivered the cattle to the Kansas City stock yards, owed no further duty to plaintiffs respecting said cattle or respecting their care in any way. The evidence of H. P. Child, (Record, 529) and J. W. S. Hutchins, (Record, 542) was introduced by the defendant for the purpose of showing that where a shipment of cattle is made to pass through Kansas City and the cattle thus shipped are delivered by the railway company bringing them to the Kansas City stock yards, where another company is to take the cattle from Kansas City, the delivering company is under no further obligations after delivering

the cattle to the Kansas City stock yards. The contention of the plaintiffs in the trial below and here, was and is that that evidence is not applicable to this case, for the reason that it was not within the contemplation of the parties to this suit that the cattle in controversy were to be shipped to Kansas City or that they were under any circumstances to be delivered to the Kansas City stock yards. The evidence shows that the defendant did not intend to give and did not give as already stated any attention to plaintiffs' cattle after they were deposited in the Kansas City stock yards.

Mr. G. A. Roberts (Record, 522-523) who was the local live stock agent of the defendant company at Kansas City on cross examination by plaintiffs' counsel, testified as follows:

Q. Why didn't you people get that train out of here? A. I don't know.

Q. You knew about the other three trains coming in Friday morning about 6:30 didn't you? A No, sir.

Q. Saturday morning I mean? A. I suppose I knew it in a general way, yes, sir.

Q. Why didn't you get them out? A. I might say we did not get them out because it was not our business to get them out; we had hauled them in and it was up to the connecting line to get them out.

As we have seen there was no connecting line in this case, whose business it was, in the way the shipment was made to receive the cattle from the defendant company at Kansas City; the routing of the cattle did not contemplate that they were to be brought to Kansas City by the defendant company or hauled from Kansas City by defendant or any other company, much less was there any evidence to show that it was the design of the parties in the routing that the connecting company in the

transit were to take the cattle from the defendant company at Kansas City.

The reason, therefore, given by the witness Roberts, that the defendant company gave the cattle no further attention after they were deposited in the stock yards, because the defendant company had hauled them in and "it was up to the connecting line to get them out", is wholly insufficient as a reason in this case for the reason that there was no connecting line, and that the defendant's duty could not and did not end until it delivered the cattle safely to the connecting carrier at Atchison, Kansas. A delivery at Atchison, Kansas, is the only delivery by the defendant that satisfied the contract in this case. As a matter of fact, however, the defendant recognized itself as still in possession of the cattle from and after the flood. This is shown by the way bills read in evidence (Record, 121). A reference to the way bill there which accompanied these cattle from Hereford, Texas, to Evarts, South Dakota, shows the following endorsement on the bill of lading: "Reloaded July 10th, 1903, Lang, Kansas." This endorsement on the way bill was made under the following circumstances; the defendant company after the flood had subsided, and the cattle in controversy had been taken down again into the stock yards, reloaded the plaintiffs' cattle and took them out to its pastures near Lang, Kansas, the next station to Emporia, Kansas, and on July 10th, the cattle having been revived sufficiently by their pasturage there to be reshipped were reloaded by the defendant and hauled from Emporia and Lang, Kansas, by way of Topeka to Atchison, and there delivered to the Burlington as the connecting carrier and taken on through to Evarts, South Dakota . The use of this original way bill made at Hereford, Texas, to accompany the shipment through by the defendant

company in reloading and taking the cattle after the flood, shows that the defendant regarded its duty as to carrying the cattle through as still existing after the flood, notwithstanding the previous delivery by the defendant company of the cattle to the Kansas City stock yards company which latter company held the cattle as defendant's bailee. As further bearing on this point, the evidence shows that the defendant company paid the charges of the Kansas City Stock Yards Company when the defendant received the cattle back from that company and when the cattle were shipped from Lang, Kansas, as already stated, by the defendant company, to go through to destination at Evarts, South Dakota, the defendant company exacted from the plaintiffs, and the plaintiffs gave the defendant a bond (Record, 127-128). This bond is a distinct recognition by the defendant company that the defendant company had had possession of plaintiffs' cattle before, during and after the flood and the purpose of that bond was to secure the defendant company in the charges paid by the defendant company for the cattle while in the Kansas City stock yards, and the charges of defendant company for pasturage at Emporia and Lang, Kansas, if, in the course of the litigation, which it was understood would follow, the plaintiffs should be held liable for those charges. And as further bearing on this point, we call attention to the deposition (Record, 422) of Gardiner Lathrop, who was then, the general attorney of the defendant for Missouri, and is now the honored general solicitor of the defendant company for all of its lines. After the flood at Kansas City, and after the cattle of the plaintiffs were taken down from the viaducts into the stock yards, there were interviews between Mr. Combs, the general live stock agent of the defendant and Mr. Lathrop, its attorney, and the attorneys of the plaintiffs in this case, and of the Minne-

sota & Dakota Cattle Company, in the other case. At one of these interviews, Mr. Lathrop, speaking for the defendant company, desired plaintiffs in these actions to take the cattle off of the hands of the defendant company, so as to relieve the defendant from the duty and burden of the further shipment of the cattle to their point of destination in South Dakota. On this point Mr. Lathrop (Record, 423) testified as follows: "I remember this that we had wanted that the plaintiffs in this case should take the cattle off of our hands and take charge of them and ship them to destination and take care of them until ready to ship and that offer was declined."

As further supporting the proposition of fact that the defendant gave no attention to the plaintiffs' cattle after the deposit of the cattle by defendant in the Kansas City stock yards, we refer to the evidence of Mr. A. W. Combs (Record, 580). Mr. Combs was the assistant general live stock agent of the defendant company at Kansas City, and testified as a witness for the defendant in this case. Mr. Combs testified as follows:

Q. It has been suggested in evidence or in questions of counsel that you might have removed those cattle from the stock yards here, why didn't you do it? A. Why it never entered into the heads of anybody in the stock yards I don't think to move any stock out of the stock yards, we never thought of such a thing and there never was any such a suggestion made by anybody, and did not deem it necessary; I talked with the stock yards foreman, Mr. Hutchings, Saturday evening
* * *

Q. Was there any other reason why you did not attempt to move the cattle in question? A. We supposed that we had the cattle delivered to the stock yards company and other carriers, connecting carriers.

Q. You may state whether or not from your experience there and the custom of the yards, you considered what had been done as a delivery of the cattle? A. Yes, sir, we did everything that is customary to do in

delivering cattle to the connecting carrier, it was done in the same usual manner that it is the custom always to do, we delivered those cattle to the stock yards company for the connecting carrier and those which were to go through without feeding we delivered to the Missouri Pacific." As we have already seen the defendant in this case was not excused from looking after the cattle and removing them from the stock yards after the cattle were deposited by defendant in the stock yards on the ground of a connecting carrier, because there was no connecting carrier in this case to receive the cattle from the defendant company in Kansas City, and for the further reason that the defendant during and ever since the flood has recognized as we have seen, in various ways, the defendant company as always being in possession of plaintiffs' cattle until they were delivered by the defendant to the connecting carrier, at Atchison, and finally shipped out to their destination at Evarts, South Dakota, inclusive of the time the cattle were in the stock yards. The contention of the defendant below was and is here, that it did not owe any duty to plaintiffs' cattle after they were delivered into the stock yards. It is not denied by the defendant, if it owed the duty to plaintiffs to care for plaintiffs' cattle after they were delivered into the stock yards, the same as if defendant had never delivered them to the said stock yards, that defendant did not perform that duty; in short, it is not denied by defendant that it did not care for plaintiffs' cattle after they were delivered into the stock yards, if defendant owed said cattle any duty while they were therein. The issue tendered by defendant on this branch of the case is, that having delivered the cattle into the stock yards, the defendant no longer owed any duty in respect thereto. The defendant does not deny that it did not perform its duty, if it owed a duty. As we have seen, the cattle as a matter of fact, as between plaintiffs and defendant, were still in defend-

ant's possession, notwithstanding the delivery of the cattle into the stock yards, because their delivery by defendant in the stock yards was without plaintiffs' consent, and because there was no connecting carrier at Kansas City in the case, and because all the uncontradicted evidence in the case shows that the defendant treated itself as being in possession of said cattle while in the stock yards and during and after the flood and until their delivery to the connecting carrier at Atchison in their final transit after the flood.

What was true as we have seen of Roberts and Combs, with respect to their neglect of plaintiffs' cattle, after they were deposited in the stock yards, is also true of the witness Sharp (Record, 593) who, as we have seen was the general superintendent of defendant of terminals at Kansas City, and also of General Superintendent Hurley. As the foregoing statement shows, Messrs. Sharp and Hurley, although giving close attention on Saturday, May 30th, to the removal of freight cars and dead freight therein, and to the removal thereof from Argentine to Kansas City, gave no attention whatever to plaintiffs' cattle after they were deposited that Saturday morning in stock yards. The telegrams in evidence show that Mr. Hurley had been giving the closest attention to plaintiffs' cattle up to that Saturday, but the evidence of Mr. Sharp and the other evidence, shows that neither Mr. Sharp nor Mr. Hurley gave any attention to plaintiffs' cattle after they were shipped from Emporia to Kansas City. The cattle of plaintiffs in this action and the 2200 head of cattle involved in the other case, of the Minnesota & Dakota Cattle Company which were mixed together and taken up at the same time on the viaducts were worth in the aggregate from seventy-five to one hundred thousand dollars, and yet the uncontradicted evidence and facts in the

case show that neither Mr. Hurley nor Mr. Sharp gave the slightest attention to those cattle from the time they were deposited in the stock yards Saturday morning. There was considerable evidence at the trial offered and introduced by the defendant to show that the houses and stocks of goods, packing houses and other buildings and properties in the Kaw valley at Kansas City, were not removed before the climax of the flood. The testimony given for the defendant by the witness William Fletcher (Record, 552) and H. S. Swingley (Record, 564) was introduced by the defendant on this point. Of course, it was not shown and could not be shown that either the houses or stocks of goods at Kansas City in the valley of the Kaw, were placed at their locations therein after the rise of the flood of May 1903. Those houses and stocks of goods had been at the places where they were submerged by the flood for months and years prior to that flood. It was not shown, and could not be shown that the houses or stocks of goods could have been removed after the flood had reached the height it had reached, when the cattle in controversy were brought to the Kaw valley and were deposited in the stock yards. In this connection we call attention to the fact that the defendant's evidence shows that there was practically no live stock in the Kaw valley at Kansas City, Saturday, May 30th, 1903, or thereafter aside from the cattle involved in these two cases. The evidence shows that all of the cattle that were in the Kansas City stock yards at the time the cattle in these two cases were driven on to the viaducts, aside from these cattle were about 300 head. The cattle which were driven up on the viaducts was the 800 head in this case, the 2300 head in the case of the Minnesota & Dakota Cattle Company and about 300 head of other cattle making 3400 head altogether. Although the daily receipts in the Kansas City stock yards

of cattle are well known to run up into the thousands and tens of thousands, there is no evidence to show that there were any other cattle in those stock yards at the time these cattle were driven up on the viaducts except the two bunches in these two cases and said other 300 head. All of the cattle that were in the stock yards were driven up in the viaducts and the evidence shows that all the cattle that were driven up on the viaducts were these two bunches in these cases and the other 300 head. So far as the evidence shows there was not a single head of cattle in the packing houses in Kansas City when the climax of the flood came. The Sparks Brothers, as we have seen got out all of their mules, and everything that had legs with which to walk was gotten out of the Kaw valley, at Kansas City, except the cattle in these two cases and said other 300 head. A large amount of testimony introduced by the defendant and covering very many pages of this record showing that the houses and stocks of goods in the Kaw valley at Kansas City were not removed, is mere lumber in the case, and has no tendency to show what was the defendant's duty respecting the live stock in this case, which as we have seen was worth from seventy-five to one hundred thousand dollars, and which the defendant with its eyes wide open, brought to the very mouth of the Kaw river at the most dangerous point in the flood, and on the eve of its greatest height, and at the very time of its climax.

The averments in the pleadings in this action of the giving of notices by the plaintiffs to defendant of the loss and damage, were amply proven by evidence (Record, 111 to 116) and all of the averments of the petition and reply of the plaintiffs were amply proven at the trial by uncontradicted evidence contained in the bill of exceptions.

There are other facts shown in the evidence, but we will refer to them in our brief and argument.

SPECIFICATIONS OF ERRORS.

1. The trial court erred in refusing to give at the conclusion of all of the testimony the instruction and charge tendered and requested on behalf of plaintiffs, that under all of the evidence the jury should find that the defendant was liable, and to find for plaintiffs (Record, 637).

The court should have given this instruction on the ground of the wrongful deviation of the cattle without plaintiffs' consent, and for the reason that such deviation as a matter of law made the defendant liable for the consequence which ensued therefrom.

2. The Court erred after the refusal of said peremptory instruction, in refusing to give and charge the jury at plaintiffs' request instructions numbered from 1 to 13 inclusive (Record, 638-644). These instructions asked by the plaintiffs and refused by the trial court presented the issues of this case to the jury upon the question of negligence, and the court erred by their refusal.

3. The court erred in sustaining the motion and request of the defendant railway company to direct, and in directing the jury to render a verdict for the defendant and against the plaintiffs. (P. 644.)

4. The court erred in its opinion shown in the record, in saying:

> "It therefore follows on the main case, the "request for instructions to the jury to render a "verdict for the defendant must be sustained and "the like request of the plaintiff must be denied: "this will be done." (P. 655.)

POINTS AND AUTHORITIES.

I.

In this case, as the record shows, there were some exceptions by the plaintiffs in error to the rulings of the trial court in the exclusion of evidence offered by them and objected to by the defendant. We do not desire at this point in the brief to discuss those rulings. The trial court having ruled that upon all the evidence the plaintiff had no case, we submit at this time that the evidence which was excluded should be considered by this court with the evidence which was received . The plaintiffs in error in these cases are entitled in the consideration by this court of these appeals, to have all of the evidence in the record considered, the evidence offered by plaintiffs in error and excluded by the court, as well as the evidence that was received. *Ry. Co.* v. *Harris,* 12 C. C. A., 598, l. c. 602. In that case, which was decided by this court, it was adjudged that the rule is well settled that when a plaintiff offers and is ready to produce competent evidence to prove a material fact in issue, and the court rejects the evidence on the objection of the defendant, the defendant will not aftrwards be permitted to allege that the plaintiff failed to prove the facts alleged in the offer of evidence.

II.

The consideration of this cause involves in general two questions: (1) Whether the railway company is liable on account of the deviation of the shipment from Strong City to Kansas City; and (2) whether the railway company is liable on account of the several negligences charged and proven. The question of deviation raises a question of law pure and simple upon conceded facts. The question of negligences involves mixed ques-

tions of law and fact for determination by a jury under proper instructions from the court. To meet these two phases of the case, arising on the points of deviation and negligence, the plaintiffs in error asked two sets of instructions, one a peremptory instruction asking the court to instruct the jury to return a verdict for the plaintiffs, based upon the proposition of deviation, and at the same time plaintiffs submitted to the court a series of instructions submitting the issues to the jury on the propositions of negligence. It is the undoubted rule of this court that where both parties in a trial by a jury ask, on the whole case, the court to give a peremptory instruction to the jury, they are both precluded thereby, and both parties in such cases stand in the same predicament as if they had asked the court to decide the case as a matter of law. A different rule, however, arises in this case because the plaintiffs in error submitted, as they had the right to do, two sets of instructions at the same time, one asking the court to peremptorily rule the case in favor of plaintiffs on the proposition of deviation, and the other instructions asking the court in effect that if the peremptory instruction should be denied, to then submit the case to the jury on the proposition of negligence, for their determination. Of course, it will not be denied that plaintiffs had the right to insist upon the liability of the defendant on each of both propositions of deviation and negligence, and the plaintiffs therefore cannot be held to have waived its right by asking a peremptory instruction to a submission to the jury of the question of negligence, in the event that the court should deny their peremptory instruction, and we submit that plaintiffs in error have the right to maintain both propositions in this court.

III.

Unless the court felt required to give our peremptory instruction on the basis of deviation, it should have submitted the question of negligence to the jury by proper instructions, such as we asked (page 638, Record). That the court should have submitted the question of negligence to the jury and that that question was a proper question for the jury is the settled law of the Federal appellate courts. *R. R. Co.* v. *Stout*, 17 Wallace, 657, l. c., 663. In that case the United States Supreme Court, in its opinion, used the following language: "It is true, in many cases, that where the facts are undisputed the effect of them is for the judgment of the court, and not for the decision of the jury. This is true in that class of cases where the existence of such facts come in question rather than where deductions or inferences are to be made from the facts. If a deed be given in evidence, a contract proven, or its breach testified to, the existence of such deed, contract, or breach, there being nothing in derogation of the evidence, is no doubt to be ruled as a question of law. In some cases, too, the necessary inference from the proof is so certain that it may be ruled as a question of law. If a sane man voluntarily throws himself in contact with a passing engine, there being nothing to counteract the effect of this action, it may be ruled as a matter of law that the injury to him resulted from his own fault, and that no action can be sustained by him or his representatives. So, if a coach-driver intentionally drives within a few inches of a precipice, and an accident happens, negligence may be ruled as a question of law. On the other hand, if he had placed a suitable distance between his coach and the precipice, but by the breaking of a rein or an axle, which could not have been anticipated, an injury oc-

curred, it might be ruled as a question of law that there was no negligence and no liability. But these are extreme cases. The range between them is almost infinite in variety and extent. It is in relation to these intermediate cases that the opposite rule prevails. Upon the facts proven in such cases, it is a matter of judgment and discretion, of sound inference, what is the deduction to be drawn from the undisputed facts. Certain facts we may suppose to be clearly established from which one sensible, impartial man would infer that proper care had not been used, and that negligence existed; another man equally sensible and equally impartial would infer that proper care had been used, and that there was no negligence. It is this class of cases and those akin to it that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge."

In the case of *Union Pacific Ry. Co.* v. *McDonald*, 152 U. S., 262, l. c., 275, decided as late as 1893, the United States Supreme Court, in its opinion, said: "The principles announced in *R. R. Co.* v. *Stout* have been approved in many adjudged cases." And at page 279, in the same opinion, the United States Supreme Court says: "We adhere to the principles announced in *R. R. Co.* v. *Stout, supra.*" See also *Marande* v. *R. R. Co.*, 184 U. S.,

173, which is precisely in point and the latest utterance of the United States Supreme Court. In this case, as appears from the written opinion of the learned trial court, there were four specifications of negligence relied upon by the plaintiffs in their petition:

(1) That the railway company was negligent in the detention of plaintiffs' cattle at Wellington and Strong City, Kansas, and that the company could have carried said cattle to Atchison, Kansas, by way of Topeka and delivered the same to a connecting carrier at that point.

(2) That defendant company was negligent after thus detaining the cattle at Wellington and Strong City, in not further detaining and holding them in those places until the flood, which had been on in the Kaw river, had subsided.

(3) That the company was negligent in diverging and deviating the shipments to Kansas City, and in taking the cattle into the lowlands at the mouth of the river in front of the approaching flood. And

(4) That the company was negligent in failing to move or cause to be moved the cattle from their position of peril in the stock yards at Kansas City before the arrival of the climax of the flood.

All of these acts of negligence were continuous and connected, constituting one uninterrupted and continuous negligence, and all arising after the inception of the flood and not anterior to it.

In cases of negligence, where the negligence consists of the failure to perform some positive duty created by law, the question of negligence is a question of law where the facts are undisputed, but in cases like this, where the negligences are violations of duties to be asecrtained and found as facts by the jury under instructions of the court, it cannot be said that the question of negli-

gence to perform the duty so found is ever a question of law.

In this case the question of negligence on the part of the defendant company with respect to all of the assignments of negligence, was a question to be determined as a mixed question of law and fact by the jury. It was the duty and province of the jury to determine what the duty of the defendant company was with respect to each and all of the four assignments named, and having determined the duty under the instructions and guidance of the court, then it was the province of the jury to determine whether the company was guilty of negligence in the discharge of the duty so found. See Vol. 8, Rose's Notes on U. S. Rep., where the cases following and citing the case of *R. R. Co.* v. *Stout, supra,* are collected.

If it was the duty of the court in this case to pronounce judgment on the issue of negligence, on the ground that the facts on that issue were undisputed, then that judgment should have been for plaintiffs and not for defendant.

IV.

The question of proximate cause was also a question for the jury, and not for the court, and the court erred in not submitting the question of proximate cause to the jury. This was the distinct proposition ruled in the case of *Milwaukee & St. Paul Ry. Co.* v *Kellogg*, 94 U. S., 469. In that case it was adjudged by the United States Supreme Court that "the question as to what is the proximate cause of an injury is ordinarily not one of science or of legal knowledge, but a fact for the jury to determine in view of the accompanying circumstances." In the opinion in that case the Court said: "The assignment presents the oft-embarrassing question, what is and what is not the promimate cause of an injury. The point

propounded to the court assumed that it was a question of law in this case; and in its support the two cases of *Ryan* v. *The New York Central Railroad Co.*, 35 N. Y., 210, and *Kerr* v. *Pennsylvania Railroad Co.*, 62 Penn. St., 353, are relied upon. Those cases have been the subject of much criticism since they were decided; and it may, perhaps, be doubted whether they have always been quite understood. If they were intended to assert the doctrine that when a building has been set on fire through the negligence of a party, and a second building has been fired from the first, it is a conclusion of law that the owner of the second has no recourse to the negligent wrongdoer, they have not been accepted as authority for such a doctrine, even in the States where the decisions were made. *Webb* v. *The Rome, Watertown, & Ogdensburg Railroad Co.*, 49 N. Y., 420, and *Pennsylvania Railroad Co.* v *Hope*, 80 Penn. St., 373. And certainly they are in conflict with numerous other decided cases. *Kellogg* v. *The Chicago & Northwestern Railroad Co.*, 26 Wis., 224; *Perley* v. *The Eastern Railroad Co.*, 98 Mass., 414; *Higgins* v. *Dewey*, 107 Id., 494; *Tent* v. *The Toledo, Peoria & Warsaw Railroad Co.*, 49 Ill., 349. The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market-place." We are not aware that that explicit ruling by the United States Supreme Court has ever been reversed or modified, and it would not be helpful to cite other cases affirming the

same proposition. The cases following and reaffirming the above proposition in the Kellogg case, that the question of proximate cause is one for the jury, may be found collected in Vol. 9 of Rose's Notes on the U. S. Rep., p. 125.

V.

The errors of the trial court in this case, we think, will be abundantly manifest from the opinion of the trial court itself. That opinion is reported in full in Vol. 135, Fed. Rep., 135, and also is reported in the printed record in this case (page 645, Record). We will quote herein from the opinion by the pages thereof as it appears in the Federal Reporter. At the bottom of page 140, the learned trial judge says: "It is not enough in this case that plaintiffs show that some act of negligence of the defendant furnished the occasion for the loss, or that some act of negligence of the defendant contributed to the injury." We submit that this statement of the law is erroneous. The trial judge decided that, even though the negligence of the defendant contributed to the injury, still the defendant was not liable. This, we submit, is not the law. We do not believe that any authority can be found anywhere which affirms non-liability where the negligence of the defendant contributed with the act of God to produce the injury. Even the case of *R. R. Co. v. Reeves*, 10 Wallace, 176, which is relied upon as the leading case on the other side, distinctly and throughout recognizes liability on the part of the carrier if its negligence contribute, with the act of God, to produce the injury, and we do not believe any decision can be found anywhere, save and except alone the decision of the trial judge in this case, which affirms non-liability where the company's negligence contributed to produce the damage and injury.

Again, at page 143, the trial court, in its opinion in this case, used the following language: "It may be conceded that the cattle need not have been brought into Kansas City in the first instance, or, being in, that they could have been removed in the cars in which they arrived, or in others or on foot. Guided by events that followed as now seen by us today, the cattle no doubt should and unquestionably would have been removed from their place of peril." The duty of the defendant company was no different after the flood was over than it was before. If, as the learned judge says, the cattle "could have been removed in the cars in which they arrived, or in others or on foot," then it was a question for the jury to say whether, as was done by other owners of live stock, it was the duty of the defendant company to have removed the cattle in the cars in which they arrived, or in others or on foot, and whether the company was guilty of neglect of that duty. The court says that the defendant company could have removed the cattle, either in the cars or in others or on foot, and then the court says that, as matters seem to us now, "the cattle undoubtedly should and unquestionably would have been removed from their place of peril." As the flood had been on for a week in advance of the bringing of the cattle to Kansas City, what reason was there for the court saying, as a matter of law, that the duty of the company was any different during that entire week than what that duty now seems to have been? If the flood at Kansas City on that fatal Sunday had come suddenly and without warning, like a thief in the night, or a cyclone in a breath, there might be some reason for distinguishing between what the duty of the company as it seems now and what it was before the coming of that cyclone, and if the cattle "undoubtedly should and unquestionably would have been removed from their place

of peril," how can the court say, as a matter of law, that the company was not negligent, and that that negligence did not contribute to produce the injury? Then the court follows the above language by the following: "That these circumstances and acts of the defendant company furnished an occasion for the loss is unquestionable, but that the direct and proximate cause of the loss and damage was the unprecedented and unexpected flood and attendant destruction that came wholly without anticipation on the part of the defendant company." These last quoted remarks are subject, as it seems to us, to several criticisms. In the first place the flood was not unexpected. The flood had been on over a week. The rains causing the flood had been falling a month. The flood in the Kaw valley was on when the cattle arrived at Strong City. The cattle were delayed two days and over at Strong City, in consequence of the flood. The deviation which took place at Strong City and Emporia was in consequence of the flood. All of the acts of negligence charged against the defendant company took place after the flood was on. The defendant's lines from Emporia to Topeka and from there to Atchison and from Topeka to Kansas City were all flooded before the deviation, and defendant came to Kansas City with these cattle over another road. In view of all these facts, the remark of the court that the flood was "unexpected" is rather remarkable. If, after the plaintiffs' cattle had been put in the stock yards, they had been injured and damaged by a cyclone or fire, there would be some reason for saying that such cyclone or fire, being wholly unexpected, was the proximate cause of the injury. But it is not correct in this case to say that the flood was at any time unexpected after the arrival of the cattle at Strong City. Nor was it correct for the learned trial judge to say in his opinion that the flood was without

anticipation at the time it reached its climax on Sunday, for the reason that on Saturday, the day before, under the direction of the general superintendent of the company, the defendant moved 1,300 or 1,400 cars from its yards in Argentine to the highest place where the cars could be placed at Kansas City. There were 1,400 cars altogether, and the very best that the company could do with those cars was done. They could not have been taken out of the Kaw valley at Kansas City, but they were placed upon the highest ground possible in Kansas City. But while those cars were left, as they were forced to be left, in the bottoms at Kansas City, the company not having sufficient means to take them away or out of the bottom, still the plaintiffs' cattle could have been taken out by being driven out as other people drove out their live stock. And in view of this action of the defendant company with respect to said 1,400 cars on Saturday, it will not do to say in this case that the flood which had been on for a week was, on Sunday following that Saturday, "without anticipation on the part of the defendant company." It may not have anticipated that the flood would reach the heights it reached, but for more than two days before it reached its climax on Sunday, it knew full well that a flood so large and dangerous as to flood all its Kansas lines of railway over which these cattle could be shipped, was on, and that that flood was rising higher hourly from the increasing and unprecedented rains which had continued with slight intervals nearly a month. The learned trial judge in his opinion, at pages 138 and 139, summarizes the fact in words as follows: "It appears from the evidence that "during the greater part of May, 1903, unusual and "unprecedented rains fell in the watershed of the Kansas "river, which empties into the Missouri river at Kansas "City. To such an extent was this true that a vast

"amount of property located in the valley was inundated "and destroyed by high water in the Kaw river following "in consequence of such rain. The railways running "along and across this valley were overflowed and the "property destroyed. * * * At the time the cattle "were carried to Kansas City by the defendant company, "its lines of road from Topeka to Atchison and from "Topeka to Kansas City were submerged by the flood, "and could not be operated." In addition to the fact thus stated by the trial judge the evidence showed that Friday night, which was before the arrival of the cattle at Kansas City, a sudden rise, something like a tidal wave, reached Topeka in its onward flow down the valley of the Kaw river.

In view of these conceded facts, the conclusion of the learned trial judge that the flood was unexpected as expressed in his words cited above: "That these circum- "stances and acts of the defendant company furnished "an occasion for the loss is unquestionable, but that the "direct and proximate cause of the loss and damage was "the unprecedented and *unexpected* flood and attendant "destruction that came wholly *without anticipation* on "the part of the defendant company," is absolutely without support or foundation.

In support of the proposition that contributory negligence of the carrier renders it liable, notwithstanding the act of God relied on by it as the cause, see the following authorities from which citations are made in our argument following these points, viz.:

Szeczey v. *Philadelphia*, 64 Pa. St., 106; *Helbling* v. *Cemetery Co.*, 201 Pa. St., 171; *Morrison* v. *Davis*, 20 Pa. St., l. c., 176-177; *Williams* v. *Grant*, 1 Conn., 487; *Wallace* v. *Clayton*, 42 Ga., 443; *R. R. Co.* v. *White*, 88 Ga., 805; *Merritt* v. *Earle*, 29 N. Y., 115, l. c., 116f; *Michaels* v. *R. R. Co.*, 30 N. Y., 564, l. c., 570; *Bibb*

Broom Corn Co. v. *A. T. & S. F. Ry. Co.*, 102 N. W. Rep. (Minn. Sup. Ct.), p. 709; *R. R. Co.* v. *Curtiss*, 80 Ill., 324; *Wald* v. *R. R. Co.*, 162 Ill., 545; *Blodgett* v. *Abbott*, 72 Wis., 516; *Nelson* v. *Ry. Co.*, 72 Pac. Rep. (Mon. Sup. Ct.), p. 643, l. c. 651; *Steamboat Co.* v. *Tiers*, 24 N. J. Law Rep., 697; *R. R. Co.* v. *David*, 6 Heisk, 261; *McGraw* v. *R. R. Co.*, 18 W. Va., 361; *Smith* v. *Ry. Co.*, 91 Ala., 455, l. c., 456; *Coosa Steamboat Co.* v. *Barclay*, 30 Ala., 12, l. c., 127; *Nugent* v. *Smith*, 1 C. P. Div., 19 and 423; Vol. 1, Am. & Eng. Enc. of Law (2nd Ed.), 595; Vol. 5, Am. & Eng. Enc. of Law (2d Ed.), 234; Hutchinson on Carriers, Secs. 181, 187, 188; Vol. 6, Cyc. of Law & Proced., 377, 384; *Strauss* v. *Ry. Co.*, 17 Fed. Rep., 209, l. c., 212; *Caldwell* v. *Sou. Ex. Co.*, 4 Fed. Cas., No. 2303, p. 1036; *Thompkins* v. *Duchess of Ulster*, 24 Fed. Cas., No. 14087a, p. 32; *Southern Pac. Co.* v. *Schoer*, 52 C. C. A., 269, l. c., 274; *Newport News Co.* v. *U. S.*, 9 C. C. A., 579; *Clark* v. *Barnwell*, 12 How., 272, l. c., 280; *Holladay* v. *Kennard*, 12 Wall., 254; *Gleason* v. *R. R. Co.*, 140 U. S., 433; The Majestic, 166 U. S., 376, l. c., 386.

VI.

At page 142 the learned trial judge in his opinion upon the branch of the case relating to deviation, frankly admits as follows: "The route originally contemplated by the parties was to Atchison and thence by the Burlington," and the following remark shows clearly that the learned trial judge recognized the line of railway of the defendant from Strong City to Topeka and from there to Atchison as the line over which the cattle were routed. The learned trial judge on the same page, 142, on this branch of the case further says: "By this time it was impossible for the defendant to carry the cattle over its

line to Atchison, or to carry them to Kansas City otherwise than the way they were carried; that the contract of shipment and the circumstances, common business prudence and the law, as well, authorized a departure *from the originally intended route of shipment,* I have no doubt, unless the defendant knew or should have known that by such departure the safety of the shipment would be endangered." This is all that is said by the learned trial judge on the subject of deviation. The above remarks, as it seems to us, are subject to several criticisms. In the first place, according to all of the authorities, as will hereafter be shown in this brief, the defendant company was not authorized to deviate or take the cattle away from Strong City if they were in a safe place at Strong City. If, as the learned judge says, it was impossible for the defendant to carry the cattle over its line to Atchison, or even to Kansas City, otherwise than by another road, namely, the San Francisco Railroad, what reason was there for the defendant to suppose that it could get the cattle out by a roundabout transit through Kansas City, and thence up through the Missouri valley over practically the same route the cattle would have to go from Atchison northward? The flood was coming down the Kaw river. If the flood was so bad at Topeka that the cattle could not be crossed there, what reason was there for supposing that the cattle could be gotten across at Kansas City? The cattle were in a safe place at Strong City and should have been left there. By the deviation of the cattle from Strong City they were taken from a safe place into what was then known to be a hazardous place. If the cattle, as the defendant company well knew, could not be taken across the Kaw river at Topeka, then the Kaw river at Topeka was certainly a hazardous place, and if the Kaw river at Topeka was a hazardous place, most certainly the Kaw

river at Kansas City would be a hazardous place by the time the shipment arrived there. In all the cases of deviation where the court has sustained the devitaion, it was because the cattle were in an unsafe place at the time of deviation. The cattle were in a safe place at Strong City. They were there in the feed lots of the defendant company, far removed from the Kaw valley. In all of the cases where deviations have been sustained, the line to which the deviation has been made was not beset with any of the troubles which made the deviation necessary. In this case the line to which the cattle were deviated was a more dangerous line than the line of railway on which the cattle were originally routed. Again, on this subject of deviation, all the authorities agree that even when the deviation is made necessary the carrier should consult the owner of the cargo shipped. At page 137 the trial court, in its opinion, said: "The cattle were accompanied at all times by the owners of the stock or their representatives in charge, signing the contracts." The deviation in this case was absolutely wrongful for the reason that the company never consulted with the owners or parties in charge of the stock. The deviation of the cattle to Kansas City was both wrongful and negligent. If it was negligent, which was a question for the jury, the company was liable on that ground. If the cattle were safe at Strong City, then it was unnecessary, and therefore wrongful, and if wrongful, the defendant is liable. If the deviation from Strong City to Kansas City was made without the consent of the shippers, then, according to all the authorities, it was wrongful and the company is liable on that ground alone. The learned judge, at page 142, in the language we have cited above, says that the deviation was justifiable "unless the defendant knew or should have known that by such departure the safety of the shipment would be endangered."

These words bear upon the question of negligence, but, as we have seen, the deviation was wrongful, for there was no necessity for taking the cattle from Strong City, and because, as is the conceded fact in the case, they were taken without the consent of the shippers.

At the bottom of page 142 and top of page 143 of his opinion, the learned trial judge couples the bringing of the cattle to Kansas City and putting them in the Kansas City stock yards as one act. This is erroneous. When the cattle were deviated at Strong City and Emporia it was with the purpose on the part of defendant company to deliver them to the Missouri Pacific Railway Company at Kansas City, and that that company would carry the cattle from Kansas City to Omaha, up the same Missouri river valley up which the cattle were originally routed to go over the Burlington from Atchison to Council Bluffs. The defendant company did not intend to deposit and leave the cattle in the Kansas City stock yards until after their arrival in Kansas City. At the top of page 143 the learned trial judge speaks somewhat eloquently of the safety in ordinary times of the Kansas City stock yards. The defendant company was, from the arrival of the cattle at Strong City, not acting in ordinary times. One of three great floods of 1844, 1881 and 1903 was already on when the cattle reached and left Strong City. An ordinary safe warehouse in Chicago was not a proper place in which to deposit goods during the great Chicago fire, much less was it a proper place to which to deviate a shipment not destined to that city. (*Mer. Dis. Tr. Co.* v. *Kahn*, 76 Ill., 529.) The Kansas City stock yards on May 30th and 31st, 1903, was as unsafe a place in which to deposit these $100,000 worth of cattle as was a Chicago warehouse during the great fire in that city. This being so, it is immaterial whether the purpose to put the cattle in the Kansas City stock yards originated at Strong City and Emporia, or after

the arrival of the cattle at Kansas City. The learned trial judge, at the top of page 143, in speaking of the Kansas City stock yards, eloquently says, "that in all the "history of these yards they had not been overflowed or "endangered by overflow." One would think from this remark that those yards were a very ancient institution. The facts are that neither those yards or Kansas City itself were even dreamed of until sometime after the flood of 1844, and that those yards did not have anything more than an embryo existence until after the flood of 1881. The foregoing propositions, as to the effect of the admitted deviation in this case and the consequent liability of defendant, are abundantly sustained by the authorities: *Crosby* v. *Fitch*, 12 Conn., 410, l. c., 419, 420, 423; *R. R. Co.* v. *Beck*, 125 Pa. St., 620; *Phillips* v. *Bingham*, 26 Ga., 617; *R. R. Co.* v. *Cole*, 68 Ga., 623; *Cassilay* v. *Young*, 4 B. Mon., 265; *Singer* v. *R. R. Co.*, 31 Me., 228, l. c., 238; *R. R. Co.* v. *Washburn*, 22 O. St., 324; *Ex. Co.* v. *Smith*, 33 O. St., 511; *Brown Co.* v. *R. R. Co.*, 63 Minn., 546; *Hedricks* v. *Steamship Co.*, 18 La. Ann., 353: *Hastings* v. *Pepper*, 11 Pick., 41; *Proctor* v. *R. R. Co.*, 105 Mass., 512: *Ry. Co.* v. *Allison*, 59 Tex., 193; *Johnson* v. *Ry. Co.*, 33 N. Y., 610, l. c., 611; *Goodrich* v. *Thompson*, 44 N. Y., 324; *Maghee* v. *R. R. Co.*, 45 N. Y., 514; *Keeney* v. *Ry. Co.*, 47 N. Y., 525; *Robertson* v. *Nat. S. S. Co.*, 14 N. Y. Sup., 313 *Seavey Co.* v. *Union Trans. Co.*, 106 Wis., 394; *Ry. Co.* v. *Brichetto*, 72 Miss., 891; *R. R. Co.* v. *Odil*, 96 Tenn., 61; *Mer. Dis. Tr. Co.* v. *Kahn*, 76 Ill., 520; Vol. 1, Am. & Eng. Enc. of Law (2d Ed.), 594; Vol. 5, Am. & Eng Enc. of Law (2d Ed.), 422, 426; Hutchinson on Carriers, Secs. 190, 191; Lawson on Bailments, Sec. 127; Vol. 6, Cyc. of Law & Procedure, 383, 384; *Marsh* v. *Un. Pac. R. R. Co.*, 9 Fed. Rep., 873; *Ins. Co.* v. *LeRoy*, 7 Cranch., 26; *Hostetter* v. *Park*, 137 U. S., 30, l. c., 40; *Constable* v. *Steamship Co.*, 154 U. S., 51, l. c., 61.

VII.

We submit that the opinion of the trial judge is not supported by the authorities cited therein.

In the case of *R. R. Co.* v. *Wentworth*, 27 S. W. 680, cited by the trial court in its written opinion in this cause, it appears that the sheep which were being transported by the railway company from Texas to Chicago were overtaken while *en route* by a flood, which prevented the further transportation of the sheep on the line on which they were routed, and under those circumstances the railway company deviated the shipment of the sheep over another line on which there was no flood, which involved of necessity a delay, requiring, as it did, more time on the deviated line to get to Chicago than it required over the line on which they were routed. But in that case the sheep could not have been taken to Chicago by reason of the flood over the line over which they were routed, and since the action there was damage to the sheep by delay, the court held that there was no right of action since the sheep were gotten to Chicago in much less time than was necessary to take them by waiting until the flood subsided. There was no flood in that case along the line to which the sheep were deviated, and since the line on which they were routed was wholly obstructed by a flood the court held that the deviation was proper and necessary. The court, in passing on this point, says: "In this case the deviation from the usual or stipulated route was caused by unprecedented floods which rendered it absolutely necessary for the sheep to be carried over the Cotton Belt instead of the St. Louis, Iron Mountain & Southern Railroad, to prevent their loss or at least a much greater delay than actually occurred."

It seems to us that Sec. 311, Hutchinson on Carriers, which is cited by the trial judge in his opinion in con-

nection with the above Texas decision, is an authority against the learned trial judge rather than in favor of his conclusion.

In the case of *Snow* v. *Ry. Co.*, 9 N. E., 702, which in this connection is also cited by the learned trial judge in his opinion, the court held that where the contract was silent as to what line of road the initial carrier should deliver the shipment, that the carrier might select any customary and reasonably safe and direct road of railway to which the initial carrier should deliver the shipment at the terminus of its line, and that since the contract was in writing it was not competent for the parties to prove by parol evidence a prior verbal agreement specifying a certain route. However, we suggest that this decision does not bear upon the question of deviation. This decision with the two authorities above cited was cited by the trial judge in his opinion to sustain the proposition in this case that the defendant railway company was authorized and justified in its deviation of the plaintiffs' cattle from Strong City to Kansas City, but the above decision in the Snow case does not bear upon the question of deviation at all. That decision in the Snow case only bears upon the question of what would be the railway companies right in this case in the selection of a carrier at Atchison if it had carried the cattle by way of Topeka to Atchison. It does not throw any light upon the question of deviation from Strong City and Emporia to Kansas City.

Another decision cited by the learned trial judge in his opinion was the one given by this court in *Ry. Co.* v. *Elliott*, 55 Fed. Rep., 949, 5 C. C. A., 347. An extract from the opinion of Judge Sanborn in that case is contained in the opinion of the trial judge in this case, but the facts in the Elliott case do not serve to throw any light upon the case at bar, as a brief reference thereto

will show. In the Elliott case the plaintiff was in charge of certain stock shipped by rail and was riding in the caboose. Before reaching a certain station where he knew it was usual to change cabooses, he asked the conductor if a change would be made there and was answered in the negative and told that the train would only stop a few moments and he would have no time to examine his stock. On reaching the station, however, he got off, walked forward and examined several cars of the stock, and then turned back, but the train having already started he feared he would be unable to board the caboose and therefore climbed upon a stock car and walked backward along the top of the train. Before he reached the caboose the train had stopped and was backing for the purpose of changing the caboose, and it was kicked off from the train just as he was stepping upon it, causing him to fall to the track, where his foot was crushed by a wheel. And it was held by this court in that case that the statement of the conductor that the caboose would not be changed was not the proximate cause of the injury. The remarks of the court in its opinion in that case, while applicable and proper in disposing of that case on those facts, we submit throw no light upon this case and have no application to it. And it may be observed in this connection that the opinion in said Elliott case is the only opinion of this court cited by the learned trial judge in his very able and exhaustive opinion.

The case of *Ry. Co.* v. *Kellogg*, 94 U. S., 469, is one of the authorities cited by the trial judge in his opinion. In that case there was a verdict and judgment in the trial court against the railway company, based upon the act of the railway company burning the saw mill of the plaintiff on the banks of the Mississippi river. The charge against the railway company was that the fire was negligently communicated from the defendant railway's

steamboat "Jenny Brown" to an elevator built of pine lumber owned by the defendant and standing on the bank of the river, and that the fire was communicated to the plaintiff's saw mill and lumber piles while an unusually strong wind was blowing from the elevator towards the mill and lumber. The Supreme Court of the United States affirmed the verdict and judgment against the railway company. The court in its opinion in that case held that the question as to what is the proximate cause of an injury is ordinarily not one of science or of legal knowledge, but a fact for the jury to determine in view of the accompanying circumstances. It seems to us that the trial judge in this case not only did not follow the opinion of the United States Supreme Court in that case, but plainly disregarded it. It has been the recognized rule of the United States Supreme Court, ever since its decision in said Kellogg case, that it is for the jury to determine the question of proximate cause in this class of cases. The Spreme Court in that case adjudged that the finding of the jury in that case that the burning of plaintiff's mill and lumber was the unavoidable consequence of the burning of the defendant's elevator, which had been caused by their negligence, was in effect a finding that there was no intervening and independent cause between the negligent conduct of the defendants and the injury to the plaintiff. The opinion of the court in the Kellogg case proceeds throughout upon the idea that the question in this class of cases of proximate cause is one of fact for the jury, and we repeat that it is difficult to understand just how the learned trial judge in his opinion in this case felt justified in citing the opinion in the Kellogg case in support of his action directing a verdict for the defendant.

In the case of *Insurance C.* v. *Tweed*, 7 Wallace, 44, which is another authority cited by the learned trail

judge in his opinion, it was held that the defendant was not liable because in that case there was a new, intervening cause of the injury, which relieved the defendant from liability. In that case the plaintiff's cotton in a warehouse was insured against fire. The insurance company's policy contained an exception against fire which might happen by means of an explosion. An explosion took place in another warehouse across the street, resulting in an extensive conflagration embracing several squares of buildings, and among them the warehouse where the cotton in question was stored, which was wholly consumed. The fire was not communicated from the warehouse where the explosion took place directly to the warehouse where the cotton was, but first consumed several intermediate buildings, but the whole fire was a continuous affair from the first explosion and in full headway in about half an hour. The court held under those facts that by reason of the exception in the policy the company was not liable. We submit that it is not indicated in the learned opinion of the trial judge in this case how the said decision in the Tweed case was in any way applicable to the case at bar.

The case of *Ry.* v. *Reeves*, 10 Wallace, 176, which is also cited by the learned trial judge in his opinion, is one of the principal cases, if not the principal case, relied upon by the defendant in error. In the Reeves case there is to be found in the opinion no intimation that the question of proximate cause was not one for determination by the jury. The case was tried in the trial court by a jury and a verdict given against the railway company. The judgment on that verdict was reversed by the United States Supreme Court and a new trial ordered. The reversal is based upon misdirection by the trial court of the jury, but there is no intimation anywhere in the short opinion delivered by Mr. Justice Miller that the

75

question of proximate cause was a question to be determined by the court and not by the jury. The opinion throughout proceeds upon the theory that the question of proximate cause was one for the jury, to be determined by that tribunal under proper instructions of the court, and that the trial court in that case had not given proper instructions. In the opinion in that case it was also adjudged that the carrier, notwithstanding the fact of the existence of an act of God in the form of a storm or flood, is required nevertheless to exercise ordinary diligence to avoid or remedy the effects of the overpowering cause. The injury to the shipment in the Reeves case occurred at Chattanooga, where Mr. Justice Miller says: "There was a most sudden, violent and extraordinary flood." There was, however, nothing in the Reeves case to show that the carrier for four or five days prior to the damage at Chattanooga had held up the shipment for several days 150 or 200 miles distant from Chattanooga, and there was nothing in the Reeves case to show that the carrier had several days' time within which it knew of the existence of the flood, and the facts of that case render it entirely different from the case at bar. There was no deviation in the Reeves case. The court in its opinion in the Reeves case says: "If after he has excused himself by showing the presence of an overpowering cause, it is charged that his negligence contributed to the loss, the proof of this must come from those who assert or rely on it." This language is a clear recognition of the proposition that contributory negligence on the part of the carrier, co-operating with the act of God to produce a loss, renders the carrier liable. Indeed, this proposition could not be denied, being sustained by all of the authorities. However, the learned trial judge in his opinion in this case says: "It is not enough in this case that plaintiffs show that some act of negligence of

the defendant furnished the occasion for the loss or that some act of negligence of the defendant contributed to the injury." We think that the opinion of the trial judge in this case is the only one that will probably be found in the books, where it is asserted that the contributory negligence of the carrier, co-operating with the act of God, does not render the carrier liable. In the Reeves case the trial court by its 5th instruction told the jury that if the damage could have been prevented by any means within the power of the defendant or his agents, and such means were not resorted to, then the jury must find for the plaintiff. The court in the opinion of Justice Miller adjudged that the rule of this instruction was too stringent and reversed the judgment and remanded the case for a new trial.

The case of *Scheffer* v. *R. R.*, 105 U. S., 249, is also cited by the learned trial judge in his opinion. In that case by reason of a collision of railway trains in Virginia a passenger was injured and, becoming thereby disordered in mind and body, he, eight months after his injury, committed suicide, and it was held in that case, which was a suit by his personal representatives against the railway, that his own act of suicide was the proximate cause of his death.

In the case of *Ry. Co.* v. *Ins. Co.*, 139 U. S., 223, which is also cited by the learned trial judge in his opinion, it appears that the railway company had contracted with a compress company to receive and transport all cotton brought by its owners to the warehouse of the company. The railway company neglected to do this, a large mass of cotton was piled and kept by the compress company in the adjoining street, where the cotton thus collected was destroyed by fire from an unknown cause. It was held that the railway company was not responsible for the loss to the owners of the cotton destroyed, for the

reason that the railway company had given no bills of lading for the cotton in the street and the railway company had in fact assumed no custody or control of any of the cotton in the street or of the place where it was kept.

In the case of *The R. D. Bibber,* 50 Fed. Rep., 841, which is also cited by the learned trial judge in his opinion, it appears that a schooner loaded with a cargo of rails to be transported under a bill of lading which excepted liability from dangers of the seas, arrived off the bar at Galveston Harbor. While crossing the bar the vessel from some unknown cause went fast aground. The following night a storm arose which lasted two days and drove the vessel half a mile from the channel and on some shoals. The owner of the cargo brought suit against the vessel to recover the damages, alleging that the stranding was caused by the negligence of the master in not properly lightering the schooner before attempting the bar. The court there held that the grounding of the schooner was not due to the negligence of the master, and that the subsequent storm which arose the following night was the proximate cause of the injury. The case there might have some application to the case at bar if, after the cattle in controversy in this case had nearly reached Emporia while in transit, they had been overtaken by a sudden cyclone, throwing the train off the track and killing the cattle. On those facts the decision in the Bibber case and the decision in the Reeves case might apply; but in the case at bar the negligence of the defendant company commenced and continued after the flood was on and until the climax of the flood was reached. Indeed the negligence of the defendant company seems to have increased from the time of the arrival of the cattle at Strong City until the climax of the flood, in about the same proportion as the increase of the flood.

In the case of *Thomas* v. *Lancaster Mills,* 71 Fed. Rep., 481, which is another authority cited by the learned trial judge in his opinion, it was held that the fact that the destruction of a shipment by fire, occurring during a negligent delay on the part of a carrier in forwarding it, does not render such delay the proximate cause of the loss. That decision would have some application to the case at bar if the cattle of these plaintiffs had been destroyed by a sudden and unexpected fire at Emporia after the two days' negligent delay at Strong City; but in the case at bar, as we have seen, the negligence of the railway company from its commencement at Strong City until the climax of the flood, existed throughout from beginning to end after the flood was on. This flood was not a sudden affair like a fire, a cyclone or a thunder storm It had continued for several days. In the above cases cited by the learned trial judge, if the carrier had been negligent during or after the fire or the storms, or while the fire or storms were on, as in the case at bar, the court would, we think, not have said that the carrier was exempt from its contributory negligence. In the cases cited by the learned trial judge the negligence in each case existed some time anterior to the fire or flood, which in each case came on suddenly and unaware, and did not in any of the cases exist previously to the negligence of the carrier.

The case of *Hoag* v. *R. R. Co.,* 85 Pa., 293, which is also cited by the learned trial judge in his opinion, does not have any application in its facts to the case at bar.

VIII.

We submit that the error of the trial judge is further shown by the following clause of his opinion at page 140: "That it was wholly unanticipated in height and "destructive force is manifest by the undisputed fact

"that millions of dollars worth of property was placed "and left in the valley here at Kansas City by the own- "ers thereof, which was inundated and destroyed." But that "millions of dollars worth of property consisting "as it did of inanimate houses, stocks of goods and fur- "niture therein was placed and left in the valley here "at Kansas City by the owners thereof" long before the commencement of this flood, and it was not possible to move either those inanimate buildings or the immense stores therein at any time during the last week of the flood. There is another fact in this connection not mentioned in the learned opinion of the trial judge: There was not a single head of cattle in any of the Kansas City packing houses when the flood reached its climax, and only a comparatively small number of cattle, in addition to the large bunches of these plaintiffs', was in Kansas City stock yards, although its daily receipts were up into the thousands and tens of thousands of cattle. Sparks Bros. had driven their large herd of mules out of the valley and nearly all the animals which have legs to walk upon were shipped or driven out in time to be saved, and the evidence does not show any live stock loss worthy of mention, except the loss of these plaintiffs.

IX.

At the bottom of page 138 the learned trial judge in his opinion seems to assume that it was necessary to drive the cattle up into the viaducts. The judge says: "To "save the cattle in question from drowning they were "driven up into overhead viaducts." It was unnecessary to drive the cattle up into the viaducts, where they died for want of food and water, if as the trial judge found they could and should have been driven up out of the valley or shipped out on cars as was done with other

live stock. The flood was not the cause of the death of the cattle that died in the viaducts. The cattle were not any of them drowned. They died for want of food and water in the viaducts where they were placed by a human agency, namely the defendant company. If the damage must be ascribed to the last, in the train and succession of events, as was the opinion of the learned trial judge, then the want of food and water in the viaducts where the cattle were driven by men, and not the flood considered as an act of God, was the direct, immediate and proximate cause of the loss. And if the driving of the cattle up into the viaducts was made necessary by the neglect of defendant to drive or ship the cattle up out of the valley, then such negligence and the act of driving the cattle up into the viaducts were the last, efficient, immediate and direct cause of the loss and damage. Some of the authorities agree that where human agency containing no element of negligence contributes to produce the loss, the carrier is not excused by the act of God.

Steamboat Co. v. *Tiers*, 24 N .J. Law, 697; The Majestic, 166 U. S. 376, l. c., 386; *Merritt* v. *Earle*, 29 N. Y., 115, l. c., 116; *Michales* v. *R. R. Co.*, 30 N. Y., 564, l. c., 570, cited in 154 U. S., 66.

X.

The several acts of negligence charged in plaintiffs' petition constitute in their entirety one continuous negligence on the part of the defendant. Each negligence followed the preceding negligences. All those negligences had relation to the flood which preceded them. The case ought not to be decided upon the narrow theory or basis that either one of the first negligences in the train, considered by itself, was not the proximate cause of the in-

jury. If the question of those negligences was a question of fact for the jury, then the trial court erred in not submitting that question to the jury. If the question of the liability of the defendant upon the train of successive negligences was a question for the court, because of the fact that the evidence is undisputed, then the trial court erred in not ruling that question in favor of the plaintiffs. If the evidence upon the question of the train of negligences is undisputed, then we submit that the undisputed fact shows a case of very gross and almost criminal negligence on the part of the defendant company from first to last, and continuing through all the train and continuation of negligences.

The case therefore on the branch of negligence upon either theory of fact or law, must, as it seems to us, be ruled in favor of plaintiffs and against defendant. Either the plaintiffs were entitled to a submission to and a verdict of the jury upon the issue of negligence on all the specifications, or plaintiffs were entitled to the judgment of the court thereon.

ARGUMENT.

I.

In the case of *Rwy. Co.* v. *Harris,* 12 C. C. A., 598, l. c., 602, this court adjudged in an opinion by Caldwell, J., concurred in by Judges Sanborn and Thayer, that where a plaintiff offers and is ready to produce competent evidence to prove a material fact in issue, and the court rejects it on defendant's objection, defendant will not afterwards be permitted to allege that plaintiff failed to prove the facts alleged in the offer of evidence. We submit that the very many items of evidence offered by plaintiffs and wrongly and erroneously excluded by the learned trial court should be considered by this court on these appeals with the other testimony of plaintiffs which, in some instances, was so reluctantly admitted.

II.

Upon the issue of negligence we refer to the following authorities:

In the case of *Livezey* v. *Philadelphia,* 64 Pa. St., 106, l. c., 108, the court in an opinion delivered by Sharswood, J., recognized the principle that where negligence concurs with the act of Providence in causing the injury the defendant is liable, and an opinion of Chief Justice Gibson is cited, recognizing that where the act of Providence was relied upon the happening of the injury must have resulted exclusively from such act of Providence. This does not harmonize with the opinion of the learned trial court in this case that contributory negligence does not render the carrier liable.

So in the case of *Helbling* v. *Cemetery Co.,* 201 Pa. St., 171, the court recognized that where the negligence

of the defendant concurs with the act of God in producing an injury the defendant is liable. In that case there was a judgment for the plaintiff against the cemetery company for $3,500, which was affirmed by the Pennsylvania Supreme Court. The suit by the plaintiff was brought because of injury by water during rain storms to plaintiff's house. The water accumulated at the opening of a city sewer which was on the land of the defendant cemetery company, which sewer received the surface drainage. The negligence of the cemetery company charged was that it had allowed large quantities of brush, weeds and grass to lie along the water courses near the opening of the sewer, and that this so clogged the water it did not have a free passage to the sewer. The defense was that the rainfalls were so extraordinary that their consequences could not be foreseen, and that the injury was therefore attributable solely to an act of God. The appeal presented the question of instructions to the jury in the trial court. The trial court instructed the jury that if the loss resulted wholly from extraordinary floods and not from any act of the defendant, the defendant was not liable. The trial court gave an instruction to the jury in words as follows: "If, however, the weight of the evidence satisfies you that the loss was the result of two concurrent acts, an extraordinary flood and some negligence of the cemetery company assisting in producing the loss, then the cemetery company would be liable." Under this instruction the jury found a verdict for the plaintiff, which was sanctioned both by the trial court and the Supreme Court.

In the case of *Morrison* v. *Davis,* 20 Pa. St., l. c., 176-177, the court used the following language: "We may here say a word as to the care required of carriers when they discover themselves in peril by inevitable accident. In such a case the law requires of them ordinary

care, skill and foresight. This is different in different cases, depending upon the degree of civilization, and in different circumstances depending upon the degree of peril. It is commonly defined as the common prudence which men of business and heads of families usually exhibit in matters that are interesting to them. It increases as difficulties increase. In great danger great care is the ordinary care of prudent men."

In the case at bar the learned trial court was of opinion that no matter how negligent the carrier may have been, still if there was a flood, or act of God as it is called, there is and can be no liability. The trial court seems also to be of opinion that the carrier must have known all the facts before the crisis of the flood that are known now in order to be liable. In the view of the trial court there is nothing left of the law of negligence and there can be no liability in this class of cases.

In the case of *Williams* v. *Grant*, 1 Conn., 487, the court adjudged that the striking of a vessel upon a rock not generally known, and not actually known to the master of the vessel, is *prima facie* an act of God, for which the carrier is not responsible. The court further adjudged that though the situation of the rock was not generally known and was not actually known to the master of the vessel, yet if he exposed the vessel to such accident by any culpable act or omission of his own the defendant was not excused. The verdict in the trial court was in favor of defendants, but the Supreme Court granted a new trial. In one of the opinions of the court in that case it is said, in speaking of dangers of the sea and unavoidable accidents, as follows: "In either case, however, it is a condition precedent to their exoneration that they should have been in no default, or, in other words, that the goods of the bailors should not have been exposed to the peril or accident which occasioned the loss

by their own misconduct, negligence or ignorance. For though the immediate or proximate cause of a loss in any given instance may have been what is termed the act of God or unavoidable accident, yet if the carrier unnecessarily exposed the property to such accident by any culpable act or omission of his own, he is not excused. I recollect a case put in some book to this effect: That if a common hoyman unnecessarily puts to sea under circumstances which render a loss of the goods on board probable, as in very tempestuous weather, he is liable in the event of a loss, though it were immediately occasioned by the elements, over which he had no control. This I take to be the law."

This case is approvingly cited by the United States Supreme Court in *Constable* v. *Steamship Co.*, 154 U. S., l. c., 66.

In the case of *Wallace* v. *Clayton*, 42 Ga., 443, the court adjudged that an unsual or extraordinary flood in a river is such an act of God as excuses a common carrier from his liability, at all events for goods he has undertaken to transport, but even in such case the carrier is bound to exercise the care of a very prudent man to preserve the freight entrusted to him for carriage. It was also held in that case that diligence and the want of it are questions of fact to be determined by the jury under the charge of the court. In its opinion in that case the court said: "It cannot for a moment be denied that a flood such as the evidence in this case discloses is an act of God in the sense of the books, which make such an act an exception to the influences against which a common carrier insures. Indeed the irresistible march of a mighty and unexpected flood is of all others the most terrible exhibition of the powers of nature and the helplessness of man. It is only the Ruler of the Universe who can say with authority to the rushing tide, 'Thus

far shalt thou come and no farther.' When such an event occurs, that rule which makes a common carrier liable at all events gives way. Angel on Carriers, 153-160. But it does not therefore follow that the carrier may fold his hands or that he is to be excused if he is negligent or fails in exercising the diligence of a very prudent man. That duty is always upon him. Even amid the fury of the storm or the rush of the flood he must use that prudence, discretion and energy which experience teaches very prudent men to use under such circumstances. If the loss be by reason of the want of extraordinary diligence in the carrier, then, though the agent of the loss be flood or storm, the carrier is liable. Angel on Carriers, 153-160."

The case of *Richmond R. R. Co.* v. *White*, 88 Ga., 805, is directly in point. In the state of Georgia, where that case arose, there was a statute which provided as follows:

> "Sec. 2066.—One who pursues the business, constantly or continuously for any period of time or any distance, of transportation is a common carrier, and as such is bound to use extraordinary judgment. In cases of loss the presumption of law is against him, and no excuse avails him unless it was occasioned by the act of God or the public enemies of the state."

This last clause of the statute it will at once be recognized is simply in affirmance of the common law. In the above case the Georgia Supreme Court adjudged the following: "The rule of extraordinary diligence imposed upon common carriers by Sec. 2066 of the Code required the exercise of that degree of diligence to avoid unduly exposing goods to injury or destruction by an unforeseen act of God, such as an extraordinary flood or freshet, and also to protect and preserve the goods after the peril has become apparent. And generally, in order

for the carrier to avail himself of the act of God as an excuse, the burden of proof is upon him to establish not only the act of God ultimately occasioned the loss, but that his own negligence did not contribute thereto. For in cases of loss the presumption of law is against him." It was also adjudged in that case that: "After it is shown by dates of shipment that the goods had time to arrive and be delivered to the consignee before the flood occurred, the burden of showing what part of the goods, if any, did not arrive within that time is upon the carrier, and then the burden is upon the consignee to show the damage done to those which did arrive and the amount thereof, in order to recover on the ground of negligence in not giving notice of arrival or in not delivering on application."

It was also adjudged in that case that "As to goods which arrived too late to admit of giving the usual notice to consignees before the flood occurred, the carrier was bound to the exercise of extraordinary diligence in protecting them from damage by the flood whilst they were in his cars or his warehouse." It was also adjudged as applicable to such cases, where goods are overtaken by a flood, that "The measure of extraordinary diligence is that extreme care and caution which very prudent and thoughtful persons use in securing and preserving their own property, and that the acts and efforts constituting that diligence under all the circumstances of the case were for determination by the jury." It was also adjudged in that case that *"Precautions for the protection of property which would have been available as against any previous flood of which the carrier, a railroad company, had knowledge, would not necessarily fill the measure of extraordinary diligence, inasmuch as history or tradition might make it incumbent on the carrier to have more knowledge than that actually possessed, and that*

in such matters it might be just to treat the means of knowledge as equivalent to actual notice." The court in its opinion in that case recognized the difference between the extraordinary diligence required by the above statute in Georgia and the ordinary diligence required by the common law. However, what the court says in its opinion in that case about a liability where there is concurring negligence on the part of the carrier, applies as well to cases arising where the common law rule obtains as to cases arising under statutes like that of Georgia under consideration in that case. In its opinion commencing at page 812 the court there says: "We think moreover that this is where the burden ought to rest, for in its nature the defense of loss by the act of God involves a due accounting by the carrier for his own diligence so as to make it appear that the loss was occasioned by the act of God solely, unmixed with contributory negligence on the part of the carrier. *Doubtless where the carrier is in no previous default and the Providential act is so sudden and of such a nature as to leave no interval of time within which preventive measures against its effects could be taken, the mere proof of the act alone and of the consequent loss would establish the defense. This would be reasonable. But where the circumstances make a plain case for the exercise of some diligence and time for its exercise intervenes after the peril has become apparent, the burden of showing that the requisite diligence was exercised ought to rest upon the carrier.* The inquiry relates to his conduct, and he, his servants and agents, must know what that conduct was, and they of all persons have the best means, and not infrequently the only means, of proving it." Again, at page 814, in its opinion in that case the court said: "It came out in evidence that a part of the goods embraced in this action and which were injured by the flood, arrived at the company's

warehouse in time to have been received by the consignee and removed before the freshet occurred, and that there was not only an omission to give the notice of arrival customary in the business, but probably that these goods, or some of them, were detained by the carrier after they had been applied for by a drayman in behalf of the consignee. So far as these packages of goods were concerned the carrier failed in diligence and thus unduly exposed the goods to loss, before it was known or could be known that they had been put in peril by the particular act of God which subsequently affected them to the owner's damage." In that case the court, as is thus seen, affirmed a liability against the carrier because of the want of proper care on the part of the carrier in advance of the flood, and even in advance of the knowledge of the carrier that a flood was about to come. In that case as to some of the goods, they were not unduly delayed on the way and did not arrive until it was too late to give notice to the consignee before the freshet occurred, and as to these goods the court held that the carrier was bound to exercise diligence in protecting those goods from damage by the flood whilst they were in his cars or in his warehouse. Upon the branch of the case as to the existence of the danger, the question whether in that case the carrier exercised proper care to save the goods after the flood was on, the Supreme Court said: "The question for the jury was whether the company did as much as it could or ought to have done under the rule of dilligence to which it was subject and under all the circumstances which surrounded it." The court in its opinion in that case clearly recognized that it was the duty of the carrier to exercise either ordinary diligence under the common law or extraordinary diligence under the statute, to save the goods after the flood was on, and the court also regarded the question whether the carrier did exer-

cise diligence as a question for the jury. At the conclusion of the opinion the court made the following observation, namely: *"We agree with the trial court that the precautions for the protection of the property which would have been available against any previous flood of which the company had knowledge would not necessarily fill the measure of extraordinary diligence. This flood was in the year* 1888, *and there had been a higher one in the year* 1840. *History or tradition might have made it incumbent on the company to have some knowledge or information as to that instance of high water. Many persons still living would be likely to know of it and it might or might not be just to treat as against the railroad company its means of knowledge as actual notice. The jury would be apt to deal rightly with such a question."*

In the case of *Merritt* v. *Earle,* 29 N. Y., l. c., 116 F, in which an elaborate opinion was delivered on this subject, the court said: "The force of inevitable accident goes a step further and applies to ocurrences which no foresight or precaution of the carrier could prevent, but even this is not identical in meaning with the 'act of God.' That is an expression which excludes all human agency. It signifies the direct act of a Providential cause, for in a wider sense everything is an act of God, since nothing happens but by His permision." The learned judge proceeds to review the authorities, English and American, and concludes as follows: "It is a corrollary from these principles and the cases in which they are found that if the act of God is to excuse the carrier, it must be not only the sole, but the immediate, and not the remote cause of the loss." And in that case it was adjudged that if either the negligence of the carrier, or the intervening act emanating from any human source, contributed with the act of God to cause the injury complained of, the defendant is not excused by the act of

God, but is liable by reason and force of its general liabilty as a carrier. In the case at bar the defendant as a carrier is undoubtedly liable to plaintiffs for the loss and injury of these cattle, if the defendant is not excused by the act of God as the sole cause of the injury complained of; and if either the negligence of the defendant or any other action emanating from a human source contributed with the act of God to cause the loss and injury to plaintiffs, the defendant is still liable.

The same principle was recognized by the court in the case of *Michaels* v. *R. R. Co.*, 30 N. Y., 564, l. c., 570. In that case the court said: "This was in substance the case disclosed and the question recurs, whether the judge erred in holding the defendants liable. In other words, whether the defendants as carriers brought themselves within one of the two exceptions to their legal liability. What is precisely meant by the expression, act of God, as used in the case of carriers, has undergone discussion, but it is agreed that the notion of that exception is, those losses and injuries occasioned exclusively by natural causes such as could not be prevented by human care, skill and foresight. All the cases agree in requiring the entire exclusion of human agency from the cause of injury or loss. If the loss or injury happened in any way through the agency of man, it cannot be considered the act of God. Nor even if the act or negligence of man contributes to bring or leave the goods of the carrier under the operation of natural causes that work their injury, is he excused. In short, to excuse the carrier the 'Act of God' or *vis divina* must be the sole and immediate cause of the injury. If there be any cooperation of man or any admixture of human means, the injury is not in a legal sense the act of God." And after using this language the court cites, in support of the above propositions, many authorities.

See also the learned remarks of Cowan, J., in *McArthur* v. *Sears*, 21 Wendell, 190, l. c., 197.

The above case of *Michaels* v. *R. R. Co.* is approvingly cited by the United States Supreme Court in *Constable* v. *Steamship Co.*, 154 U. S., 66.

In the case of *Bibb Broom Corn Co.* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 102 N. W. Rep., 709, which was decided by the Supreme Court of Minnesota on Feb. 24, 1905, the identical flood of May, 1903, which is involved in the cases at bar was there considered by the court. On the same facts which were brought out in that case, so far as the flood was concerned, which are involved in the cases at bar, the Minnesota Supreme Court adjudged the following propositions: "(1) It is the duty of a common carrier to whom goods are delivered for transportation to forward them promptly and without unreasonable delay to their destination; (2) if he fails so to do and negligently and carelessly delays the shipment and the goods are overtaken in transit and damaged by an act of God which would not have caused the damage had there been no delay, he is liable, even though the act of God could not reasonably have been anticipated. The negligent and unreasonable delay is such proximate or concurring cause as renders the carrier liable." The opinion is exhaustive and contains the citation of many authorities, English and American. The decision in that case is decisive of these cases at bar now before Your Honors. In that case the trial court instructed the jury in part that if the corn was destroyed by an act of God unaccompanied by the concurrent negligence of the defendant, plaintiff could not recover, but in effect left the jury to say whether the delay in forwarding the car was negligence and whether such negligence concurred in causing the damage. This instruction was approved by the Minnesota Supreme Court and

the judgment of the trial court was affirmed. The rule applicable to this class of cases is thus stated by the court in its opinion in that case: "As a general rule applicable to all cases of negligence, if damage is caused by the concurrent force of defendant's negligence and some other cause for which he is not responsible, including an act of God, he is nevertheless liable, if his negligence is one of the proximate causes of the injury complained of, even though, under the particular circumstances, he was not bound to anticipate the interference of the intervening force which concurred with his own. * * * The authorities are at variance insofar as negligent delay is concerned, only in cases involving property not perishable. The principle in the case at bar was of that character. The property would not have been damaged but for the flood that submerged the car while in the yards at Kansas City. Neither would it have been damaged had defendant forwarded the car to Minneapolis promptly and without unreasonable delay, as it was required by law to do. So the question is, was the negligent delay of defendant in forwarding the car one of the proximate causes of the damage to the corn, or did such delay concur with the flood in causing the damage?" The court then proceeds to an examination and consideration of the authorities bearing on the question and then proceeds in its opinion as follows: "We have examined the authorities holding the opposite of this doctrine and while the courts adhering to the same are of eminent standing we have no difficulty in adopting the view in the cases above cited. The rule which permits a carrier to excuse his negligence by an act of God overtaking him while thus in fault, seems to us unsound or as based on too strict an application of the rule of proximate cause. It is the duty of a common carrier, to whom goods are delivered for transportation, promptly and without unreasonable delay

to forward them to their destination, and such was defendant's duty in the case at bar. This it failed to do, and its negligence in this respect is not seriously controverted. The car arrived at defendant's yards in Kansas City on the 23rd of May and was permitted to remain there without proper effort to forward it until it was overtaken by the flood. It could have been moved from defendant's yards on any day after its arrival, prior to the 29th of May, and had this been done the corn would not have been damaged. If defendant had acted as required by the terms of its contract and as enjoined by law, the car would have been forwarded and would have arrived at its destination prior to the flood. That defendant's neglect concurred and mingled with the act of God seems the only reasonable conclusion the facts will warrant, and we feel safe in applying the general rule that an act of God is not in such cases a defense. Every reason in equity and justice relives a carrier from the performance of his contract and from liability to injuries to property in his custody for transportation, resulting exclusively from the act of God or other inevitable accident or cause over which he has no control and could not reasonably anticipate or guard against. But reasons of that nature lose their force and persuasive powers when applied to a carrier who violates his contract and by his unreasonable delay and procrastination is overtaken by an overpowering cause, even though of a nature not reasonably to be anticipated or foreseen. If but for his negligence the loss would not have occurred, no sound reason will excuse him, and he should not be relieved by an application of the abstract principles of the law of proximate cause. No wrongdoer should be allowed to apportion or qualify his own wrong, and if a loss occurs while his wrongful act is in operation and force and which is attributable thereto, he should be held liable. *Davis* v. *Garrett*, 6 Bing., 716."

In the case of *Cobb* v. *Ry.*, 149 Mo. Rep., 609, l. c., 628, the court said: "And the fact, if it was one, that the storm had been unprecedented, affords defendant no excuse, because if a hard rain storm would sweep bents *a fortiori,* would one more severe? And the evidence unmistakably shows that had stone piers been used, defendant would have given no cause for the present litigation. *The unusual severity of the storm in this instance, instead of furnishing an excuse to defendant, should rather have struck the spur of vigilance into the flank of its apprehension.*"

In the case of *Davis* v. *R. R. Co.,* 66 Vt., 297, l. c., 298, 29 Atl. Rep., 313, l .c., 315, the Supreme Court of Vermont in 1894 delivered an opinion in which the following langauge is used: "But it is contended that the delay or negligence of the defendant in not removing the grain as speedily as the county court has found that it ought to have done renders the defendant liable. It is evident that the fire was the immediate, proximate cause of the destruction and loss of the grain. If the fire had not occurred, or if that cause is eliminated, the grain would not have been lost. The *causa causans* was the fire. The concomitant incident was the delay by the defendant in removing it from the elevator. But that delay would not have destroyed the grain, and caused its loss, if the fire had not intervened. It is generally held that a common carrier is liable on the ground of negligence only when that negligence is the proximate cause of the loss. On this subject, and on what is the proximate and what the remote cause, these authorities are helpful: *Bohen* v. *City of Waseca,* 32 Minn., 176, 19 N. W., 730, 50 Am. Rep., 564, and note; *West* v. *Ward,* 77 Iowa, 323, 42 N. W., 309, 14 Am. St. Rep., 284, and note; *White* v. *Conly,* 14 Lea., 51, 52 Am. Rep., 154, and note; *Haverly* v. *Railroad Co.,* 135 Pa. St., 50, 19 Atl., 1013, 20 Am.

St. Rep., 848, and note; *Perley* v. *Railroad Co.*, 98 Mass., 414, 96 Am. Dec., 645, and note. But courts differ in holding the carrier liable when his delay is the remote cause of the loss, and a proximate cause exists therefor, for which he is not liable. Courts of last resort, holding the carrier liable in such cases, are those of New York, followed by those of Missouri and Illinois. Holding that the carrier is not liable for such remote cause, are the courts of the United States, Massachusetts, Pennsylvania, Ohio, Michigan, West Virginia and Iowa. The cases of these states, pro and con, can be found collected in a note to *Norris* v. *Railway Co.*, 23 Fla., 182, 1 South 475, 11 Am. St. Rep., 355. To the last named class, apparently, should be added the courts of Nebraska and of Maine. *McClary* v. *Railroad Co.*, 3 Neb., 44; *O'Brien* v. *McGlinchy*, 68 Me., 557. *In some of the cases cited, holding the carrier liable, another element existed, in addition to the delay of the carrier in moving the goods to their destination, to-wit, the exposure of the property to the action of the elements, which was observable to the carrier, like freezing, or the want of food and care when the property consisted of live animals. When the property is of a kind liable to injury or destruction by such exposure, whether moving the property with due dispatch, or delaying so to move it, the carrier is under a duty to use common prudence to protect the property from dangers which are known to him to exist, and which have come expectedly or unexpectedly; and, if the danger came without his fault, he may charge for the extra care. Beckwith* v. *Frisbie*, 32 Vt., 559. *Some of the cases holding the carrier for delay might have been properly decided against him because, knowing the danger to which the property was exposed, he did not exercise the diligence and care of a prudent bailee to protect it."*

In this case Messrs. Hurley and Sharp, who were

the general superintendents of defendant, seemed to have thought they owed a duty to remove the 1,400 cars of dead freight from Argentine on May 30th, but that they owed no duty to care for plaintiffs' live stock.

In the case of *R. R. Co.* v. *Curtiss,* 80 Ill., 324, the Illinois Supreme Court held the following: "If fruit trees and shrubbery are destroyed by the cold in the hands of an intermediate carrier by reason of negligence or unreasonable delay, or if by such delay in transportation or in delivering to the next carrier in the line the latter cannot by reasonable efforts transport and deliver before they are destroyed by cold weather, the former carrier will be liable for the loss." It was also held in that case that: "Where fruit and ornamental trees shipped were destroyed by frost before reahing their destination, and this was caused by delay of transportation to Chicago, where they were to pass into the hands of another line, the fact that the company's buildings in Chicago were destroyed by fire will not furnish a sufficient excuse for the delay *where it appears that other shipments made afterwards went through in time and were delivered to the other line.*" In speaking of the duty of the carrier in that case the court in its opinion delivered by Judge Walker said: "The cold weather was approaching and the hazard of delay was increasing and it required, considering the nature of the freight and its liability to injury from frost, that all reasonable efforts should have been made to get them in the hands of the next carrier in the line before winter should set in or the weather become severely cold. Failing to do so, appellants were liable for the neglect."

In the case at bar the first train load of cattle of the Empire State Cattle Company was hauled through from Strong City to South Dakota on time, and if the same care had been used by defendant as to the second train

load in moving it homeward without delay from Strong City the loss would have been prevented.

In the case of *Wald* v. *R. R. Co.*, 162 Ill., 545, the Supreme Court of Illinois held the following: "A loss or injury is due to the act of God where it is occasioned exclusively by natural causes, such as could not be prevented by human care, skill and foresight. A common carrier is not exempt from liability for a loss occasioned by an act of God if the carrier has been guilty of any previous negligence which brings the property in contact with a destructive force or unnecessarily exposes it thereto. A carrier is responsible where property committed to it is by its negligence brought under the operation of natural causes that work its destruction or is exposed to such cause of loss. Unnecessary delay of a carrier which subjects the goods in its possession to a loss by an act of God, which they would not otherwise have met with, is of itself such negligence as will make the carrier liable for the loss. A carrier which without sufficient reason fails to ship the trunk of the passenger upon the limited train taken by such passenger, is liable for its destruction by a flood which comes upon the later train upon which it is shipped, though such flood is in itself an act of God." It was further held in that case that "it is a question of fact for the jury whether or not a railroad company is guilty of negligence in not sending a passenger's baggage by the train on which he travels and having it so carried throughout the journey." In that case the plaintiff took passage from Cincinnati over the defendant railway company to New York City on a limited express train. The plaintiff had his trunk checked from Cincinnati to New York. The railway company neglected to ship plaintiff's trunk by the train on which he took passage, as the company could and should have done, but the trunk went forward on a later train, which

later train was caught in the Johnstown, Pa., flood, where appellant's baggage was lost. In the opinion in that case, which is exhaustive and contains the citation of many authorities, there is a full consideration of the subject of proximate cause in these cases, and the rule which has been generally recognized by the courts (except possibly the trial court in the case at bar), that if there is concurring negligence on the part of the carrier, the fact that the damage was caused by an act of God is not a defense.

In the case of *Blodgett* v. *Abbott*, 72 Wis., 516, 7 Am. St. Rep., 873, the court adjudged that the defendant carrier was not excusable because it thought the next connecting carrier might have trouble in the continued transit of the goods.

According to that authority the fact that defendant thought while plaintiffs' cattle were at Strong City that they might not be carried by the connecting carrier beyond Atchison was no excuse for the delay. Indeed the evidence in this case is undisputed that if defendant had moved forward this train load of cattle the same as plaintiffs' other train load it would have gone through the same to the destination of both.

In the case of *Nelson* v. *Ry. Co.*, 72 Pac. Rep., 643. l. c., 651, decided by the Supreme Court of Montana in 1903, it was held that a common carrier receiving property for transportation, with knowledge of the existence of an obstruction on its route, and without informing the shipper, cannot offer the obstruction as an excuse for not making a prompt delivery thereof, though the obstruction is the act of God, and it is bound to take notice of the signs of approaching danger liable to create obstructions, if any are known to it. In the opinion of the court in that case the court said: "Another instruction given is as follows: 'The court further instructs you that if you

find from the evidence that an obstruction of the defendant's road by a snow blockade or otherwise existed at any point at the time these sheep were loaded, which would interfere with the prompt and safe carrying and delivery of these sheep, and which was known to the defendant, and the sheep were accepted by the defendant for shipment without informing the plaintiff of the state of affairs, the defendant cannot offer the obstruction as an excuse for failure to deliver promptly, even though the obstruction was the act of God. Having undertaken to take the shipment with full knowledge of the facts, its liability as a common carrier attached. It was bound to take notice of the signs of approaching danger if any were known to it, and, if the danger was of such a character as reasonably to awaken aprehension at a time when the facilities and means of escape from danger were within their control, they were bound to use such means for the safety of the property intrusted to their care.' The appellant complains of this instruction for the reasons (1) there is no evidence to base it upon; (2) that it is an erroneous statement of the law. The record contains evidence as to the prevalence of a storm at the time this shipment was made; that the probability of obstruction was discussed, defendant's witnesses testifying that they informed plaintiff at the time of shipment that the worst blizzard ever known was prevailing in North Dakota along the line of defendant's road. The receipt of this information was denied by plaintiff, and the question as to the existence and severity of the storm and the dangers attendant upon the shipment became and was one of the issues in the case. As to the second objection made by defendant to this instruction, we can only say that we find no error, but believe the same to state correctly the law as applicable to this case. The general rule governing this matter is expressed in *La-*

mont v. *Nashville R. R. Co.*, 9 Heisk. (Tenn.) 58, in which the court says: *"The company were bound to take notice of the signs of approaching danger, and, if of such character as reasonably to awaken apprehension at a time when the facilities and means of escape from the danger were within their control, they were bound to use such means for the safety of the property intrusted to their care.'* Further sustaining this general proposition of law, we cite the following authorities: *Fox* v. *B. & M. R. R. Co.*, 148 Mass., 220, 19 N. E. 222, 1 L. R. A., 702; *Corbett* v. *St. Paul, M. & O. R. R. Co.*, 63 Wis., 82, 56 N. W., 327; Hewett v. Chicago Ry. Co., 63 Iowa, 611, 19 N. W., 790, 5 Am. & Eng. Enc. Law (2d Ed.), 255; *Express Co.* v. *Jackson*, 92 Tenn., 326, 21 S. W., 666."

In this case we submit that General Superintendents Hurley and Sharp had no right on May 30 to speculate as to how high the then existing and unprecedented and continually rising flood might reach, or guess or take chances as to the exact number of feet up to which it might go. This is also true as to conditions Friday, when the cattle were deviated from Emporia.

In the case of *Steamboat Co.* v. *Tiers*, 24 N. J. Law Rep., 697, the Court held: A common carrier is not excused from his liability when the loss is occasioned by the Act of God, unless the Act of God is the proximiate cause of the injury, nor where the negligence of himself or any other person concurs with the Act of God in producing the loss. That a severe storm produced an unusually low tide and thereby caused the carrier's barge to strike against a timber projecting from a wharf, so low as in ordinary tides to be no cause of injury, will not excuse the carrier from the loss of the goods occasioned by the timber piercing the vessel. It was further held in that case that the doctrine that where

both parties are guilty of negligence there can be no recovery, does not apply to the owner of goods delivering them to a carrier during a storm in which it may be difficult for the carrier to protect them. If the carrier consents to receive them he is liable for all injury after delivery. The opinions in this case contain the citation of many authorities. In the opinion at p. 700, the Court says: "Admitting that the loss in this case was occasioned not by negligence in leaving the barge in a situation where she was liable to strike against the bulkhead, instead of securing her better, but that in point of fact the loss was occasioned by the low tide bringing her in contact with a timber projecting a foot or more in the bulkhead, and that that concurrence of a low tide produced by a violent storm, itself strictly an act of God, and the projecting timber which was left to project by the agency of man, was it a loss by the act of God, for which the carrier is not responsible? I am clearly of the opinion it was not. The immediate or proximate cause of the loss was the projecting timber, and defendant strenuously insists that it was not the mere influence of the storm casting the barge against the bulkhead which produced the injury, and this they are driven to do in the hope thus to escape the consequences of their negligence in allowing her to remain unnecessarily in a position where this might have happened. Admitting this negligence, they say it did not occasion the injury. Had the bulkhead been free from defect, as they supposed, no injury would have occurred. The remote cause of the loss was undoubtedly the storm, but had there been no projecting timber their argument in that case would have been inefficient as that the real producing and proximate cause was the projecting timber. It is the duty of carriers to provide good and sufficient docks, boats and other implements necessary and proper for their

business and although these instruments need not be absolutely perfect they must be free from defects, seen or unseen. If defects do in point of fact exist, the carriers are not excused, even if it be shown that they have exercised extraordinary diligence to prevent them. In the case of *Backhouse* v. *Snead,* 1 *Murphy* N. C. R., 173, it was held that where the carrier hired his vessel to be repaired by a skillful workman, who made a rudder apparently sound but internally rotten and the loss happened by reason of its breaking, he was responsible, though he was ignorant of the defects. This decision was in accordance with the general principle which holds the carrier responsible for every loss produced by an accident not coming within the definition of an act of God, as for a loss occasioned by a fire which happened without any negligence on his part or by robbers or by the misconduct or negligence of third parties; the question in such cases is not whether there has been any degree of negligence on the part of the carrier, but whether he has shown that the proximate cause of the loss was an act of God or of public enemies. Against all other causes of loss he undertakes to insure, and if the accident which occasioned it was not an act of God or of enemies but was wholly without his fault, it was at all events his misfortune and not the misfortune of the owner. The argument for the defendants in this case is that inasmuch as if there had not been an unusually low tide, produced by a violent storm of wind, the barge would not have struck the timber; therefore, the loss must be attributed to the storm. But if that argument was sound, it would follow that if an unseaworthy vessel should founder in a storm, the fact that she might have gone safe if the weather had remained fair would excuse the carrier. This is not pretended to be the law. If a vessel be in fact unfit for

her business, a loss arising from a storm is presumed to have been occasioned by the defect of the vessel, because it is impossible to say how far the defect contributed to the loss. Upon the like principle if the carrier's dock be imperfect a loss arising by the influence of a storm acting upon the imperfection and which would not have happened in the absence of either cause, must be attributed to the imperfection. The loss is not by an act of God alone. It is produced partly by an act for which the carrier is responsible. Had there been no storm, but had the dock itself given way and sunk the vessel, or had a projecting timber before unnoticed or believed not to be dangerous occasioned the injury, since no act that could be called the act of God had intervened, it is undeniable that the carriers would be liable. In this case an act of God did intervene and was instrumental in producing the loss, but it was not the sole or proximate cause of the loss. And defendants themselves insist and assume in the charge they desire that the storm itself did not do the injury. Had not another instrument concurred which proceeded from the active or passive agency of man and for which man is responsible, there would have been no loss.'

In the case of *R. R. Co.* v. *David,* 6 Heisk. 261, it was held that "when goods in the hands of a common carrier are placed in jeopardy by some *vis major* he is bound to use actively and energetically such means to save them as prudent and skillful men engaged in that business might fairly be expected to use under like circumstances. It is error therefore to charge the jury that in such case the carrier is bound to use all the diligence which human sagacity can suggest." The Court in that case, in speaking of the case of *R. R. Co.* v. *Reeves,* says: "The sounder rule is thus given by the Supreme Court of the United States, citing from 20

Pa. Rep., 171, in the case of *R. R. Co.* v. *Reeves*, 10 Wallace 191, that when carriers discover themselves in peril by inevitable accident the law requires of them ordinary care, skill and foresight which is the common prudence which men of business and heads of families usually exhibit in matters that are interesting to them. While the rule is not very clearly expressed or defined by the above statement of it, nor very distinctly illustrated so far as shown by the reference to the course of heads of families in matters interesting to them, yet the principle intended to be stated is the true one,—that is that in case of accident or an emergency such as is presented in this case, a railroad company is bound to use such means as would suggest themselves to and be within the knowledge and capacity of well-informed and competent business men in such positions and such diligence as prudent, skillful men engaged in that kind of business might fairly be expected to use under like circumstances, and that this diligence and these means should be actively used to protect and secure the property confided to their care. In other words, there should be no failure to use actively and energetically all the known and usual means which may fairly be expected to be found within the knowledge of men of average qualifications engaged in a responsible business of this kind where large amounts of property of the citizens passing through their hands and are entrusted to their care."

In the case of *McGraw* v. *R. R. Co.*, 18 W. Va., 361, it was held that if the goods transported were frozen, it exempted the carried from liability provided he had been guilty of no previous negligence and misconduct by which such loss or damage may have been occasioned. In the opinion in that case at p. 365 the Court says: "But whenever the common carrier is

exempt from liability, either because of an act of God *or because of the nature and inherent character of the property and its liability to loss or damage, he must be free from any previous negligence and misconduct by which that damage may have been occasioned, for though the immediate or proximate cause of a loss in any given instance may have been what is termed an act of God, or from the nature and inherent character of the property, yet if the carrier unnecessarily exposed the propety to such accident by any culpable act or omission of his own he is not excused."*

In the case of *Smith* v. *Ry. Co.*, 91 Ala., 455, l. c., 456, the court in its opinion said: "An act "of God is a cause which no human prudence or power "could prevent or avert. While it is true that no human "agency can prevent or stay an act of God, the act "itself being that of Omnipotence and irresistible, it is "frequently the case that the results or natural conse- "quences of an act of God, by the exercise of reasonable "foresight and prudence, may be foreseen and guarded "against. When this can be done by the exercise of "reasonable diligence and prudence, a failure to do so "would be negligence and subject the party on whom "this duty devolved to damages, although the original "cause was an act of God. *Notice of an extraordinary "rise at the head of a river might be sufficient to parties "engaged in business lower down to expect a proportion- "ate rise and to prepare for it, dependent more or less on "the suddenness of the rise and the time after notice and "before the rising water reached the place where the "injury occurred."*

See also *Coosa River Steamboat Co.* v. *Barclay*, 30 Ala. 120, l. c. 127.

In this case defendant was bound to take notice from flood conditions in the Kaw river at Topeka, where de-

fendant had its chief offices, as those conditions existed on Friday, May 30, when these cattle were forwarded from Strong City, that it was positively and unqualifiedly dangerous to attempt to take them across the Kaw river at Kansas City.

In the case of *Nugent* v. *Smith,* 1 C. P. Div., 19 and 423, l. c., 436, the Court in an exhaustive opinion delivered by Cockburn, C. J., said: "The carrier is bound to do his utmost to protect goods committed to his charge from loss or damage, and if he fails herein he becomes liable from the nature of his contract. In the one case he can protect the goods by proper care. In the other it is beyond his power to do so. If by his default in omitting to take the necessary care, loss or damage ensues, he remains responsible, though the so-called act of God may have been the immediate cause of the mischief. If the ship is unseaworthy and hence perishes from the storm which it otherwise would have weathered, if the carrier by undue deviation or delay exposes himself to the danger which he otherwise would have avoided, or if by his rashness he unnecessarily encounters it, as by putting to sea in a raging storm, the loss cannot be said to be due to the act of God alone, and the carrier cannot have the benefit of the exception."

In Vol. 1, Am. & Eng. Enc. Law (2d Ed.), 595, the author uses the following language: "Where the negligence of the carrier concurs with an act of God in producing a loss, the carrier is not exempted from liability by showing that the immediate cause of the damage was the act of God; or, as it has been expressed, where the loss is caused by the act of God, if the negligence of the carrier mingles with it as an active and co-operative cause, he is still responsible."

In Vol. 5, Am. & Eng. Law (2d Ed.), 234,

the author uses the following language: "No accident or casualty which might have been prevented by the exercise of ordinary care and forethought on the part of the carrier and by the use of known means not requiring any extraordinay diligence, can be attributed to inevitable accident or act of God as a cause, and the carrier cannot escape liability therefor."

In Hutchison on Carriers, Sec. 181, the rule is stated thus: "And whenever the carrier is placed in a situation in which it becomes necessary for him to exercise his skill or judgment, no matter what may be the circumstances of danger or difficulty, he takes the risk of the proper exercise, and if there be a way or means of escape, *a carrier by losing his presence of mind* or by mistaking one object for another is thereby misled or shows a want of the necessary skill and judgment whereby a loss occurs, he is responsible." See also Hutchinson on Carriers, Secs. 185 to 192. In Hutchinson on Carriers, Sec. 186, it is said: *"And it may be stated generally that whenever he goes to meet danger in spite of the warning of the elements or with a blind confidence that he will be able to encounter it in safety, whether it be upon sea or on the land, he brings the loss upon himself and it will not avail him that the immediate cause of it was the Act of God."*

In this case the telegrams read in evidence taken in connection with the evidence of Mr. Douthitt show that defendant's officers and agents wholly lost their presence of mind when they commenced the repeated acts of loading and unloading of the cattle at Strong City, and that they did not regain their presence of mind until the flood subsided.

In Hutchinson on Carriers, Secs. 187 and 188, the cases of the *Charleston S. B. Co.* v. *Bason,* 1 Harper, 262, and *Campbell* v. *Morse,* 2 Harper,

468, are cited by that author with approval. In the first case, where goods were laden upon a steamboat which grounded from the reflux of the tide, in consequence of which she fell over and the water rose into her cabin and injured goods belonging to the plaintiff, the owners of the vessel were held liable for the loss because it was held that the master of the vessel was guilty of negligence in not selecting a proper place for the grounding of the vessel or in not removing the goods when he saw that the coming of the water into the cabin was inevitable under the circumstances in which the vessel was placed. He was therefore liable for two reasons: (1) because of his negligence in bringing the vessel into the improper place where the danger should have been seen, and (2) because when the grounding had occurred he did not use the proper diligence to save the goods. And in the other case, of *Campbell* v. *Morse,* the carrier undertook to cross a stream between sundown and dark, immediately after a rain, and the wheels of his wagon stuck fast and he was unable to extricate it before the stream rose so as to submerge the body of his wagon and damage the goods. He relied for his defense upon the nature and circumstances of the misfortune as an excuse, although it was proven that the rise was more sudden and higher *than any that had been known to take place in the stream for forty years.* The Court held that it was manifest that had he gone through the ford without being stopped the accident would not have occurred. In attempting to cross the stream under the circumstances, he took upon himself the risk of its sudden rise and the consequences.

In this case defendant's officers and agents had no right to estimate or guess that this flood would be of the same exact height as the flood of 1881, and that it would not go higher.

In Vol. 6, Cyc. Law & Proc., 377, it is said: "The

term act of God used to express a cause of loss or damage, for the consequences of which the carrier will not be liable, means some casualty not due to human agency. The terms inevitable accident and unavoidable accident are sometimes used as synonymous with the act of God, but they lack the suggestion that the loss is due to other than human agency and therefore their use is not satisfactory. Indeed, it has been said that act of God is distinguishable from inevitable accident. In the civil law the carrier is said to be excused by *vis major* and also by *casus fortuitus,* but the rule of carriers' liability by the civil law is the same as by the common law, and these terms are not equivalent to act of God. To constitute act of God the casualty must be not only the direct result of natural causes, but one which is in no way contributed to by human agency."

Again, at p. 384, the same author says: "It is clear from what has been already said that if the carrier might, by reasonable care or foresight, have avoided loss by act of God or other excepted cause, he will be liable. The duty also rests upon him as far as possible to avoid or lessen the damage resulting from such cause, and negligence in not doing so will render him liable."

In the case *Strouss* v. *Ry. Co.,* 17 Fed. Rep., 209, l. c., 212, the Court in its charge to the jury said: "You will see, then, from the statements of these general principles, that the important question for you to settle from the evidence is whether, after these trunks were receivd by the baggage master and checked, the flood came so suddenly that, under the circumstances, the injury could not have reasonably been prevented by the defendant, or its agents in charge of the trunks, by the use of all possible means. If it could have been done with the exercise of reasonable and proper and all possible means that could be exercised and used by these officers, then the defend-

ant was bound to place the trunks in a place of safety and prevent damage to the goods in the trunks. If, under the circumstances, it could not have been so reasonably and possibly done—with the surroundings of the parties at that time, from the impending flood—the sudden character of the flood—if they could not take care of the gooods under these circumstances, then you will be justifiable in saying that they were injured by the act of God; but the theory of that is that the company must use every possible means to prevent the flood from damaging the goods. The general rule is that if goods in the hands of a common carrier are damaged by the public enemy—as in case of the army destroying goods at a depot in the late war—then the law says the common carrier is not to be held responsible for the loss of the goods. And so of sudden floods and cyclones, that render it beyond the power of the company to take care of the goods and protect them. And this question narrows itself down to the fact as to what care this defendant gave, under the circumstances, to these goods that night, in order to save them from injury, and what it did do. If, by the exercise of the means within its control, with all the surrounding as the depot was fixed (the plaintiffs put their trunks there in the depot as it was constructed), and you could not expect the railroad company to make any extraordinary provisions such as were only required on extraordinary occasions, but it would be required to use all the machinery it had around it to make this baggage secure—its officers did all that was possible to be done under the circumstances, then it is not liable; if they did not do that, then it is liable to this plaintiff for the damages resulting from its failure to carry these goods safely to Napoleon, and is only to be excused from the performance of this contract by the happening of an act of Providence that they could not avoid."

In the case of *Caldwell v. Southern Exp. Co.*, 4 Fed. Cas. No. 2303, p. 1083, decided by the Circuit Court of the U. S. for the Western District of Tenn., it was held that the carrier is liable if he negligently expose property to capture by a public enemy, in consequence of which it is captured and destroyed. In that case it was held that if the negligence of the carrier concurred with the act of the public enemy the defendant was liable.

In the case of *Tompkins* v. *The Duchess of Ulster*, 24 Fed. Cas. No. 14087a, p. 32, the District Court of the U. S. for the Southern District of New York, in an opinion delivered by Judge Betts, held "that the act of God which excuses a common carrier from liability must be the immediate and distinct result of Providential events, *suden or overwhelming in their character, which human sagacity or force could not foresee or prevent.*" In that case it appeared that a steamboat loaded in New York for Peekskill sunk in a storm in the North River. The case was one in admiralty. The libelant owners of the cargo proved by the pilot that there was fault and negligence in the management and equipment of the boat and it appeared that the boilers leaked and extinguished the fires, thus disabling the engines from working; also that an ashhole was left open below the deck. The claimants contended that the vessel and cargo were lost on account of the violence of the storm, and denied the allegations of negligence and improper equipment. The vessel was held liable by the Court for the loss of the cargo. In the opinion in that case the Court said: "In the aspect of the controversy it might be important to examine particularly this branch of the case, because the rule of law seems explicitly settled that when the loss is produced wholly by natural causes, still if there be the least degree of negligence conducing to it or it arises in any way from human actions or neglect or in combination with

such action or neglect, the carrier is not excused. *McArthur* v. *Sears*, 21 Wendell, 190. *Williams* v. *Grant*, 1 Conn., 487. * * * Yet usually the qualification attends that the accident or necessity which excuses carrier must be the immediate and distinct result of Providential events, *sudden or overwhelming in their character, which human sagacity or force could not foresee or prevent. Forward* v. *Pittard*, v *Durn.*, and E. 33, 3 Kent Comm., 217." The illustrations Chancellor Kent gives as the summary of the doctrine on this subject are that the carrier is responsible unless the loss has happened by means of lightning, earthquake or tempest.

In this case, as we have seen, the flood was no sudden affair coming like a fire or cyclone, but had been coming on for nearly a month before its climax was reached.

In the case of the *Southern Pacific Co.* v. *Schoer*, 52 C. C. A., 269, l. c. 274, 114 Fed. Rep., 466, this court adjudged that nothing less than such a fortuitous gathering of circumstances as prevents the performance of a duty and such as could not have been foreseen by the exercise of reasonable prudence or overcome by the exercise of reasonable care and diligence constitutes an act of God which will excuse the discharge of a duty." That was a case where the recovery was based upon damage sustained by the plaintiff in consequence of a collision of a train of the defendant. The railway company contended that the collision was due to an act of God. In the opinion of the Court in that case, which was delivered by Judge Sanborn, this Court used the following language: "But there was nothing in all this or in any of the evidence of the case to warrant an instruction to the jury that they might find that this collision was caused by an act of God, and nothing less than an act of God would relieve the defendant from the duty of exercising reasonable care in the operation of its trains. The foundation of the

rule that the act of God excuses the failure to discharge a duty is the maxim *Lex neminem cogit ad impossibilia. If by the use of reasonable care, prudence and diligence under the circumstances of a particular case it is possible to discharge the duty, then those circumstances do not constitute a valid excuse for the failure to perform it. Nothing less than such a fortuitous gathering of circumstances, preventing the performance of a duty, as could not have been foreseen or overcome by the exercise of reasonable prudence, care and diligence, constitutes an act of God which will excuse the discharge of the duty.'*

In the case of *Newport News Co.* v. *U. S.*, 9 C. C. A., 579, 61 Fed. Rep., 488, the Court adjudged that under the Revised Statutes of the U. S., Secs. 4386, 4388, forbidding interstate carriers of animals to confine them more than twenty-eight consecutive hours without unloading for rest, water and feed, unless prevented by storm or other accidental causes, such unloading is excused by unavoidable causes only and therefore not by an accident to a train due to negligence. The language of the act of Congress considered in that case, "unless prevented from so unloading by storm or other accidental causes," is the same, word for word, as the concluding words of the second paragraph of the contract in this case, which is recited in the opinion of the Trial Judge in his opinion in this case. In the opinion in that case of the Circuit Court of Appeals for the Sixth Circuit the following language is used: "Congress did not mean that simply because the carrier had encountered the storm, therefore he must be excused. It must appear that the storm prevented obedience. The storm could not be prevented. Its consequences may be avoided or mitigated by the exercise of diligence. If with all reasonable exertion a carrier is unable, by reason of a storm, to comply with the law, then he has been unavoidably

prevented from obeying the law. If notwithsanding the storm he could, by due care, have complied with the law, then he is at fault because his own negligence is the last link in the chain of cause and effect, and in law the proximate cause of the failure to comply with the law. Therefore, to avail himself of the excuse of storm the carrier must show not only the fact of a storm, but that with due care he was prevented as an unavoidable result of the storm from complying with the law. We may reach but one conclusion as to the meaning of Congress by the expression "other accidental causes." If the storm is no excuse unless its unavoidable effect was to prevent compliance, then it follows that no other accidental causes would be an excuse unless that cause and its effect are likewise unavoidable. The meaning of the words "other accidental causes" must be ascertained by referring to the preceding special words.

The rule *noscitur a sociis* is clearly applicable. A storm is unavoidable in the sense that it cannot be prevented. Other accidental causes must be taken to mean other unavoidable accidental causes. An effect attributable to the negligence of the appellant is not an unavoidable cause. The negligence of the carrier was the cause; the unlawful confinement and unreasonable detention but an effect of that negligence."

In the case of *Clark* v. *Barnwell*, 12 Howard, 272, l. c., 280, the U. S. Supreme Court in its opinion said: "And the main question in the case is whether or not the damage in question was occasioned by one of the perils and accidents within this clause of the bill of lading, for the masters and owners, like other common carriers, may be answerable for their acts although no actual blame is imputable to them, and unless they bring the case within the exception, in considering whether they are chargeable for a particular loss, the question is not whether the loss

happened by reason of negligence of the persons employed in the conveyance of the goods, but whether it was occasioned by any of those causes which, either according to the general rules of law or the particular stipulations of the parties, afford an excuse for the non-performance of the contract. After the damage to the goods, therefore, has been established, the burden lies upon the respondents to show that it was occasioned by one of the perils from which they were exempted by the bill of lading; but even where evidence has been thus given, bringing the particular loss or damage within one of the dangers or accidents of the navigation, it is still competent for the shippers to show that it might have been avoided by the exercise of reasonable skill and attention on the part of the persons employed in the conveyance of the goods. For then it is not deemed to be, in the sense of the law, such a loss as will exempt the carrier from liability, but rather a loss occasioned by his negligence and inattention to his duty. Hence it is that although the loss occurs by a peril of the sea, yet if it might have been avoided by skill and diligence at the time, the carrier is liable."

In the case of *Holliday* v. *Kennard*, 12 Wallace, 254, the U. S. Suprme Court, in an opinion delivered by Mr. Justice Bradley, affirmed the rule that when goods in the hands of a carrier are threatened to be destroyed or seized by a public enemy he is bound to use due diligence to prevent such destruction or seizure. It is not necessary that he should be guilty of fraud or collusion with the enemy or willful negligence to make him liable. Ordinary negligence is sufficient. In the opinion in that case Mr. Justice Bradley said: "The effect of the charge as delivered was that although a common carrier is not responsible for the destruction or loss of the goods by the act of God or a public enemy, he is nevertheless bound to

use due diligence to prevent such destruction or loss. *If his negligence or want of proper attention contributed thereto, he would be liable therefor.* * * * Surely the law requires this degree of diligence and would make the defendant liable for the want of it—that is, for ordinary ngligence. Whether such negligence was or was not proved was fairly left to the jury."

In the case of *Gleason* v. *Virginia Midland R. R. Co.*, 140 U. S., 435, l. c., 439, the U. S. Supreme Court in its opinion used the following language: "Extraordinary floods, storms of unusual violence, sudden tempests, severe frosts, great droughts, lightnings, earthquakes, sudden deaths and illnesses have been held to be acts of God, but we know of no instance in which a rain of not unusual violence and the probable results thereof in softening the superficial earth have been so considered In *Dorman* v. *Ames*, 12 Minn., 451, *it was held that a man is negligent if he fail to take precautions against such rises of high waters as are usual and ordinary and reasonably to be anticipated at certain seasons of the year, and we think the same principle applies to this case.*" The recurrence of floods in May and June annually are to be anticipated in both the Missouri and Kaw rivers. But the flood of 1903 in the Kaw River, according to the testimony of both Messrs. Connor and Jennings, was far above the average annual floods from an early time in May, 1903, and its growth was continuous and unprecedented from the start.

In the case of The Majestic, 166 U. S., 376, l. c., 386, the Supreme Court of the U. S. unanimously adjudged that the act of God which would exempt from liability a common carrier is limited to causes in which no man has any agency whatever. In the opinion of the Supreme Court in that case the following language is used: "'The act of God,' said Chancellor Kent (Vol.

2, p. 597), 'means inevitable accident without the intervention of man and public enemies,' and again (Vol. 3, p. 216) that 'perils of the sea denote natural accidents peculiar to that element which do not happen by the intervention of man nor are to be prevented by human prudence.'" And *casus fortuitus* was defined in the civil law to be *quod damno fatali contuigit cuivis diligentissimo possit contingere.* It is a loss happening in spite of all human effort and sagacity. The words "perils of the sea" may, indeed, have grown to have a broader signification than the act of God, but that is unimportant here. Shipmen, in the Court of Appeals, quotes from 1 Parsons on Shipping, 255, the definition there given of the act of God, and the reason for it, as follows: "The act of God is limited, as we conceive, *to causes in which no man has any agency whatever, because it was intended never to raise in the case of the common carrier the dangerous and difficult question whether he actually had any agency in causing the loss, for if this were possible he should be held.*"

III.

Upon that branch of the case relating to the question of deviation we submit the following authorities:

In the case of *Crosby* v. *Fitch,* 12 Conn., 410, l. c., 419, 420-423, this question of deviation was discussed and decided. In that case the goods were consigned for shipment in defendant's vessel from New York City to Norwich, Conn., and the usual course of navigation vessels in such cases was by Long Island Sound. The navigation of the sound being interrupted by ice, the vessel made the voyage south of Long Island, where a loss occurred by the goods being thrown overboard in a storm to save the vessel. The Court held that the vessel should not have commenced its voyage until the ice had disap-

peared from the sound; that there was no sufficient necessity for the deviation, and that the owners of the vessel were liable for the loss of the goods. The Court, at p. 422, places the liability on the ground of contract, holding that the usual and customary route is within the contemplation of the parties when the contract of shipment is made.

On the subject of deviation see also *Powers* v. *Davenport,* 7 Blackford, 497; *Philips* v. *Bingham,* 26 Ga., 617.

The above case of *Crosby* v. *Fitch,* 12 Conn., 410, and the cases of *Davis* v. *Garrett,* 6 Bing., 716; *Wiliams* v. *Grant,* 1 Conn., 487, and *Michaels* v. *R. R.,* 30 N. Y., 564, are approvingly cited by the U. S. Supreme Court in the case of *Constable* v. *Natl. Steamship Co.,* 154 U. S., 66.

In the case of *R. R. Co.* v. *Beck,* 125 Pa. St., 620, the Court adjudged that when a railroad company, in disregard of a shipper's instructions and of its undertaking, forwards merchandise by steamer instead of by rail, and the merchandise is lost by fire on the steamer, the carrier is responsible for the loss in an action on the contract, the question of proximate cause as in an action for negligence being immaterial. In that case the Court in its opinion says: "If the defendant company, for reasons of its own, saw fit to disregard instructions and forward the cigars by steamer instead of by rail, and a loss resulted, it is too plain for argument the defendant would be responsible for such loss. It is begging the question to say that if the cigars had been shiped by rail as directed a loss might have occurred. In such case the defendant would have incurred no responsibility."

So in *Phllips* v. *Brigham,* 26 Ga., 617, it was held that "if a common carrier deviates from the regular route and

the goods are lost it is a conversion." In the opinion in that case the Court said: "If the boat took the cotton by agreement, to carry the cotton to Savannah, and instead of going the ordinary route to Savannah went an extraordinary route, and while out of the ordinary route the cotton was lost, that was a conversion."

In this case the ordinary and usual route, according to all the evidence, for a shipment over defendant's road from Amirilla, Texas, to Atchison, Kansas, was by way of Wellington, Strong City, Emporia, Topeka and Valley Falls to Atchison, and the taking of the cattle from Emporia to Kansas City was a deviation by an extraordinary route not within the contemplation of the parties in making the shipment.

In the case of *R. R. Co.* v. *Cole,* 68 Ga., 623, it was held that "Where goods are delivered to the first of a connecting line of railroads to be shipped to a given destination by a specified route, a delivery by the first railroad to another railroad which forms a part of a different route is a breach of the contact and a conversion which renders the first road liable for the value of the goods, and if the goods be delayed by such delivery, or damage result, the first road may be held responsible therefor."

In this case the route within the contemplation of the parties, as evidenced by the endorsements on the back of the contracts of shipment and also on the way bills, was from Amirillo to Atchison over defendant's road, from Atchison to Council Bluffs over the Burlington route, and thence to Evarts, S. D., over the C., M. & S. P. Ry., and the attempt to transport the cattle over Missouri Pacific Railway by way of Kansas City was a conversion.

In the case of *Cassilay* v. *Young,* 4 B. Monroe, 265, the Appellate Court of Kentucky held that the undertaking of a carrier to deliver goods, the dangers of the river

excepted, with privileges of reshipment at a particular point, will not authorize a stoppage short of the point designated for reshipment, and if the carrier stops short of that point and the cargo be lost in a storm, the carrier will be held responsible. The vessel of the defendants which carried the plaintiff's goods in that case was sunk in a storm at Paducah. The shipment was destined to Vicksburg, Miss. The Court in its opinion in that case says: *"The storm at Paducah was undoubtedly a peril of the river or an act of God for the effects of which the carriers would not have been liable if they had encountered it in the ordinary course of their voyage and of their duty, but as it comes upon them when out of the course of their voyage and of their duty and might probably have been avoided or at least its effects greatly mitigated but for their disregard of their duty and of their contract, we are of opinion that they are liable for the loss."*

In the case of *Sager* v. *R. R. Co.*, 31 Me., 228, l. c., 238, the Court held that "a common carrier will be liable for damage to goods resulting from disobedience of the directions given by the owner and assented to by the carrier respecting the mode of conveyance."

In the case of *R. R. Co.* v. *Washburn*, 22 O. St., 324, it was held that a common carrier who undertakes to transport goods over the whole or a part of its own route and then to forward them to a designated destination beyond is bound to transmit, with their delivery to the carrier next on the route, all special instructions received by him from the consignor, and in default thereof in any material or substantive particular to stand responsible or to make good the loss to which such negligence shall have contributed. In that case a shipment was made from Cleveland, O., destined to Martinsburg, Mo. The shipment was delivered to the Cleveland, Columbus & Cin-

cinnati R. R. Co., which was to carry the goods to St. Louis and deliver them to the North Missouri R. R. Co., on whose line said point of destination, Martinsburg, was situated. The receiving company carried the goods to Columbus, and there delivered the goods to the defendant, Miami R. R. Co. The line of the defendant railroad company composed a part of the line of the initial railroad company. The goods were carried to Cincinnati and were there diverted by being delivered to the Ohio & Mississippi R. R. Co., which did not constitute any part of the line of shipment originally designated, and the goods were consigned to C. A. Scott, a commission merchant at St. Louis. On the arrival of the goods at St. Louis Scott refused to pay the freight charges, and the goods were lost in St. Loius. In its opinion in that case the Ohio Supreme Court said: "A common carrier who receives goods under an agreement to transport them over the whole or a part of its own route, and then to forward them to a destination beyond acts in the two-fold capacity of carrier and forwarder. In the latter capacity alleged negligence in which is the sole ground of controversy presented by this record, he acts as agent of the consignor and as such is bound to transmit with reasonable exactness to the next succeeding carrier the instructions of his principal. If these instructions be without restriction as to the subsequent route, intermediate consignment or mode of transit of the goods, but are in general terms to forward them to a designated destination, he will have discharged his duty as forwarding agent by accompanying their delivery in good order to the carrier of the next usual route of transit, with the like general instructions in terms sufficiently explicit and unambiguous to inform him of their ultimate destination."

In the case of *Express Co.* v. *Smith,* 33 O. St., 511, the Court there held as follows: "The carrier who un-

dertakes to carry goods over his own road is not responsible for unavoidable delays such as might be occasioned by the destruction of a railroad bridge by a flood, and if such delays occur while the goods are in transit it is thereupon the duty of the carrier to exercise his sound discretion and reasonable diligence in forwarding the goods to their destination. He is not bound to divert the goods from his own to another road over which he has no control, unless in the exercise of such discretion and diligence it appears that a change in route would have prevented the loss attendant upon delay." In that case it was contended by the plaintiff that the injury to the goods while in transit near Utica, N. Y., by reason of heavy rains, could have been avoided if the goods had been transshipped and the shipment deviated either by way of Syracuse or Buffalo, and it was contended that, therefore, it was the duty of the carrier to make such deviation. The Court, at p. 520, respecting this contention, said: "Had the plan suggested been in fact pursued and the peaches transshipped either by way of Syracuse or Buffalo, the delay which would have ensued, together with the rough jolting attendant upon the necessary cartage, would, as it seems to us, have insured their entire destruction. Thereupon the shippers might, with much force of argument, have said: *'We shipped by your route and you had no right to make a deviation. By so doing you subjected our property to unusual delays and risks not contemplated, and loss having ensued, you are responsible. You should have gotten it around the break with all speed, but if that were impossible you should have sold it to the best advantage instead of taking a caurse which must have necessarily led to its entire loss.'*"

In the case of *Brown and Haywood Co.* v. *The Pacific R. R. Co.*, 63 *Minn.*, 546, it appeared that the

defendant carrier had received the shipment of goods from the plaintiffs to be carried to a point beyond defendant's line, with directions from plaintiffs to deliver them to certain connecting carriers, to be carried to their destination. The shipper made an agreement with the last connecting carrier to have the car containing the goods stopped at two intermediate points on its line and certain portions of the goods delivered to each point, the balance to be carried to the destination to which the goods were billed by the initial carrier. The initial carrier had no knowledge of this agreement and wrongfully sent the goods by a disconnecting carrier, whose line did not reach the place of destination but did reach one of said intermediate points, to which it brought the goods and was proceeding to forward the whole of them to the place to which they were so billed, when plaintiff disclosed to it his contract to have the goods distributed to the three points, and demanded that it be complied with. Before complying with the same, this carrier compelled him then and there to pay the whole freight for the whole route and thereupon delivered him the goods destined to that point, and undertook at his own cost to carry to each of the other points the portion of goods destined to such point. In doing so one package of goods was broken and destroyed. In a suit by the shipper against the initial carrier for the loss, the Court held in that case the initial carrier became, by its wrongful act of diverting the goods from the designated route, an insurer for their safe delivery at the three places of destination, though two of those places were never disclosed to it. It was further held in that case that the transaction between the shipper and the carrier to whom the goods were wrongfully delivered did not amount to a delivery then and there to the shipper so as to relieve the initial carrier from his liability. There was a judgment in the trial court

against defendant carrier, and on an appeal that judgment was affirmed. In the opinion in the case the Court says: '"Appellant concedes that by misconducting the goods beyond the end of its own line the defendant was liable for conversion, and was therefore liable for the safe arrival of the goods at their destination, all of which is undoubtedly good law."

In the case of *Hedricks* v. *Steamship Co.,* 18 La. Ann, 353, the Court held that "where a party selects one ship in lieu of another, whereon to ship his goods, he cannot complain if they are lost, although his bill of lading was made out for that other."

In *Hastings* v. *Pepper,* 11 Pick., 41, it was held that "if a common carrier receives goods directed to be carried in a particular manner and position, he is bound to carry them in that manner and position, and if he carries them otherwise and they are lost or damaged the burden will be upon him to prove that the loss or damage was in no degree attributable to his breach of contract, but was occasioned solely by the act of God or a public enemy or the act or fault of the owner himself. In the opinion which was delivered by Chief Justice Shaw it is said: "As the carriage is a matter of contract, as the owner has a right to judge for himself what position is best adapted to carry goods of this description with safety and to direct how they shall be carried, and as the carrier has the right to fix his own rate for the carriage or to refuse altogether to take the goods with such directions, the Courts are all of the opinion that if the carrier accepts goods thus marked, he is bound to carry the goods in the manner and position required by the notice. Here it is in evidence and not denied that the box was stowed in such a manner that the marked side was not kept up and consequently the large bottle which was broken by some cause on the passage after it was stowed

and before its arrival, bore its weight on its side and not on its bottom, but it is argued that although this fact is evidence of both negligence and breach of contract, still if the loss was not the consequence of such negligence the defendant is not the more responsible on that account. This is no doubt correct, but we are clearly of the opinion that such negligence and breach of contract being proved, the defendant is bound to stand to the loss unless he can prove clearly that the loss was in no way attributable to that cause, or rather, to prove affirmatively and beyond reasonable doubt what was the cause of the loss and that such cause was not attributable in any degree to the negligent disregard of the notice on the box."

In the case of *Proctor* v. *R. R. Co.*, 105 Mass., 512, it appeared that the defendant railway company, whose road ended in Boston, received at a way-station goods addressed to St. Louis, which the defendant company agreed to convey to Boston and forward thence by the Merchants Express, which was a line of transportation from Boston to the West; but instead of delivering the goods to said Merchants Express at Boston, the defendant company forwarded the goods to New York by other carriers, who there delivered the goods to a company styled the Merchants Express & Transportation Co., which conveyed them thence to St. Louis at a cost greater than would have been the cost of their transportation thither by said Merchants Express, and the court held that the company was liable to the consignor of the goods for the difference in cost.

In the case of *Rwy. Co.* v. *Allison*, 59 Tex., 193, the court held that *"if a common carrier deviates from his route or forwards goods by different conveyances than those contemplated by his agreement, he becomes an insurer of the goods and cannot avail himself of any ex-*

emption in his behalf in the contract." In that case the company, in receiving the freight, stipulated against responsibility for damage beyond its own line, but agreed to forward the goods through to Chicago in the cars in which they were loaded, and it was held that by changing the cars after they left the road of the company it assumed the risk of safe transportation of the goods, notwithstanding the stipulation against liability for damage beyond its own line. At page 198 the court, in its opinion, says: *"The exemption from liability is, however, available only where the carrier forwards the goods consigned to him in the manner and by the route with reference to which the contract is made. If he deviates from his route or forwards the goods by different conveyances from those contemplated by his agreement, he becomes an insurer of the goods and cannot avail himself of any exceptions made in his behalf in the contract. Fatman* v. *Cincinnati R. R. Co.,* 2 Disney, 248; *Robinson* v. *Merchants Dispatch Co.,* 45 Iowa, 470. The contractor forwarded the melons in this case through from Galveston to Chicago on the cars in which they were loaded as an entirety. By changing the cars after they left appellant's road the risk of their safe transportation was assumed by its agent, the connecting line, when the change occurred, for the company, and it became liable notwithstanding the stipulation against damage beyond its own terminus. A case in point is that of *Stewart* v. *Merch nts Dispatch Co.,* 47 Ia., 229. Their goods were delivered to a transportation company at Worcester, Mass., to be taken to Muscatine, Ia., through without transfer in cars owned and controlled by the company, and the contract contained a clause of exemption against liability for loss by fire. When the goods reached Chicago they were transeferred to a warehouse and consumed by fire the same day. It was held that the com-

pany were liable for the loss notwithstanding the exemption."

In the case of *Johnson* v. *R. R. Co.*, 33 N. Y., 610, l. c., 611, the court adjudged that a common carrier in the shipment of goods is bound to obey the instructions of the shipper, and if he disregards instructions and the goods are lost, the carrier is liable for their value; that the disregard of instructions by the carrier is at his own risk. The goods sued for in that case were lost on the passage thereof to New York in a boat that was lost. The goods had been delivered to the railway company at Littlefalls, in Herkimer County, New York, to be transported by the railroad company to Albany and thence forwarded by the People's Line of steamboats to New York City. The railway company, however, did not, in accordance with the instructions, deliver the goods to the People's Line of steamboats at Albany, but delivered them to a line of towboats of another company running between Albany and New York. The court, in its opinion, says: "The defendant undertook to transport the flax to Albany and to forward it thence to New York by the People's Line of steamboats; on the refusal of that line to receive it the defendant's obligation as a carrier ceased, and if it incurred any further liability it was in the character of agent for the owner of the property. In the absence of instructions as to the mode of transportation from Albany, defendant owed no duty to plaintiff beyond the delivery of the property in the usual course of business to safe and responsible carriers for transmission to its destination. *Brown* v. *Dennison*, 2 Wendell, 593; *Van Santvoord* v. *St. John*, 6 Hill, 157. But when the forwarding agent is instructed as to the wishes of his principal and elects to disregard them, he is guilty of a plain breach of duty and when he sends goods in a mode prohibited by the owner he does it at his own risk and incurs the liability of an insurer."

In the case of *Goodrich* v. *Thompson*, 44 N. Y., 324, the court adjudged the following proposition: If any express company contracts to forward goods by a particular steamer, but in fact sends them by a different steamer and they are lost, the company is liable for the loss. The fact that the specified vessel is withdrawn from the route so that the goods could not be shipped by her does not authorize them to forward by any other usual, customary and proper mode of conveyance. *It is their duty to notify the owner and await instructions.* Forwarding by another vessel being unauthorized, they are responsible for the consequences.

In the case of *Maghee* v. *R. R. Co.*, 45 N. Y., 514, the court adjudged the following to be the rule in this class of cases, namely: When a carrier accepts goods to be carried, with a direction on the part of the owner to carry them in a particular way or by a particular route, he is bound to obey such directions, and if he attempts to perform his contract in a manner different from his undertaking, he becomes an insurer and cannot avail himself of any exception in the contract. In that case there was a judgment in the trial court for the railway company which, on appeal, was reversed by the Court of Appeals. There is a full consideration of the case in the opinion delivered by Judge Andrews, and also of the above proposition adjudged by the court in the case, with the citation of a number of authorities, commencing at page 522 of the opinion.

See also *Hinckley* v. *R. R. Co.*, 56 N. Y., 429.

In the case of *Keeney* v. *Rwy. Co.*, 47 N. Y., 525, the company contracted to transport a quantity of cattle from Goderich to Buffalo. The cattle were sent to Brantford, and there the cars containing them were detached and placed upon a side track where they could neither be unloaded nor fed and watered, and were left for two

or three days, and consequently some of the cattle died and others were injured. The court held that the above was not an act of negligence in the execution of the contract, but an entire and intentional abandonment of all effort to perform the contract for the time, thus constituting a breach of contract, and the defendant was liable.

In the case of *Robertson* v. *National S. S. Co.*, 14 N. Y. Sup., 313, it appeared that the defendant carrier by its bill of lading acknowledging receipt of a quantity of goat skins in good order, agreed to forward them from Havre, France, by a certain steamer to London, to be there transported upon another steamer to New York. Defendant shipped the goods from Havre to Southampton and thence by rail to London, and the court held that this was a deviation from the terms of the contract, which made defendant liable as insurer for damages to the skins from their becoming wet and slimy before their arrival at London, although the cause thereof did not appear, and that the express terms of the contract could not be varied by any usage among shipping men as to routes. The court, in its opinion in that case, used the following language: "The bill of lading expressly provides that the carrier shall not be liable for damage from sweating, inherent deterioration, rain, spray or perils of the sea. From the evidence it is clear the defendant is not liable unless it be for deviating from the terms of the contract in shipping goods to Southampton and sending them from thence by rail to London, instead of forwarding them by the steamer Wolf direct to London as provided by the bill of lading. If it was clear that the damage to the skins resulted from their own inherent characteristics and that deviation had nothing whatever to do with their subsequent impaired condition, the deviation might be regarded as of no consequence; but it is impossible to hold that the

deviation may not have led to the wet and slimy condition of the skins which was discovered when they arrived at London. *It is not for the court to determine whether the usual and customary route or one prescribed by the consignor is best suited to obtain safety and dispatch. The consignor may select his own mode of conveyance and has a right to require that the contract be fulfilled in the manner agreed. Dunseth* v. *Wade,* 2 Scam., 285. *If it is not so fulfilled the carrier takes all the chances and assumes all the risks and this is precisely the position in which the defendant placed itself by the deviation aforesaid. How or from what cause the skins became wet and slimy as discovered at London, does not appear. Whether they would have fared different if they had been forwarded by the Wolf direct to London, is left to conjecture. The risk of this cannot be put upon the plaintiff, for defendant took the chances and must now bear the loss.* The contract was to carry the skins to London by the Wolf. This meant direct to London by water and without changes. If that was possible—and it was—the consignor was entitled to have his goods forwarded as he directed and the failure of the defendant to perform its contract in this regard made it an insurer and responsible for the loss. Hutchinson on Carriers, Sec. 314. The rule is that if a carrier attempts to perform his contract in a manner different from his undertaking, he becomes an insurer for the absolute delivery of the goods and cannot avail himself of any exceptions made in his behalf in the contract. Lawson on Contracts, p. 122. *Maghee* v. *R. R. Co.,* 45 N. Y., 514."

In the case *Seavey Co.* v. *Union Transit Co.,* 106 Wis., 394, it appeared that a railway company received goods consigned to the plaintiff at West Superior, upon a bill of lading providing for their transportation over the company's road in care of a certain steamship com-

pany at Buffalo, from which point to West Superior the latter operated a regular line of boats. At Buffalo the railway company delivered the goods to a different steamship company, the defendant, which ran a line of boats to West Superior and Duluth, and which contracted to transport the goods to West Superior on a specified vessel. Defendant had no notice or knowledge of the original transportation contract. For its own convenience the defendant transferred the goods at Duluth to a railway company to be carried to West Superior, and while in possession of such railway the goods were damaged. It was held by the Wisconsin Supreme Court (1) that, except as it constituted the first carrier a forwarding agent, the original bill of lading has no force as between plaintiff and defendant, and its provisions as to the responsibility of an intermediate and forwarding carrier are irrelevant; (2) the delivery to another carrier at Duluth was a breach of defendant's contract, and rendered it liable as an insurer for any injury or loss that would not have occurred had it performed its duty."

In the case of *Rwy. Co.* v. *Brichetto*, 72 Miss., 891, it was held that a railroad company having transported vegetables consigned to a northern market to the junction of its road with another road in the same system, and finding that because of a strike they could not be forwarded over that road, instead of sending them by another available route, *without communicating with the shipper, as could easily be done*, diverts them to a southern market where they are sold at a sacrifice, is liable in damages. In that case the railway company had a contract of carriage of the plaintiff's vegetables from Edwards, Miss., to Cincinnati, O. On the freight reaching Meridian, where the goods were to be delivered to the Alabama Great Southern Railroad, called the connecting link, but really a link in the same system of which

appellant was a part, it was found impossible to forward the freight over that road by reason of a strike. On these facts the court, in its opinion, says: *"It was the duty of appellant in this unforeseen emergency to communicate with the shipper, if convenient, and take his directions. It was altogether practicable to have notified the shipper in a few minutes, and to have taken his advice, but this the appellant failed to do."*

In this case Mr. Frost, who is one of the plaintiffs, accompanied the shipment on defendant's cars as the representative of all the plaintiffs, and was never consulted with reference to defendant's movements of their cattle. (Record, pp. 37, 39, 40, 41, 195.)

In the case of *R. R.* v. *Odil,* 96 Tenn., 61, the court there held: A common carrier cannot justify a deviation *en route* upon refusal of a connecting carrier to receive freight on account of a strike, without notice to the shipper and instructions from him, where it appears that the goods could have been held and properly cared for without injuring their safety until such notice had been given and instructions received. It was also held by the court in the case that "A common carrier who unjustifiably substitutes another connecting carrier for the one named in the bill of lading, becomes insurer for the substituted carrier, and is liable for the loss of the goods while in the latter's possession, even by inevitable casualties." The facts of that case as appears from the opinion of the court were as follows: The potatoes of the plaintiff were shipped from Nashville, Tenn., destined to Chicago. The bill of lading, as well as the proof, showed that the potatoes were routed to go by the Louisville & Nashville Railroad Co. to Evansville, Ind., and from there by the Evansville & Terre Haute Railroad and into Chicago over the Chicago & Eastern Illinois Railroad. When the potatoes reached Evansville

they were tendered to the Evansville & Terre Haute Railroad immediately upon their arrival, but that road declined to take them on account of a strike then prevailing on the Chicago & Eastern Illinois Railroad. Thereupon the Louisville & Nashville Railroad Co. delivered the potatoes to the Peoria, Decatur & Evansville Railroad, which had a line into Chicago connecting with the Wabash Railroad at Sullivan, and running into the city over that road. This road at that time was open to Chicago and was as well equipped and as expeditious as the road over which plaintiff had routed the potatoes, and was in no sense inferior. After the potatoes had been delivered to that road and had started upon their transit the strike spread to the Wabash road, and that road refused to receive the potatoes on their arrival at Sullivan, the junction point. The potatoes were thereupon taken back to Peoria and placed in the hands of a warehouse man and sold for the railroad upon the idea and belief that being perishable this disposition was the best for the shipper and other persons concerned. No notice was given to the plaintiff that the Evansville & Terre Haute Railroad had refused to receive the potatoes at Evansville, or that they had been sent over the Peoria road, or that they had been diverted to and sold at Peoria. Plaintiff refused to accept the proceeds of the sale. Based on these facts the court, in its opinion, says: "It is insisted in the assignment of errors that under the facts in this case an emergency had arisen which justified a deviation in route, inasmuch as the one chosen by the shipper was closed by a strike and the other equally good was open. There is no doubt that when, in case of an unforeseen necessity, the safety of the shipment demands a deviation from the route agreed upon with the shipper, it may be made and will be justifiable, as, for instance, forwarding perishable freight by rail when a storm pre-

vents a boat from proceeding upon its voyage; *but where the goods can be properly cared for and held until the shipper can be communicated with, the carrier will not be justified in selecting another route without notice to him and instructions from him.* Ray on Freight Carriers, Sec. 1. Hutchinson on Carriers, Sec. 14. See also *R. R.* v. *Campbell*, 7 Heisk., 261. *Unless justified by urgent circumstances a deviation by the carrier will render it responsible for losses resulting even from inevitable casualties, and the original carrier becomes in effect an insurer for the line he selects.* Ray on Freight Carriers, Sec. 79. Hutchinson on Carriers, Sec. 314. *It clearly appears in this case that the plaintiffs could have easily been consulted by letter or wire and their instructions t ken, when it was found that the route selected was closed at Evansville, and the shipment safely held in the meantime; and failing to do this, the defendant road must be held to be liable for any injury resulting from the substituted route."*

The case of *Merchants' Dispatch Tr. Co.* v. *Kahn*, 76 Ill., 520, illustrates the principle of liability in cases of deviation in transit. In that case the goods were shipped from Worcester, Mass., for Matoon, Ill., as the point of destination, and the usual course of carriage and transit was by way of Indianapolis and not by way of Chicago, but in that case the carrier took the goods to Chicago and stored them in a warehouse where they were destroyed by the great Chicago fire; the court held on those facts that the carrier was liable for the loss.

In Vol. 1, Am. & Eng. Enc. Law (2d Ed.), 594, the author uses the following language: "Thus it has been held that although a hard frost may be considered an act of God, yet damages to goods on board a steam vessel by the leaking of a pipe which was burst by the frost is a loss for which the carrier may be held liable,

and if a cargo is injured by a storm at sea during a deviation from the usual course by the master of the vessel, it has been maintained that the deviation is a sufficient proximate cause of the loss to enable the freighter to recover."

In Vol. 5, Am. & Eng. Enc. Law (2d Ed.), 422, 426, the author on this subject of deviation says: "The carrier is liable for any loss occurring in the course of a deviation from its proper route or from the instructions of the shipper as to other matters, no matter from what immediate cause the loss may arise. It has been urged with much force that the very fact of a deviation ought not to affect the carrier's liability unless it be shown further that such fact contributed in a direct way to cause the loss, *but the rule has been strictly adhered to that the shipper is bound only to prove a deviation and the loss in the course of it; upon such proof the carrier is liable unless it can be clearly shown that the loss would have occurred had there been no deviation. * * * In cases of emergencies which justify a deviation and when the owner's consent might fairly be presumed, the carrier may act in contradiction or modification of the letter of his instructions, but in all such cases should give notice to the owner, as soon as practicable, of what has been done."*

In Hutchinson on Carriers, Secs. 190, 191, the subject of the liability of the carrier in cases of deviation is fully stated. In Section 190 of that work the author says: *"So if the carrier deviate without necessity from the regular and usual course, he will be held responsible for any loss which may occur, whether by the act of God or from any other source, and it will not be competent for him to show that had he gone the usual and customary route he would, in all probability, have encountered the same danger with the same conse-*

quences, nor would it avail him that had he done so the same misfortune would beyond a reasonable doubt have overtaken him."

In Lawson on Bailments, Sec. 127, the rule in cases of deviation is stated thus: "Loss by act of God after deviation. Deviation is the voluntary departure from the voyage or route without necessity or reasonable cause. Necessity can alone sanction it in any case, and then it must be strictly commensurate with the *vis major* producing it. *If a master deviates from the usual course of his voyage and damage is caused by a tempest in itself the act of God, the proximate cause of the loss is the wrongful act of the master and he is responsible for it. The same rule applies to carriers by land.* If the carrier has agreed to send goods by land and he sends them by water, or if he has agreed to carry them by canal and he takes them out to sea, and they are lost by an act of God, he is liable. So, if he agrees to send them by one line of boats and sends them by another, or if he agrees to send them by steam and he sends them by sail, the burden of showing a necessity for the deviation rests upon the carrier, and the necessity must be real and not merely apparent. If the deviation is one for the convenience of the carrier, he assumes the risk for any loss that may occur and becomes an insurer at all events."

In 6 Cyc. Law & Proc., 383, 384, the author uses the following language: "If the carrier, in transporting the goods, unnecessarily deviates from the usual and ordinary route contemplated in the undertaking, he will be liable for any loss occurring during such deviation, although such loss is within the recognized exception to the carrier's liability. Indeed, it is said that in departing from the established route the carrier is guilty of misfeasance and is liable for the value of the goods on the theory of conversion. The carrier is equally liable where,

having expressly contracted for a particular route, mode or manner of transportation, he transports goods otherwise than as stipulated and they are lost or damaged. Thus if the carrier leaves goods at a point short of their destination he becomes absolutely liable for loss or injury. It may become necessary for the carrier, by reason of some emergency not contemplated at the time of shipment, to change the route or method of transportation, and, if so, he will not be liable for subsequent loss or injury for which he is in general not responsible by law or contract, but if it is practicable in such case without risk to the goods, to notify the shipper, the carrier should do so rather than to depart from the terms of the contract, and await further directions. There is some uncertainty as to whether, when a deviation from the usual or stipulated route or method of transportation is shown, the carrier may excuse himself by proof that subsequent loss or damage, for which he would not but for the deviation have been liable, would have occurred had there been no deviation, but at any rate it is incumbent on the carrier to clearly and satisfactorily establish that fact, which usually he will be unable to do."

In the case of *Marsh* v. *Union Pacific R. R. Co.*, 9 Fed. Rep., 873, the United States Circuit Court for the District of Colorado held that when goods are sent not according to the contract with the owner but by some other route, there is no lien for freight money.

In the case of *Ins. Co.* v. *LeRoy*, 7 Cranch., 26, the United States Supreme Court passed on this question of deviation in an insurance case. In the opinion in that case the court said: "The discharge of the underwriters from their liability in such cases depends not upon any supposed increase of risk, but wholly on a departure of the insured from the contract of insurance. The consequences of such violation of contract are immaterial to

its legal effect as it is *per se* a discharge of the underwriters, and the law attaches no importance to the degree in cases of voluntary deviation. Necessity alone can sanction a deviation in any case, and that deviation must be strictly commensurate with the *vis major* producing it."

In the case of *Hostetter* v. *Park*, 137 U. S., 30, l. c., 40, the United States Supreme Court, in its opinion, said: "A deviation is defined to be a voluntary departure without necessity or reasonable cause from the regular and usual course of a voyage in reference to the terms of a policy of marine insurance, but it is no deviation in respect to such a voyage to touch and stay at a port out of its course if such departure is within the usage of the trade." In the case at bar the question of usage does not arise, because there is neither evidence nor pretense of any usage that shipments of cattle from Texas to Atchison may be deviated away from the main line across the Kaw at Topeka to Kansas City.

In the case of Constable v. *Steamship Co.*, 154 U. S., l. c., 61, *the court, in its opinion, says: "In the law we may deem a deviation as defined to be a voluntary departure without necessity or any reasonble cause from the regular and usual course of the ship insured.* 1 Bouv. Law Dict., 417. *Hostetter* v. *Park*, 137 U. S., 30, 40. *Davis* v. *Garrett*, 6 Bing., 716. *Williams* v. *Grant*, 1 Conn., 487. *As for instance, where a ship bound from New York to Norwich, Conn., went outside of Long Island and lost her in a storm. Crosby* v. *Fitch*, 12 Conn., 410. *Or where a carrier is guilty of unnecessary delay in pursuing a voyage or in the transportation of goods by rail. Michaels* v. *N. Y. Central R. R.*, 30 N. Y., 564.

In *Express Co.* v. *Kountze Bros.*, 8 Wall., 342, the express company received from defendants in error a

quantity of gold dust for transportation from Omaha to Philadelphia, and in its receipt stipulated that it should not be liable "for any loss or damage by fire, the acts of God, or the enemies of the government, mobs, riots, insurrections, or pirates, or from any of the dangers incident to a time of war." There were two routes over which the property might be sent; one through the state of Iowa and the other by way of St. Joseph, and by railroad across the state of Missouri. The former was the safest by reason of the disturbed conditions of Missouri on account of the war then in progress; the latter route was the more expeditious though the more hazardous. Plaintiffs, so one of them testified, notified the company's agent not to send the gold dust by the St. Joseph route. The company, nevertheless, did so, and the gold dust was lost by robbery while in transit through Missouri. The court said (p. 353): "If this testimony be true, it is hard to conceive a case of grosser negligence, for here were two routes—the one safe and the other hazardous—and yet the express company, in definance of the wishes of the owner of the property, rejected the safe and adopted the hazardous route. *Carriers of goods cannot escape responsibility if they behave in this manner, for they are required to follow the instructions given by the owner of property concerning its transportation whenever practicable.*" Judgment against the express company was affirmed.

In *L. & N. R. R.* v. *Duncan*, 34 So., 988, s. c. 137 Ala., 446, a car of mules were delivered to the railroad company for transportation from Birmingham, Alabama, via Montgomery, and thence over the Plant system to Greenville, Florida. No one for the shippers acccompanied the shipment. On arrival at Montgomery the Plant system refused to take the shipment, and the company, without communicating with the owners, for-

warded the car by another and much longer route, whereby the owners claimed damages to the shipment. Judgment for the plaintiffs was reversed and the cause remanded for a new trial, not because there was no case, but because of the insufficiency of the petition, but the court said (p. 990): "On the state of facts existing with reference to this consignment, after the car had reached Montgomery, and the Plant system had refused to accept it for carriage to Greenville, * * * *it was defendant's duty to give notice of that fact to the consignors, to the end that they might give further directions as to routing the consignment, unless the property was of such perishable nature as that the time necessary to give such notice and to receive such instructions would have caused a delay in forwarding calculated to injure or destroy it.* * * * *Live stock is, of course, perishable in a general sense; but we apprehend that horses and mules released from the car and in a pen at Montgomery, as these were, were in no danger of perishing while the defendant was communicating with the consignors at Birmingham, and receiving their reply.* It seems clear to us, also, that the parol evidence as to the consignors having given direction for the consignment to go from Montgomery by the Plant system, did not tend to vary or contradict the stipulations of the bill of lading, and that the evidence received on this subject, if believed by the jury, established the fact that the consignors directed the transportation to be over the Plant system."

In *Gulf C. & S. F. Ry.* v. *Irvine*, 73 S. W., 540 (Tex. Civ. App.), the court said: "The facts in this case show that appellees demanded that their cattle be shipped over appellant's line from San Angelo, Texas, to Brownwood, Texas, and thence over the line of the Fort Worth & Rio Grande Railway. This the appellant refused to do, and routed the cattle over its line by way of

Temple and Cleburne, a distance of 115 miles further than by the route desired by appellees. The shipper usually has a right to select the route over which his goods are to be shipped, *and the carrier will be held liable for all damages resulting from a deviation from the route selected by the shipper.*"

IV.

We submit, in conclusion, that the defendant should by this court be held liable to plaintiffs for their demand herein, both on the grounds of deviation and negligence and that the judgment should be reversed, and the cause remanded with directions to the lower court to grant a new trial.

Respectfully submitted,

JAMES S. BOTSFORD,
B. F. DEATHERAGE, AND
O. G. YOUNG,
Attorneys for Plaintiffs in Error.

THE MINNESOTA AND DAKOTA CATTLE COMPANY, *Plaintiff in Error,*

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *Defendant in Error.*

No. 2277.

STATEMENT.

As shown by the petition (Rec., 5-11) this is an action to recover the sum of $42,621.37 damages alleged to have been suffered by the plaintiff by reason of the defendant's wrongful conduct and negligence as a common carrier for hire, of freight, consisting of three train loads of live stock belonging to the plaintiff, two trains being shipped from Kenna in the Territory of New Mexico, and one from Bovina, in the State of Texas, all to be transported over the line of the defendant's railroad to Atchison, Kansas, thence by the Kansas City, St. Joseph & Council Bluffs, or Burlington route, to Council Bluffs, Iowa, thence by the Chicago, Milwaukee & St. Paul Railroad to Evarts, South Dakota. The allegations of the petition are substantially identical with those contained in the petition filed in the preceding case. The essential specifications of the respects in which the defendant was guilty of wrongful and negligent conduct and violation of its duty as a common carrier, whereby plaintiff's loss was sustained, are the same in both cases. Briefly the history of the movement of the three train loads of cattle in controversy in this case is as follows:

Stuebe (Rec., 385, *et seq.*) testifies: The cattle were bought in Texas by the plaintiff Cattle Company about

April 20, 1903. The first train load, of 21 cars, left Kenna, New Mexico, by the Pecos Valley Railroad Monday, May 25, between five and six o'clock p. m. The second train load left Kenna, Tuesday, the 26th of May, between six and seven o'clock p. m. and consisted of 22 cars, 3 cars of which train were dropped at Amarillo, Texas, and the train went on with 19 cars. The third train load, from Bovina, Texas, consisting of 17 cars, picked up the 3 cars at Amarillo, making 20 cars in that train. This train left Bovina, Texas, between nine and ten o'clock p. m., Tuesday, May 26th. The three train loads comprised 2293 head of cattle. Both Kenna trains were ahead of the third train from Bovina, which was personally accompanied by the witness Stuebe, who was personally interested in the plaintiff Company and its representative. The other two trains were also accompanied by representatives of plaintiff, the owner. The Bovina, or third train, reached Wellington, Kansas, between six and seven o'clock p. m. Wednesday, May 27th, and the cattle were there unloaded and fed. This train left Wellington between seven and eight o'clock a. m., Friday, May 29th, having been held there by the defendant about 36 hours. Its next stop was at the Kansas City Stock Yards, where it arrived between six and seven o'clock a. m. Saturday, May 30th. The first train from Kenna, which had started from that station, as stated, Monday, May 25th, between five and six o'clock p. m. and the train load of the Empire State Cattle Company, in controversy in the preceding case, arrived at Kansas City at the same time, Saturday morning, May 30th. The second Kenna train, which started from Kenna, as stated, the evening of May 26th arrived in Kansas City Friday evening, May 29th (p. 387). This train started 24 hours later from the point of shipment, and arrived at Kansas City 12 hours sooner than the first Kenna train.

Witness Welsh, plaintiff's ranch foreman (p. 348), had charge of and accompanied the first train shipped from Kenna on Monday, May 25th. His first stop was made also at Wellington on the evening of the 26th, between ten and eleven o'clock. He requested to be loaded out next morning at five o'clock, the 27th, but was not loaded out until the evening of the 27th about seven o'clock. The train ran that night to the first station beyond Strong City and then was taken back to Strong City and unloaded there about daylight on Thursday, the 28th. It also was detained at Strong City all of the 28th, and was re-loaded Friday morning, the 29th, leaving Strong City about noon on that day, and arrived at Kansas City, as stated, Saturday morning, May 30th (p. 349). This witness states that the 20 cars in his train got all necessary feed at Wellington, Kansas, but only got one bale to the car at Strong City. He saw Mr. Frost, of the Empire State Cattle Company and both the trains of that company at Strong City. In other words this train of cattle and the train of the Empire State Cattle Company, which was in charge of the witness Cloyd (Rec., preceding case, p. 31), which went on to its destination and missed the flood, and the train in charge of Frost in controversy in the companion case, were all three at Strong City at the same time. The train in charge of Cloyd was sent on and reached its destination in safety, the two trains in charge of Frost, for the Empire State Cattle Company, and Welsh for the Minnesota & Dakota Cattle Company, were not sent on from Strong City until about noon on Friday, the 29th, when they were hauled as one train to Kansas City, reaching there, as stated, Saturday morning, the 30th. The train load belonging to this plaintiff, which arrived at Kansas City Friday night, and the two train loads belonging to this plaintiff and the one train load belonging to the

Empire State Cattle Company, which arrived Saturday morning, were all unloaded in the Kansas City Stock Yards and placed in what is known as the Shipping Division of the Yards. From that time on, the history of the cattle belonging to both plaintiffs in these cases, is identical. The statement in the preceding case, of the history of the flood of 1903 in the Kaw River, the details there given of the conduct and misconduct of the defendant in the movement of these cattle, it is unnecessary here to repeat. The acts and omissions, on the part of the defendant, complained of, are precisely the same, and everything in that regard that is there said applies with equal potency in both cases. About one fact, which we regard as of vital importance, there can be no doubt, and that is, all of these trains were originally routed from their respective stations of shipment by way of Amarillo, Texas, thence by the defendant's main line to Atchison, and thence by the Burlington north. The court in its opinion says, as to this fact (p. 647): "The way-bills upon which the cattle were shipped, and other evidence, discloses that the cattle were, by the initial carrier, routed over its line to Amarillo, Texas, thence over the defendant's line of road, by way of Wellington, Strong City and Topeka, to Atchison, Kansas, thence over the Burlington road to Council Bluffs, Iowa, and from thence to point of destination over the Milwaukee railroad."

In addition to the way bills (p. 125) sustaining this statement of fact as to the original routing of the cattle, the shipping contracts attached to defendant's answer in both cases, although the court says that they themselves did not specify the route, show by their endorsements (p. 19) of "Kenna, N. M., to Atchison, Kas." and "Bovina, Tex., to Atchison, Ks." what the route was; and the bond attached as an exhibit to defendant's answer in this case (p. 19), on which defendant grounded a cross

action for the recovery of the expenses incurred at Kansas City and in the subsequent pasturage of the cattle, taken and accepted by the defendant July 9, 1903, recites that this plaintiff shipped the three train loads of cattle mentioned, "all of said shipments to be transported over the line of the Atchison, Topeka & Santa Fe Railway Company, or its connections, as shown by the stock contract, to Atchison, Kansas, and thence forwarded to Evarts, South Dakota, the point of destination." Whatever, therefore, the legal effect of defendant's act in bringing these cattle to Kansas City, the unquestionable fact is that it deviated the shipments from the line of transportation selected and determined between the parties at the time the shipments were made, and of their own motion and without the consent of the plaintiff, or its representatives in charge of the cattle, and without consultation with them or any of them, hauled the cattle to Kansas City and unloaded them off of the main line at a point where it was never contemplated they should be. Nearly all of the facts alleged in the petition in regard to the negligence of defendant are, as the court in its opinion says (p. 645) practically undisputed. It is practically undisputed that these cattle were detained by the defendant company at Strong City and Wellington for a length of time more than sufficient for them to have been fed and watered and safely transported to Atchison before the flood interrupted traffic on defendant's main line. The last train, according to the testimony heretofore cited, crossed the Kaw River at Topeka on Friday morning, the 29th of May, and reached Atchison safely. One train load of the Empire State Cattle Company's cattle which was, as stated, at Strong City at the same time that part of the plaintiff's cattle and the remaining train of the Empire State Cattle Company were there and ready to be shipped, went through to its destination in safety. Indeed, the court says (p. 652):

"It is true that if this delay had not occurrred and the cattle had been promptly forwarded to and through Kansas City (Atchison?) they would not have been caught in the flood at Kansas City."

We, therefore, take the fact of the negligent and unnecessary delay on the part of the defendant as being established. It is an undisputed fact, also, that these cattle were in a safe place until they were brought into the Kaw valley and placed in the Kansas City Stock Yards near the mouth of that river, and at the lowest point in the valley. And again the court says (p. 652): "If they had been kept at such points until the flood had subsided they would not have been injured as they were at Kansas City."

The Court's attention has already been extensively called to the history of the flood and the situation of the defendant's railroad, and of its officers who directed and manipulated the movement of these trains. For brevity, and because the graphic delineation of that situation can not be improved, we will not attempt to go over it in detail. The fact that the flood conditions in the Kaw River and its tributaries began sometime prior to the defendant's receipt of these cattle for transportation; the fact that that stream had, for weeks before the climax of the flood, been constantly rising; the fact that the defendant's General Offices were located at Topeka and its officers managing the traffic of its road were in constant and intimate touch with the situation; the fact that when Superintendent Hurley assumed the responsibility of ordering these train loads of cattle to come forward to Kansas City on Friday, May 29th, he knew at that time that defendant's line from Topeka to Kansas City, and from Topeka to Atchison,, was impassable; the fact that he knew at that time that his order could not even be obeyed without hauling the trains by way of Olathe over the

Frisco tracks;—all these facts are practically undisputed.

The cattle having arrived in Kansas City, and being placed in the pens of the Shipping Division, the defendant did nothing toward getting them out to a place of safety. Kendrick, Live Stock Agent of the Burlington (p. 283), was ready to take the cattle out before any of them had arrived, and on Friday afternoon he went to the Santa Fe office to arrange to take the cattle out, but was told they were routed by the Missouri Pacific.

A rough sketch of the situation of the Stock Yards, with reference to the Kaw River, will be found on page 235 of the record. The office, at that time, of defendant's local Live Stock Agent was at Argentine. When Kendrick went to the defendant's office in the Exchange Building to arrange about taking the cattle out, the person in charge, at his request, confirmed by 'phone from the Argentine office, his statement that the cattle were routed by the Missouri Pacific. Kendrick, it seems, was even then afraid to credit the statement that his road was not to take the cattle, and satisfied himself by speaking to defendant's Argentine office over the 'phone, and in that conversation he was told the same thing. (p. 286). The Burlington had plenty of cars and equipment. Its loading chutes were in the south end of the Stock Yards just opposite the pens marked "Shipping Division," where the cattle were located, and south of the Exchange Building. These loading chutes and pens in the Shipping Division were on the highest ground in the Stock Yards. The loading chutes of the Missouri Pacific were quite a distance north of the Exchange Building and located at the lowest part of the yards. The Santa Fe office was advised by the Missouri Pacific office, as early as nine o'clock Saturday morning, that the latter road could not take these cattle. Mr. Douthitt, General Live Stock Agent of the Missouri Pa-

cific, whose special province and business it was to make arrangements of this kind, and who, the testimony conclusively shows, was the highest authority in the matter, of any agency of the road at Kansas City, testified (p. 267 *et seq.*) that the first he heard of the cattle being in Kansas City was about 8:30 Saturday morning, May 30th, at which time the Santa Fe agent first spoke to him about taking them out. He says (p. 272): "We told them we would not have the power to handle that many trains of cattle without notice; that the indications were we could not get them out under any circumstances. We would make an effort, if the water was not any higher by noon, to load one train that day." Yet, with this distinct and emphatic notification that the Missouri Pacific could not take the cattle, the defendant allowed the opportunity offered by the Burlington to pass, and there is no proof that they even applied to the Burlington, or made any effort to have the cattle taken out. That the Burlington could have taken them any time on Saturday is apparent from Kendrick's testimony, and from the fact that that road, having its loading chutes near the Shipping Division in the highest part of the yards, as stated, shipped out a train load of 35 cars of cattle as late as six o'clock Saturday evening. (p. 289, 290).

Defendant had no arrangement with the Missouri Pacific to take these cattle at Kansas City. The statement of the trial court (p. 648) that it had is a mistake. If anything was needed to establish this fact, other than the clear and unequivocal testimony of the only official with whom that arrangement could be finally made at Kansas City, general live stock agent Douthitt, it is not lacking. The list of telegrams (pp. 179-195) is indeed a tangle of wires and they are not rendered more intelligible by their want of chronological order and the failure to enter on many of the copies produced the

hour and minute of their sending and receipt. But from these telegrams it is apparent that no arrangement was arrived at with Missouri Pacific to take the cattle at Kansas City. H. H. Clark, local superintendent at Atchison seems to have thought on Thursday, the 28th, that his road, the Missouri Pacific, would get 142 cars (including the cattle in question) from defendant at Kansas City. He wires Supt. Hurley 7:36 *a. m.*, 28th, (Thursday) (p. 188) "Will accept 42 cars stock Kansas City for Sioux City and Evarts S. D. *with distinct understanding your line will accept all responsibility and pay all claims* that may arise by reason of delays due to high water. * * * *Stock will not move unless above accepted.*" Later, same day, 7:57 *p. m.* (p. 188), he wires "Cannot accept 100 additional cars stock at Kansas City until further advised." Then still later, same day, he wires, 9:52 *p. m.* (p. 189) "Will accept the stock at Kansas City. Advise when you will deliver the 100 car lot." *These are all the wires from Clark on Thursday, 28th, between 7 a. m. and 10 p. m.* It was doubtless these dispatches which lead the Court to so confidently assert that it was arranged with the Missouri Pacific to take the stock at Kansas City. But see what Mr. Hurley was doing on the 28th. He wires General Supt. Burlington, St. Joe (188) "We have 142 cars stock for you destined Sioux City, Iowa, Evarts, S. D. and Stair, Canada. Can you not accept this at Kansas City and handle it through." Burlington answers (p. 189) same date: "Mr. Barnes of the Burlington wires at 6:10 p. m. Expects to have washout at Hamburg repaired by 3:30 p. m. today and if no further trouble can handle business over K. C. road as usual. At 7.26 p. m. he wires, yes, can handle stock for Evarts, S. D. Kansas City to Council Bluffs." *Then same day Hurley wires his superintendent at Topeka,* McLellan: "I have told

Fox to load stock held at Strong City and Wellington which amounts to 100 cars. *K. C. St. J. & C. B. now advise us they are open and can accept it.* If anything arises so they cannot accept it before it reaches Kansas City deliver to Missouri Pacific." He also wires Clark same day (28th) answering the latter's proposition of conditional acceptance: "The stock goes to you on revenue basis, is not detoured, therefore cannot accept any responsibility. We loaded it on your previous acceptance and have it in transit. Will you protect at Kansas City." To this, as seen above, Clark replied by his wire of 9:52 p. m. that he would accept stock at Kansas City and asking when the 100 car lot would be delivered.

Now note what Mr. Hurley had accomplished on this 28th day of May. He had made a definite and distinct arrangement with Clark for the Missouri Pacific to take the 142 cars of stock at Kansas City. Clark, it affirmatively appears from Douthitt's testimony had no authority, as superintendent at Atchison, to make the arrangement, but he did make it and could doubtless have had it ratified. *Mr. Hurley also had made on this same day a definite arrangement with the Burlington General Superintendent for that road to take these same* 142 *cars of stock at Kansas City.*

He seems strangely determined to get this hundred thousand dollars worth of cattle over or into the swollen and constantly swelling Kaw, if it took two connecting carriers to do it. The first 42 cars of the 142, *which he had promised both roads,* were delivered to Burlington. So Clark, Friday, 29th, (p. 192) in an offended sort of tone wires: "All arrangements made to handle the 142 cars cattle. Am now advised first 42 cars delivered Burlington. Advise. Also inform me in regard to other 100 cars. When will it be delivered." This Hurley

seems not to have answered and Clark wired him again 9:14 a. m. Friday (p. 194). "We are holding crews at Kansas City to protect stock. Am now advised you turned the 43 cars over to Burlington. *Can you say if we will get the* 100 *cars? If not wish to turn the crews back to Atchison.* Please answer quick." Let it be particularly noted what defendant's general superintendent did with this opportunity to have these cattle transported out of this perilous valley into which he was bringing them. He threw it away. Defendant had already broken faith with Clark by turning over to the Burlington nearly one-third of the cars which he had prepared to take, and it was natural and essential that he should desire to save his road the trouble and expense of having crews and equipment on hand to receive the cattle, if he was to be fooled a second time. This is Mr. Hurley's answer (p. 194). "Your wire in regard stock. 19 cars will reach Kansas City about 1:30 p. m. today. Balance of it will reach Kansas City late this evening or tonight. *Cannot give you correct figures on it now, but will do so as early as possible.*" He never did so. This is the last word of the defendant to the Missouri Pacific, until it took the matter up with Mr. Douthitt Saturday morning, the 30th, about 8:30 when they were told that Missouri Pacific was not prepared to take the cattle. Of course it was not. Hurley in reply to Clark's pointed request, twice wired, to know if he would get the 100 cars, does not even tell him he can have the 19 cars expected in Friday afternoon, but says "cannot give you *correct figures* on it now, but will do so as early as possible." All this fully explains why Kendrick, the Burlington agent, went to the Santa Fe office Friday afternoon to arrange for taking out the expected cattle. There had been no disturbance or violation of the agreement made Thursday the 28th with the Burlington through its general superintendent at St. Joe to take out the 142 cars. All

of these that had arrived, 42 cars, it had received and transported. The balance were coming and Kendrick was on hand ready to receive them. But is it not incomprehensible that defendant, after having thrown down Clark, should fail to avail itself of the chance which was at hand of having the Burlington take the cattle out? Why should the Santa Fe office tell Kendrick that Missouri Pacific was going to take the shipments when it was not, and Mr. Douthitt had distinctly so told defendant's agents as early as 8:30 that morning? The explanation is not far to seek. Mr. Hurley had wired Clark: "Cannot give you *correct figures* on it now." Were there any *figures* about it except that there were 100 cars of stock which "will be in this evening or tonight? There were. Mr. Mullen, president of plaintiff, says (p. 408) that the through freight contracted to be paid was $111.00 per car from Kenna to Evarts, and $100.00 per car from Bovina to Evarts. Mr. Brown. chief clerk live stock department of the Santa Fe, testified (483) that under the general rule a certain portion of that $111.00 per car and $100.00 per car would go to the Santa Fe for hauling to Atchison and a certain other portion to the Burlington for hauling from Atchison to Council Bluffs, and a certain other portion to the Milwaukee for hauling from Council Bluffs to Evarts; that (486,487) under the general rule, the haul from Atchison to Council Bluffs not being the same as from Kansas City to Council Bluffs, the same pro rata of the through rate would not apply to the two hauls; and that if a shipment were made over the Santa Fe that was to go by the Burlington to Council Bluffs from Atchison and that shipment came into Kansas City, it would be necessary to make some special arrangement with some other carrier to make the longer haul from Kansas City to Council Bluffs. It is manifest where Mr. Hurley's

"figures" come in. Neither the Burlington nor any other road would haul from Kansas City to Council Bluffs for the same proportion of the through rate as from Atchison. It is plain that by dickering with these two roads and playing one against the other the defendant frittered away the opportunity which both afforded to save these cattle. But whatever the explanation or whether there is any or not, the fact cannot be successfully denied that defendant repudiated its arrangement with Clark and refused the cattle to the Burlington which was ready to take them. It tried to run on two tracks at once and failed to get on either, for no other perceptible reason than in order to save a few hundred dollars in freight. Therein it was grossly neglectful of its high duty to the plaintiffs. It continued its policy of neglect all day Saturday, 30th, making no effort whatever to get the cattle out of the dangerous location in which it held them—except in the case of 20 cars of this plaintiff's stock, the story of which will be told later on in this statement. Steube for plaintiff haunted defendant's office during Saturday trying to induce its officers to take some action. As soon as he arrived he went at once to see the Santa Fe agent at defendant's office in the Exchange Building. This was about seven o'clock Saturday morning (388)—found the office locked—went then to office of Mr. Allen—remained there awhile when he and Allen returned to defendant's office about 7:30 a. m. They found there Mr. Brown, chief clerk of the general live stock agent, Mr. Titus. They told Brown (389) that they wanted to get the cattle out as soon as possible. He says "all right, we are arranging it now." He went to Burlington office and back to Santa Fe office, found Brown out and went to breakfast. About eight o'clock he and Frost (of the Empire State Company) went to defendant's office

and Brown told them he was trying to get the cattle out then (p. 390). "I says I can't see why we can't get them out at once, at least the train that got in yesterday; *the Burlington man told he can get them out as soon as he gets orders.*" Brown's answer on receiving this information (which he or his office already had) is of importance as showing defendant's gross neglect and disregard of its duty. "He says the Missouri Pacific takes out your cattle"; although Mr. Douthitt had informed him or his office that under no circumstances could the Missouri Pacific do any such thing. When asked when this would be done Brown said, "I let you know soon." Then Steube and Frost went out and rounded up their helpers and charged them to stay around the yards as they were liable to leave at any time. Afterward about 9 o'clock a. m. they went back to Brown and were told they would get out about noon. They returned about noon (391) and were told that the Missouri Pacific would not take the cattle. What did defendant do in the afternoon and evening of Saturday toward making any effort to forward these cattle or remove them from their place of known peril? Nothing whatever. This record does not contain any evidence that the Santa Fe officials paid any attention to the cattle or did or attempted anything for their preservation and protection from Saturday noon until after the flood. It shows on the contrary that they did not. (Combs recalled p. 619-622). Heavy rises were known to be coming on top of a stage of water already threatening the whole valley. Child, general supply agent, of the Stock Yards Company, called by defendant, testifies (536) that the great volume of water which caused the enormous rise at Kansas City, Sunday morning, 31st, came from west of Manhattan. "Q. How long did it take that rise to run from Manhattan to the mouth of the Kaw? A. Forty hours."

"Q. How long would it take the rise to run from Topeka down the Kaw? A. About twenty hours." Connor of the United States weather bureau answers the last question (311), "not more than about thirty hours." He seems to know accurately, for he says: "The crest of the flood moved at the rate of two and six-tenths miles an hour in the Kaw." *So that, taking Connor's statement as the reliable fact, somewhere between midnight Friday the 29th and daylight Saturday the 30th, this destructive rise rolled its tide of waters past the very doors of defendant's general offices at Topeka.* Yet defendant's officers would have it appear, *and the Court in effect holds as a matter of law,* that on the appearance of this great rise at Kansas City, it was as unknown and unannounced to them as if it had started at the Belt line bridge, and no jury should be permitted to infer that they knew of or had any reason to apprehend its coming. Not only defendants' officers at Topeka, whence emanated all orders relative to the movement of these cattle, must have known early Saturday morning of the descent of this great volume of water, but it was known and apprehended at Kansas City because communication was not interrupted between the points, and Hutchings, superintendent of the stock yards, says (545) the "general order" to put the cattle in the viaducts was issued *Saturday afternoon.* Why he should call the order "general" is not apparent, because everybody else with cattle in charge in that great market, except defendant and one other party with a small bunch, had sense enough to get them out of the valley. There was nothing comparatively to which to apply the "general" order, except the cattle of these plaintiffs. They were driven into these narrow viaducts, Supt. Child says (545), partly Saturday night and mostly Sunday morning, the work being finished about ten o'clock. Steube says they were

driven up into the viaducts Saturday night beginning about ten o'clock and that they were all up there when he saw them about eight o'clock Sunday morning (393). This was an act of most reprehensible folly. It was plain that they could be neither fed nor watered in such a place. The viaduct is merely an elevated chute. They spent some hours, according to Child, cramming this valuable herd of more than 3,000 cattle into these viaducts when all the while they were within twenty or thirty minutes of the highlands and absolute safety. Supplies of men and horses ample to handle and take care of them were at hand. (Callen, p. 622.) But Assistant General Live Stock Agent Combs (p. 580), had heard of loose Texas steers chasing people, and then if taken out they would *"come in contact with dogs* and everything that would frighten that kind of cattle to death." So they were saved from the certain doom which awaited them, if taken to the hills, and were condemned to the viaducts as a preferable and more "practicable" fate. After the cattle had been given this Indian burial, that is after eight o'clock Sunday morning, Sparks, who had 700 mules just across the alley from the pens of the shipping division where these cattle had been yarded, drove them out of the valley and saved them (p. 345). Mr. Moore, one of defendants' counsel at Kansas City, saw the mules being driven out by the Allen Avenue viaduct about 11 a. m. Sunday the 31st (p. 422) The cattle remained in these viaducts eight days. The remnant of them were taken by defendant to Emporia, there pastured until July 10th when they were shipped to Evarts. Those belonging to the respective plaintiffs were not separated until after their arrival at Evarts (397). This plaintiff received 1,831 head out of 2,293, the rest were dead as a result of their being placed on the viaducts. The remnant was variously estimated to be worth at

Evarts from $10.00 to $15.00 per head (399). The cattle when shipped were worth $22.00 per head at points of shipment. The freight paid by plaintiff at Evarts was $6,438.00.

Plaintiff in its petition seeks to recover this loss and damage from defendant on the following grounds:

(1) The wrongful deviation of the shipments from their route.

(2) The negligence of the defendant in unreasonably detaining the cattle at Wellington and Strong City.

(3 Defendants' negligence, in sending the cattle forward into the Kaw Valley, at the time and under the conditions when it was done.

(4) Defendants' negligence in deviating the cattle and hauling them to Kansas City.

(5) Defendants' negligence in failing to remove or cause the removal of the cattle from the yards in time to escape the flood.

The answer (p. 11-14), after a general denial, sets up in the second paragraph a series of statements of fact, and we attempt a brief review of the evidence pertaining to each so far as it has not already been referred to.

(a) The answer asserts that defendant, before the arrival of said shipments at Topeka, was notified by the Burlington that it could not accept the cattle at Atchison because of washouts on its line, and that it then made arrangements with the Missouri Pacific to take the cattle at Kansas City. We have already conclusively shown that defendant made arrangements both with Clark, superintendent of Missouri Pacific at Atchison and with general superintendent of the Burlington at St. Joe to take the cattle at Kansas City; that it violated and repudiated the arrangement with Clark on Friday the 29th;

that when by reason thereof the Missouri Pacific made no preparation to take the cattle at Kansas City, defendant insisted on its taking them, when they knew it could not, and refused to allow the Burlington to take the cattle, when they knew it could. To this we have nothing to add, except to correct an error of the trial court on the facts in this connection. The Court says (p. 653) that the Burlington notified defendant it could not take the cattle at Atchison on account of washouts, and later notified defendant, it could take them, and then again notified defendant that it could not take them. All this is true. *But once more and after this,* it notified defendant that it could take them at Kansas City and agreed to do it, and did take all of them there that defendant would allow it to take, forty-two cars (p. 194).

(b) Defendant's answer states that it did transport the cattle to Kansas City, "with the knowledge, consent and acquiescence of plaintiff." No claim was made below and doubtless none will be made here that this is true. When the trains reached Kansas City, Steube, in charge, thought he was in Atchison (407). All of the evidence bearing on the matter shows that the cattle were brought to Kansas City solely by orders of defendant without a "by your leave" asked of plaintiff, though ample opportunity for consultation at all times existed.

(c) The answer next alleges that defendant did deliver twenty carloads of plaintiff's cattle, 760 head, to the Missouri Pacific Railway, at Kansas City and delivered the balance to the Stock Yards company to be held by that company until the Missouri Pacific could take them out. We assert and propose to demonstrate by citation of proof, mostly by defendant's witnesses, the entire falsity of this allegation. The point of fact of initial importance in this connection is as to the method of making delivery of cattle from one carrier to an-

other through the medium of the Stock Yards Company so that possession and control of the stock pass from one to the other. About this fact there will or should be no dispute. Child says (p. 540) the stock yards company paid the delivering road all charges that it had on its bills, took the cattle and bills, and turned the latter over to the receiving carrier with all charges including its own for feed and care added, loading out the cattle on the order of the receiving line. He says (539) that in effecting such delivery the stock yards company acts as agent for both parties. Mr. Douthitt, of the Missouri Pacific, testifies (283):

"Q. Where they were unloaded, as they were in this instance, how would your road get them? A. The way bills would be delivered by the Santa Fe to my office; we would place an order with the stock yards company to run those cattle to our loading chutes at a certain hour; the stock yards company would load them at that time into our cars or cars we furnished at that particular point; the way bills then would be forwarded to the terminal office by my office, and conductor of the train take them out and take them through."

There are very many pages of testimony introduced by defendant relative to the alleged delivery of these twenty cars and to the customary manner of making delivery through the stock yards to a connecting carrier. We deem it unnecessary to cite further testimony as to the method pursued, except to add that of defendant's local live stock agent, Roberts, who says (468) that the way bills from the train would be sent over to his office at Argentine by a messenger and then by him (Roberts) turned over to the office of the connecting line.

Now put all of the testimony under the glass and see whether delivery of these 20 cars of cattle to the Mis-

souri Pacific was ever effected, and whether the stock yards company, while holding all the cattle, ever ceased to be the agent of the defendant. First as to what was actually done with the twenty cars. Hildebrand, yardmaster of defendant, says (518) he got the train of stock about six o'clock in the morning, *immediately upon its arrival, and was ordered by the Argentine office of defendant* to take it to the Missouri Pacific yards. He "got hold of the train" on one of the main lines between the south end of the Santa Fe yards and Twelfth street, hauled it as far as Twelfth street, and then sent it on in charge of Santa Fe switchman Cappell (519). Cappell says (pp. 520-521) that he was ordered by Hildebrand to take the train on into the Missouri Pacific yards, situated some distance north of the Exchange building and just east of the Kaw river, and this he did leaving the train there. Ed. Davis, foreman of stock yards company for what is known as "the Missouri Pacific side" (508) testifies for defendant that it was his duty to see that cars were unloaded and loaded; that a switch engine and crew of the Missouri Pacific moved these cars to the Missouri Pacific chutes; that he had them unloaded and immediately drove them back south through the alleys and put them in the shipping division; that being through cattle that was where they belonged (510); that he did this of his own motion without any orders from anybody; that at the place where they were unloaded there were no pens fit to receive them (p. 511) as there was water in the pens at that time, possibly a foot, and still coming in (512); that if the Missouri Pacific took the cattle out they would be loaded at the same point where they were unloaded (514); that there were no cars there to load the cattle into at the time they were taken from the Santa Fe cars; and that after these cattle were unloaded the Missouri Pacific did not load

any cattle at those chutes (p. 515). So that, as far as concerns *the cattle* of these 20 cars, they simply had a circuitous journey, planned and ordered by the defendant alone, around through the Missouri Pacific yards, and were escorted by the yard foremen back through the alleys to the shipping division, where the rest of plaintiff's cattle were. Now as to the way bills for the 20 cars, without the delivery of which there could be no delivery of the cattle. D. Farley, chief clerk of defendant's local freight office, produces a receipt for these cars (p. 473), purporting to be signed by R. P. Isitt, local freight agent of the Missouri Pacific; says it was made out in the hand writing of one Evans, yard clerk of the Santa Fe (476); that he did not know who signed Isitt's name to it, but knows that Isitt did not (p. 477). Sullivan, defendant's chief night clerk at Kansas City says (p. 494), another receipt is in the handwriting of one Winthrop, an under clerk in the office; that he (Sullivan) altered the way bills of the 20 cars by scratching out the words "K. C. St. Joe & Council Bluffs" and writing "Mo. P.", and inserting in place of "Atchison" the letters "K. C." (p. 495); he directed Winthrop to deliver the bills with the receipt to the Missouri Pacific (p. 496), and never saw any of the papers after their delivery to Winthrop, until the day he testified. This receipt in two sheets marked 14a and 14b, is shown in the record (pp. 497-499), and bears the stamps, Missouri Pacific freight office, *June 30th*, 1903, and A. T. & S. F. Ry. Co., July 4th, 1903, *a month after Sullivan says he gave the papers to Winthrop*, and more than two weeks after the stock represented by the receipt (or what was left of it) had been placed by defendant in the pastures at Emporia. There is not a particle of evidence even tending to show that Winthrop or any one else ever delivered the way bills and receipt (14a, 14b) to the Missouri

Pacific. As to the Isitt receipt for the cars (marked 15) though much discussed, it was not introduced in evidence. Isitt says of it (p. 633): "That is a receipt for the cars, what is called an interchange slip. * * * That is a certificate that the cars have been received and taken for the purpose of adjusting the rental on the cars between different lines, that is the purpose of that slip. That is such a slip as is signed by both lines, no matter what the circumstances are under which the car is delivered, whether it is right or wrong it makes no difference. Q. It doesn't indicate anything then in reference to whether your line has accepted for further transportation to another point those cars, or not? A. Not at all." It will be borne in mind that Mr. Douthitt, when he told defendant's agent about 8:30 Saturday morning that the Missouri Pacific could not under any circumstances engage to take the cattle, told him also (and it was a mere matter of his disposition to accommodate) that he "would make an effort, if the water was not any higher by noon, to load one train that day." At exactly noon he tried with an engine to get to the Missouri Pacific loading chutes, but the water put out the fires and the attempt failed (p. 273): "Q. Now was there in fact any cattle delivered to your road—these cattle? A. No sir. Q. Did you receive from the Santa Fe any order for any of these cattle? A. No sir. Q. Did you receive from the Santa Fe any way bills? No, sir." Hutchings, superintendent of the stock yards, says (p. 546) that he did not know whether the bills for these four trains of cattle showed any routing by any particular line beyond Kansas City or not; that the cattle were taken out by the Santa Fe, the same road that brought them in; that the Stock Yards Company held them as agent for the Santa Fe, delivered them back to the Santa Fe, required Santa Fe to pay its charges, and if the Santa Fe intended them to be delivered to a con-

necting carrier, as a matter of fact it was not done. Roberts, local live stock agent, says (p. 468) that these way bills, in ordinary course, would have gone to his Argentine office by messenger and been sent by him to the office of the connecting carrier; *that he found these identical way bills in his office after the subsidence of the flood* (p. 469).

"Q. So that these way bills were not delivered to any connecting carrier at Kansas City, were they? A. Not that I know of, no, sir."

Mr. Combs testified (590): "Q. Your railroad company hauled these (cattle) back to Emporia or Lang to these pastures? A. Yes, sir. Q. And then hauled them from there on to Atchison, and by way of these other roads to Evarts? A. Yes, sir. Q. Under the same original routing and way bills that they had been loaded under from Texas? A. Yes, sir; they were carried to their destination on their usual way bills—on the regular way bills." He admits that in all the numerous conferences held in June between the parties to these suits relative to the cattle, no intimation was ever given that any part of them had at any time been delivered to the Missouri Pacific. The testimony of Mullen (635) and of Frost (636) shows that numerous interviews were held between them and defendant's representatives, Mr. Lathrop and Mr. Combs, in which plaintiffs were urged to take the cattle off of defendant's hands at Kansas City, and at no time did they say anything indicating that one trainload had been delivered to the Missouri Pacific. In the stipulation (528) introduced by defendant to support its cross action set up in the third count of the answer, it writes down and signs "it is agreed in this case that the defendant was compelled to pay out and did pay out, on account of plaintiff's cattle at the stock yards at Kansas City $2,428.60, and at Emporia

$2,820.38." Why should it be compelled to pay or pay anything, if in truth it had delivered, as alleged, twenty cars to the Missouri Pacific and the remainder to the Stock Yards Company for the Missouri Pacific?

In this same third count and counter-claim, it *pleads* the fact (p. 15) "that the said defendant company, as is the general custom, well known to plaintiff, in cases *where cattle in the possession of railway companies in the course of transportation* are fed, watered and cared for by a Stock Yards Company, paid to the said Stock Yards Company the sum of $2,428.60;" and assistant general live stock agent Combs acknowledges (585, 586) that the expense of unloading the 20 cars at the Missouri Pacific chutes was a part of these charges which defendant paid. Defendant, in this third count, not only *admits,* but *alleges* that all of these cattle, while in the Kansas City stock yards, *were in its possession in the course of transportation, and bottoms on that fact* its prayer for a judgment against this plaintiff for the expenditures there made on account of the cattle. Yet, in the face of all this overwhelming proof, the defendant, again acting on the principle of "any viaduct in a flood," seeks to save itself by climbing up on the tottering proposition that it had cleared itself of all responsibility by delivering 20 cars to the Missouri Pacific, and the remainder to the Stock Yards Company for the Missouri Pacific. This structure of falsework will break down, it has broken down; and the place where it was is covered by the truth.

(d) The answer next pleads that the damages sued for were caused by the act of God. Elsewhere in this combined brief is discussed the question of whether under the proof adduced defendant can, as a matter of law, successfully charge the responsibility upon the Almighty.

(e) The answer next pleads that plaintiff gave defendant no notice, as required by paragraph eight of the shipping contracts, of its claim for damages. Plaintiff's reply (pp. 21, 25) pleads compliance with said paragraph and waiver of its requirements. Due notice was given and claim made (216 *et seq.*) (324). Detail of the evidence, which abundantly shows waiver, is not deemed necessary in as much as no question in this regard was raised on the trial below or in the court's opinion.

(f) The third count of the answer is a counterclaim for the expenses incurred by defendant, while holding the cattle at Kansas City and Emporia, and at the conclusion of all the evidence was dismissed by the defendant (Rec. Minnesota & Dakota Cattle Co. case, p. 30).

The main questions to be determined are:

1. Did the court err on the facts disclosed in not directing a verdict for the plaintiff, by reason of the wrongful deviation of the shipments? If not,

2. Did the court err in refusing to submit the questions of negligence to the jury and in directing a verdict for the defendant?

SPECIFICATION OF ERRORS.

1. The trial court erred (Rec., 637) in refusing to give, at the conclusion of all the testimony, the instruction and charge tendered and requested on behalf of the plaintiff, that under all the evidence the jury should find that the defendant was liable, and to find for the plaintiff. The court should have so instructed, because the undisputed proof shows a deviation by the defendant, without plaintiff's consent, of the shipments of cattle from the route by which they were billed, and in such case as a matter of law defendant is liable for the loss sustained.

2. The court erred, after refusal of this peremptory instruction, in refusing to give and charge the jury, at plaintiff's request, instructions from 1 to 13, inclusive, (Rec., 638, 644), and in refusing to give each of said instructions.

3. The court erred in sustaining the motion and request of the defendant railway company to direct, and in directing, the jury to render a verdict for the defendant and against the plaintiff. (Rec., 30.)

4. The court erred in its opinion, shown in the record, in saying: "It, therefore, follows on the main case the request for instruction to the jury to render a verdict for the defendant must be sustained, and the like request of the plaintiff must be denied. This will be done." (Rec., 655.)

POINTS AND AUTHORITIES.

All propositions, and authorities cited and reviewed in support thereof, as set forth in the preceding brief, are here adopted pursuant to the stipulation and agreement between the parties that a joint brief might be filed.

In view of the fact that the errors assigned, and the propositions involved, are precisely the same in both cases, all of the authorities relied on by plaintiffs in error in both cases have been compiled and reviewed in the foregoing brief of the Empire State Cattle Company, *et al.* To avoid unnecessary repetition, we re-state briefly the points made, as follows:

1. For the purpose of determining whether the action of the trial court in peremptorily directing a verdict for the defendant was correct or erroneous, all of the testimony offered, both that which was admitted and that which was excluded, will be considered by this court.

2. The question of whether the defendant is liable as a matter of law for the wrongful deviation of the shipments, and whether, therefore, the court erred in refusing the plaintiff's request to direct a verdict for the plaintiff, is a separate and distinct question from that of whether the court erred in holding as a matter of law that there was no evidence sufficient to go to the jury, on the matter of the defendant's negligence. Plaintiff had and has a right to the separate determination of these questions.

3. Even if the plaintiff was not entitled to a peremptory instruction to the jury to find for the plaintiff, by reason of the wrongful deviation of the shipments, the other and further question of defendant's negligence

should have been submitted to the jury under proper instructions.

4. Under the facts proven, the question of the proximate cause of the injury was a question for the jury to determine as a matter of fact, and not for the court to decide as a matter of law. It should have been submitted to the jury.

5. The opinion of the trial court (135 Fed., 135) fails to consider many of the facts which are vital to a correct conclusion, and incorrectly declares the law of the case, as we have heretofore shown.

6. The trial court, in its opinion (*supra*, p. 142), recognizes that the defendant deviated these shipments on its own responsibility, as claimed by plaintiff, but incorrectly declares the law in such cases. Under the evidence the defendant is liable for the consequences of that deviation.

7. The propositions of law asserted by the trial court in its opinion are not supported by the authorities therein cited and relied upon.

8. The fact that immense quantities of household property and merchandise were lost in the flooded districts of Kansas City has no tendency to show that the defendant was not negligent in respect to the loss suffered by this plaintiff.

9. It was not necessary, as assumed by the trial court, to place these cattle in the overhead viaducts at the stock yards. It was a grossly negligent act to do so.

ARGUMENT.

Supplementing the argument heretofore made, we will refrain from making the brief more voluminous, except to devote a very limited space to the principle which should govern in determining whether a trial court should or should not take a case from the jury and peremptorily direct its verdict. A most instructive and luminous decision in which the duty of the trial court is defined and the principle applied, is found in the case of *Marande* v. *R. R.*, 184 U. S., 173. That was an action to recover from the railroad the value of certain cotton which was destroyed by fire while in defendant's cars on its tracks near its terminal wharf, it being claimed by the plaintiff that defendant was negligent (a) in operating its locomotives near the cotton on the wharf; (b) in failing to properly care for the property, and (c) in providing inadequate fire apparatus, together with lack of instructions in its use and lack of competent men to handle it. The Circuit Court, at the conclusion of the evidence, had directed a verdict for defendant, and the Circuit Court of Appeals affirmed the judgment. The defendant being incorporated under an act of Congress, plaintiff took the case to the Supreme Court by writ of error. That court reversed the judgment of the Court of Appeals and of the Circuit Court, and directed a new trial. Two assignments of error were considered; one that the case should have been allowed to go to the jury on the issue of deviation, and the other that plaintiff should have been allowed "to go to the jury on the general question of the loss of the cotton by the negligence of the defendant." Mr. Justice White, delivering the opinion, said (176): "In order to pass upon the issues arising on these assignments, the evidence must be con-

sidered. In taking it into view, however, we shall do so only to the extent necessary to enable us to decide the question of law which arises, that is, *was the evidence sufficient on the subject of negligence and deviation to go to the jury?*" After an elaborate statement of the evidence, he proceeds (186): "Such being the proof, was it sufficient to go to the jury? In answering this question, as we have said at the outset, we shall be called to pass upon, not the preponderance of the evidence, but whether it was adequate to go to the jury; and this involves not a decision as to the facts, but the determination of a proposition of law." He then quotes the governing principle from 172 U. S., l. c., 545: "If different inferences might fairly be drawn from the evidence by reasonable men, then the jury should be permitted to choose for themselves." And again from 179 U. S., l. c., 659: "It is undoubtedly true that cases are not to be lightly taken from the jury; that jurors are the recognized triers of questions of fact, and that ordinary negligence is so far a question of fact as to be properly submitted to and determined by them." Mr. Justice White then continues (191): "We come, then, to an analysis of the evidence for the purpose of ascertaining whether it was correctly decided that it afforded no reasonable ground upon which a jury, in the exercise of its functions, could have inferred that the destruction of the cotton by fire was occasioned by the negligence of the defendant. In doing so, we shall, of course, be mindful that as both courts below have held that the evidence had not the tendency stated, their decision is entitled to great respect—*a respect, however, which cannot relieve us from the duty of securing the plaintiffs in the enjoyment of their constitutional right to trial by jury if, in our opinion, the case made by them was one proper to be decided as one of fact by the jury, and not to be concluded as a matter of law by the court.*"

In the above cited case, the bill of lading provided for the carriage of the cotton by defendant to "the port of New Orleans," and thence by steamship to Havre, France. It seems that plaintiff contended both that defendant had deviated the shipment, whereby it was liable for the loss, and that the loss was occasioned by the negligences specified. The action of the trial court in holding that there was no sufficient evidence of the fact of deviation to authorize the jury to find such fact is approved by the Supreme Court, but guarded with the remark (p. 198): "We cannot say that testimony may not be introduced at the new trial which may modify the aspect of this question as exhibited in the record now before us." In the case at bar *the fact* of deviation is not at all in question, and the issue presented to this court in that regard is, what is the legal effect of that fact on the question of defendant's liability? Does it render the defendant liable, irrespective of the negligence charged? Plaintiff contends that it does. If it is right about this, the court should have so told the jury, leaving them to find and fix the quantum of damages. Or, is the conceded fact that defendant summarily hauled these cattle away from their line of shipment, without consulting the owner, a matter by which it incurred no responsibility, and of which plaintiff has no right to complain? In other words, is it an immaterial fact not bearing on the question of liability? The lower court so held. The Supreme Court seems, in the case just cited, to have thought it of vital moment, and that liability would as surely follow its existence as would non-liability its non-existence. On the question of negligence involved in the cases at bar, in order to approve the action of the trial court in directing a verdict for the defendant, it is necessary to hold,

1. That the fact of deviation is an immaterial fact;

2. That there is no evidence tending substantially to show, or from which a jury would be allowed to infer, negligence in detaining these cattle at Wellington and Strong City, or that even if the detention was negligent it was immaterial as not being the proximate cause of the loss;

3. That there is no evidence from which a jury will be permitted to infer that defendant's officers knew, or had reason to apprehend, at the time of bringing the stock to Kansas City, they were bringing them to a hazardous place, or that if they did, their negligence was immaterial because, as a matter of law, it was not the proximate cause;

4. That there is no evidence from which reasonable men could conclude that during Saturday, May 30th, defendant was negligent when its officers declined to send the cattle out over the Burlington, and made no effort to send them out otherwise, except to offer them to the Missouri Pacific;

5. That there was no substantial evidence that defendant's officers, on Saturday, May 30th, knew, or ought to have known, of the enormous rise coming, although the undisputed evidence of competent witnesses is that it came from west of Topeka, and must have passed defendant's general offices from twenty to thirty hours before reaching Kansas City;

6. That no jury will be permitted to find that the act of placing these cattle in the viaducts, when they could easily have been taken out of the valley, was other than the act of a reasonably prudent and careful person.

The authorities heretofore cited demonstrate the impossibility of upholding the action of the court in

taking the case from the jury on the facts shown. A common carrier cannot be guilty of doing the acts shown in this record, and of omitting to exercise that vigilance and care of property to which the shipper is entitled, and then evade responsibility by saying "It was the act of God—the Lord hath taken away."

It is respectfully submitted that the judgments should be reversed and a new trial of the cases directed.

R. E. BALL,

Attorney for Plaintiff in Error,
Minnesota & Dakota Cattle Co.

61903

9527
87

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.7

No. 179.

See No 178

THE MINNESOTA AND DAKOTA CATTLE COMPANY, PETITIONER,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITION FOR CERTIORARI FILED DECEMBER 26, 1906.
CERTIORARI AND RETURN FILED FEBRUARY 11, 1907.

(20,499.)

(20,499.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

No. 534.

THE MINNESOTA AND DAKOTA CATTLE COMPANY, PETITIONER,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

INDEX.

	Original.	Print.
Stipulation at to Contents of Record and Hearing of Cause	a	1
Stipulation as to Printing	c	2
Citation and Acknowledgment of Service	1	3
Writ of Error and Clerk's Return	3	3
Amended Petition	27	5
Amended Answer to Amended Petition	34	11
Exhibit A (Contract for Shipment of 10 Cars of Cattle, May 25, 1903)	40	17

	Original.	Print.
Exhibit K (Bond Minnesota & Dakota Cattle Co., to The Atchison, Topeka & Santa Fe Railway Company)	60	19
Reply	62	21
Order Consolidating Causes for Trial	67	25
Jury Impaneled; Trial January 16, 1905	68	26
Trial January 17, 1905	69	26
Trial January 18, 1905	70	27
Trial January 19, 1905	71	27
Trial January 20, 1905	72	28
Trial January 21, 1905	73	28
Defendant's Demurrer to the Evidence	74	28
Trial January 23, 1905	75	29
Trial January 24, 1905	76	30
Verdict and Judgment, January 25, 1905	77	31
Defendant's Request for Peremptory Instruction and Exception to Ruling Thereon	79	31
Plaintiff's Request for Peremptory Instruction and Exception to Ruling Thereon	80	31
Order Extending Time to Settle Bill of Exceptions	89	32
Order Extending Time for Defendant to Serve Amendments to Bill of Exceptions	90	33
Record Entry of Filing of Bill of Exceptions, etc.	988	33
Assignment of Errors	990	34
Bond on Writ of Error	991	35
Clerk's Certificate to Transcript	993	36
Clerk's Certificate to Printed Record	38	39
Caption to Supplemental Transcript of Proceedings in U. S. Circuit Court of Appeals	1	39
Appearance of Counsel for Plaintiff in Error	2	40
Appearance of Mr. R. F. Walker as Counsel for Defendant in Error	2	40
Appearance of Mr. Gardiner Lathrop and Mr. C. Angevine as Counsel for Defendant in Error	3	40
Argument Commenced	4	41
Order of Submission	4	42
Opinion U. S. Circuit Court of Appeals	6	43
Judgment U. S. Circuit Court of Appeals	7	43
Motion of Plaintiff in Error for Order Enlarging Time to File Petition for Rehearing	8	44
Order Enlarging Time to File Petition for Rehearing	9	45
Petition for Rehearing	10	47
Order Denying Petition for Rehearing	17	55
Clerk's Certificate to Supplemental Transcript of Proceedings	18	55
Writ of certiorari and return		57

a In the United States Circuit Court of Appeals for the Eighth Circuit.

Empire State Cattle Company et al. Plaintiffs in Error
No. 8155 vs.
Atchison, Topeka & Santa Fe Railway Company Defendant in Error

Minnesota & Dakota Cattle Company Plaintiff in Error
No. 8157 vs.
Atchison, Topeka & Santa Fe Railway Company Defendant in Error

Stipulation.

It is agreed by the several parties to both of the above causes that said causes were tried together in the trial Court, as appears from the records therein, and that the bills of exceptions in said two causes are precisely the same, and it is further agreed that to save unnecessary costs of printing herein, the entire record in one cause, The Empire State Cattle Company case, including the bill of exceptions therein may be printed, and that in the other cause, the other one of the above causes not so printed in full, the record proper therein may be printed omitting from the printing the bill of exceptions therein, and that this stipulation may be printed in connection with the record proper therein in lieu and in place of the bill of exceptions therein.

And it is further agreed that both of said causes may be heard and argued together in said Circuit Court of Appeals on the record, including the bill of exceptions printed in one of the above causes in full, and that the Court may determine both of said causes on said printed record in full of said cause and on the printed record in the other cause the same as if the said two records had been printed in full.

Dated this 18" day of May, 1905.

BOTSFORD DEATHERAGE & YOUNG
Attorneys for Empire State Cattle Co. et al.
R. E. BALL
Attorney for Minnesota & Dakota Cattle Co.
A. A. HURD, O. J. WOOD, ANGEVINE & CUBBISON.
Attorney- for Atchison, Topeka & Santa Fe Railway Company.

b Nos. 8155 and 8157. Empire State Cattle Co. et al No. 2276 vs. A T & S F R. R. Co. Minnesota & Dakota Cattle Co. No. 2277. vs. A. T. & S. F. R R Co. Stipulation as to contents of record and hearing of cause. Filed Jun 24 1905. John D. Jordan, Clerk.

c In the Circuit Court of Appeals of the United States Eighth Circuit.

Minnesota and Dakota Cattle Company, Plaintiff in Error,
vs.
Atchison, Topeka & Santa Fe Railway Company, a corporation, Defendant in Error.

It is stipulated that the following parts of the record are not necessary or material for the consideration of the errors assigned, and need not be printed, viz:

1. Original Petition (pp. 5-11).
2. Summons and return (pp. 12 & 13.)
3. Defendant's motion to make more definite (p. 14)
4. Opinion of Court on said Motion (pp. 15-17)
5. Order (p. 18)
6. Original Answer (pp. 19-24)
7. Stipulation as to filing replies (p. 24 1/2).
8. Stipulation (p. 25 & 26).
9. Contracts, Exhibits B to J, Amended Answer. (pp. 42-59)

It is stipulated that Exhibits B. to J. attached to the Amended answer are identical in terms with Exhibit "A", except in the number of cattle mentioned and the number and initials of the cars, and except that Exhibits D. E. G. are endorsed "Kenna, N. M. to Atchison Kas," and Exhibits H. I. and J. are endorsed "Bovina, Tex. to Atchison, Ks". The Clerk will print this stipulation in lieu of printing said Exhibits B to J.

10. Request and notice for amendments to Bill of Exceptions (pp. 81-82)
11. Notice same (pp. 83-84).
12. Motion (pp. 85-87)
13. Motion for order extending time (pp.88).

Clerk will print entire record except above, and except bill of exceptions as heretofore stipulated.

A. A. HURD & ANGEVINE & CUBBISON,
Attys. for Defendant in Error.

R. E. BALL,
Atty. for Plaintiff in Error.

No. 2277 Minnesota & Dakota Cattle Company Plaintiff in Error vs. Atchison Topeka & Santa Fe Railway Co. Defendant in Error. Stipulation as to printing record. Filed Jun 24 1905. John D. Jordan, Clerk.

1 The United States of America. To The Atchison, Topeka and Santa Fe Railway Company, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit of the City of St. Louis, Missouri, sixty days from and after the date this Citation bears date, pursuant to a writ of error, filed in the Clerk's office of the Circuit Court of the United States for the First Division of the Judicial District of Kansas, wherein The Minnesota and Dakota Cattle Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witnes, the Honorable John C. Pollock, Judge of the Circuit Court of the United States for the District of Kansas, this 12th day of May in the year of our Lord one thousand nine hundred and five.

JOHN C. POLLOCK,
United States District Judge, for the District of Kansas.

Service of the above acknowledged this 12th day of May, 1905.

A. A. HURD,
O. J. WOOD,
C. ANGEVINE,
Attys for Deft.

2 No. 8157 United States Circuit Court, First Division of the Judicial District of Kansas. The Minnesota and Dakota Cattle Company vs. The Atchison Topeka and Santa Fe Railway Company. Citation. Filed May 12, 1905. Geo. F. Sharitt, Clerk.

3 United States of America—ss.

The President of the United States, to the Honorable the Judges of the Circuit Court of the United States for the First Division of the Judicial District of Kansas—Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, at the January Term, 1905, thereof, be-

tween The Minnesota and Dakota Cattle Company, plaintiff and The Atchison, Topeka and Santa Fe Railway Company, defendant a manifest error hath happened, to the great damage of the said The Minnesota and Dakota Cattle Company as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Eighth Circuit, together with this writ, so that you have the said record and proceedings aforesaid, at the city of St. Louis, Missouri, and filed in the office of Clerk of the United States Circuit Court of Appeals, for the Eighth Circuit, on or before the 11th day of July, 1905, to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 12th day of May in the year of our Lord one thousand nine hundred and five.

The Seal of the Circuit Court of the United States District of Kansas. 1862.

Issued at office in the City of Topeka with the seal of the Circuit Court of the United States for the First Division of the Judicial District of Kansas, dated as aforesaid.

GEO. F. SHARITT,
Clerk Circuit Court United States, First Division of the Judicial District of Kansas.

Allowed by
JOHN C. POLLOCK, Judge.

4 Return to Writ.

United States of America,
First Division of the
Judicial District of Kansas—ss.

In obedience to the command of the within writ, I herewith transmit to the United States Circuit Court of Appeals for the Eighth Circuit, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

The Seal of the Circuit Court of the United States District of Kansas. 1862.

In Witness Whereof, I hereunto subscribe my name, and affix the seal of said Circuit Court, at office in the City of Topeka this 1st day of June, A. D. 1905.

GEO. F. SHARITT,
Clerk of said Court.

No. 8157. United States Circuit Court, First Division of the Judicial District of Kansas. Minn. & Dak. Cattle Co. vs. A. T. & S. F. Ry. Co. Writ of Error to the Circuit Court of the United States for the First Division of the Judicial District of Kansas. Filed 12th day of May, 1905. Geo. F. Sharitt, Clerk.

* * * * * * * * *

27 In the Circuit Court of the United States for the District of Kansas, First Division.

The Minnesota & Dakota Cattle Company, a corporation, Plaintiff,

No. .... vs.

Atchison, Topeka & Santa Fe Railway Company, a corporation, Defendant.

Amended Petition for Damages.

Now comes plaintiff and by leave of court files herein its amended petition, and for its cause of action against the defendant states that at all the times hereinafter mentioned the plaintiff, The Minnesota & Dakota Cattle Company, was and still is a corporation duly organized and existing under and by virtue of the laws of the state of South Dakota and at said times was and still is a citizen and inhabitant of said state of South Dakota; that the said defendant, Atchison, Topeka & Santa Fe Railway Company, during the times hereinafter mentioned was and still is a corporation duly created as a railway company under the laws of the state of Kansas, and at said times was and still is a citizen of said state of Kansas, having its habitation and residence and its chief of office and place of business at Topeka, in Shawnee county, in said First Division of the District of Kansas; that during all of said times the said defendant, in connection with its other lines of railway, owned and operated lines of railway from Kenna, in the Territory of New Mexico, and from Bovina, in the State of Texas, to and through the State of Kansas to the City of Atchison in said State, by way of

Topeka, and that over said lines, in connection with its other lines of railway, said defendant was at said times and still is a common carrier, engaged as a railway company in transporting for hire passengers and all kinds of freight, including live stock, and as such common carrier owes the duty to carry all freight and live stock received by it for trans-
28 portation over said lines, and every part thereof, safely and with due and reasonable care and diligence. Plaintiff states that on or about May 25th, 1903 it was the owner of sixteen hundred thirty-five head of cattle at Kenna, in the Territory of New Mexico, and six hundred fifty-nine head of cattle at Bovina, in the State of Texas, making a total of two thousand two hundred ninety-four head of cattle, which the plaintiff desired to ship from said points to Evarts, South Dakota. That said shipments were made by way of Amarillo, in the state of Texas, and directed by the plaintiff to be made thence over the line of the defendant company from Amarillo, Texas to Atchison, Kansas, and by the Burlington Route from Atchison Kansas to Council Bluffs, Iowa, and by the Chicago, Milwaukee & St. Paul Railway from Council Bluffs to their destination at Evarts, South Dakota. That said cattle were shipped on the 25th and 26th days of May, 1903, in three train loads. Two trains from Kenna, New Mexico, consisting one of twenty cars and one of twenty-two cars, containing in the two trains sixteen hundred thirty-five head of cattle and one train from Bovina, Texas, of seventeen cars, containing the remaining six hundred fifty-nine head of said cattle, all consigned and routed over the defendant's said road as aforesaid.

Plaintiff states that all of said cattle were delivered to the defendant at the points aforesaid, and at Amarillo, Texas, for shipment over the said line of defendant's railway to Atchison, Kansas, and to be delivered there and forwarded by the connecting railway company as aforesaid, and on said dates the defendant accepted from the plaintiff said cattle for shipment as aforesaid, from said points to Amarillo, Texas, and to Atchison, Kansas, over the lines of defendant's said railway.

That defendant transported said cattle over its said line to Kansas City, Missouri, one train thereof arriving at Kansas City on Friday evening, May 29th, 1903, and the other two trains arriving at Kansas City on Saturday morning, May 30th, 1903, about nine o'clock A. M. That in transit two trains of said cattle were unloaded and detained by defendant's orders, at Wellington, Kansas, and the other train at Wellington, Kansas and at Strong City, Kansas, stations

on the line of said defendant's railway, and were not transported to Kansas City, Missouri until and at the times
29 aforesaid. That for several days before the arrival of said trains of cattle in Kansas City, Missouri, continuous and heavy rains had prevailed throughout the western states, and particularly in Colorado, Kansas, Nebraska, Iowa and Missouri, and unprecedented floods had commenced in the waters of the Kaw, or Kansas River, and in the Missouri River, extending from the source of the Kaw River and its tributaries to its mouth, and extending down the Missouri river from its source to the point where the Kaw River empties into the Missouri River. That during all of the time that said cattle were detained at Wellington, Kansas, and at Strong City, Kansas, and during the interval between the dates of their shipment as aforesaid, and of the arrival of said trains at Kansas City, Missouri, the said floods in both said Kaw and Missouri Rivers were daily and hourly getting higher, as the defendant, its officers and agents in charge of and directing the transportation of said cattle well knew. That the defendant failed and neglected to continue the transportation of said cattle to Atchison, Kansas, by way of Topeka, Kansas, as by the plaintiffs directions it was its duty to do, the same being the regular line of transportation and the main line of the defendant's said railway to Atchison, Kansas, but the defendant wrongfully and negligently and of its own motion, and without the consent of plaintiff, deviated from said main line and carried said cattle to Kansas City, Missouri, at which place same arrived as aforesaid, and defendant unloaded the same in the yards and pens of the Stock Yards Company at Kansas City, Missouri, which are located in the bottoms along the Kaw River and near its mouth, where the lands are low, and at a time when the waters of said Kaw River had been continually and still were rapidly rising, as defendant knew, and where the overflow of said Stock Yards by the waters of the Kaw River was hourly threatened, and when the defendant, its officers and agents in charge and control of said cattle, knew that an unprecedented flood was then descending the Kaw River, which would and must overflow the lands where said stock yards were located, and where defendants unloaded and deposited said cattle at the times aforesaid.

Plaintiff states that on Sunday, May 31st, 1903, said
30 pens and yards where said cattle were situated, were flooded and overflowed, and defendant in order to save said cattle from drowning, drove the same together with other cattle then in said yards into the viaducts extending over said pens and yards and above the water, and the same

remained in said viaducts from Sunday, May 31st, 1903, to June 7th, 1903. Plaintiff states that the overflow of said Kaw River at the point where said stock yards are located, extended from May 31st to June 7th, 1903, back from said yards a distance of three quarters of a mile or more, and was of a depth of from eight to fifteen feet, and in consequence of said flood and of the placing of said cattle in the viaducts, it was impossible to feed or water said cattle during said period of seven days and was impossible for the plaintiff to sufficiently feed and water the same.

Plaintiff states that notwithstanding the defendant was negligent as aforesaid in detaining said trains of cattle an unreasonable length of time at Wellington, Kansas, and at Strong City, Kansas, as aforesaid, and in not continuing promptly their transportation to Atchison, Kansas, by way of Topeka, Kansas; and notwithstanding the defendant wrongfully and negligently, without the plaintiff's consent, diverted said shipments and transported said trains of cattle to Kansas City, Missouri, off of the regular and proper route; and notwithstanding the defendant negligently imperilled said cattle by taking them from the high lands and depositing and unloading them near the mouth of the Kaw River, under the circumstances aforesaid, still the plaintiff states the fact to be that the defendant could have by the exercise of care and diligence taken said cattle out of their perilous position and had time before the overflow and flood of Sunday, May 31st, 1903, to have hauled said cattle to a place of safety, or could have had them transported from their place of peril by some connecting railroad, but defendant failed and neglected to do this and allowed said cattle to be and remain in the yards and pens where they were overtaken by the flood as hereinbefore stated.

Plaintiff states that said cattle were so transported and hauled by the defendant of its own motion, and without the consent of plaintiff or consultation with the plaintiff, its servants and officers in charge of said cattle, and
31 contrary to the directions of plaintiff as to the routing of said cattle to Evarts, South Dakota. Plaintiff states that at the time and places of shipment of said cattle as aforesaid, they were in good condition, and were worth the price and sum of twenty-two dollars per head. Plaintiff states that by reason of the premises, and as a direct result of the acts of the defendant hereinbefore states, four hundred sixty-five head of said cattle died and were wholly lost to the plaintiff, and thereby plaintiff lost and was damaged in the sum of ten thousand two hundred thirty ($10,-

230.00) dollars; that the remaining eighteen hundred twenty-nine head of said cattle were so weakened and emaciated by reason of the premises and by reason of being confined for the time aforesaid without food or water, that the same were injured and deteriorated in value, and plaintiff actually lost in value the sum of at least ten dollars per head, making a total damage and loss on account of the injury and deterioration of the remainder of said cattle, suffered by the plaintiff, of eighteen thousand two hundred ninety ($18,290.00) dollars. That on the further transportation of the remainder of said cattle from Kansas City, Missouri to their said destination, the plaintiff incurred and was compelled to pay for extra cars and extra freight, in the sum of eight hundred eighty-eight ($888.00) Dollars. That plaintiff incurred and was put to extra expense in consequence of the premises, and in looking after and attempting to preserve and save as many of said cattle as possible, in the sum of eleven hundred twenty-three and 37/100 ($1123.37) dollars.

Plaintiff further states that the remnant of said shipment of cattle were not delivered to plaintiff at Evarts, South Dakota until about the middle of July, 1903, whereas, said shipments could and should, by the exercise of due care and diligence on the part of defendant, have been so delivered in the early part of June, 1903; and by reason thereof, and by reason of the several negligences of defendant as herein stated, said remnant of said cattle reached said destination in such weak and debilitated condition as to render them unfit and incapable of enduring the rigors of the following winter, and as a direct result thereof more than five hundred head of said remnant of the cattle died and are totally lost to the plaintiff to its further and additional damage in
32 the sum of twelve thousand ($12,000.00) dollars.

That the total damage and loss suffered and sustained by this plaintiff by reason of the premises, and by reason of the wrongful acts and negligences of defendant as aforesaid, is forty-two thousand six hundred twenty-one and 37/100 ($42,621.37) dollars.

Plaintiff states and charges the fact to be that by the exercise of due and reasonable care in the carriage and transportation of said cattle from the point of shipment aforesaid to Atchison, Kansas, all of said loss and damage could have been avoided, and that defendant was guilty of negligence therein in the following particulars to-wit:

First. Defendant did not exercise due and reasonable care, but was negligent in its detention of said cattle at Wellington, Kansas, and at Strong City, Kansas, and by the exercise of due and proper diligence could have carried and transported said cattle to Atchison, Kansas, by way of Topeka, Kansas, and delivered the same to the connecting carrier at that point, and thus escaped the peril and destruction of the flood.

Second. That defendant was guilty of negligence, after having so long detained said cattle at Strong City and at Wellington, Kansas in not further detaining or holding them in some place of safety until the unprecedented flood in the Kaw River, hereinbefore mentioned, had subsided, so that the transportation of said cattle might be safely resumed.

Third. That defendant was guilty of a wrongful and negligent act in diverging and deviating the shipments of said cattle to Kansas City, Missouri, off of the line of transportation over which said cattle were directed by the plaintiff to be carried.

Fourth. That the defendant negligently and carelessly and knowing that an unprecedented flood was descending the Kansas River, hauled said cattle into the low lands at the mouth of said River, and unloaded and left them in front of the approaching flood.

Fifth. That defendant, after having wrongfully transported said cattle to Kansas City, Missouri, as aforesaid, carelessly and negligently failed and neglected to move or cause to be moved, the same from their position of peril in the Stock Yards at Kansas City, Missouri, as defendant had reasonable time and opportunity to do, but the same were overtaken by the flood.

33 Sixth. That the defendant did not exercise due and reasonable care and diligence and was negligent in not properly or sufficiently feeding and watering said cattle, both while the same were at Strong City, Kansas, and at Wellington, Kansas, and while the same were in the yards and viaducts of the Kansas City Stock Yards Company at Kansas City, Missouri.

Plaintiff further states that all of the several injuries, damages and losses to and of said cattle hereinbefore specified, and the losses and expenses aforesaid, were each and all caused by the several negligencies and want of due and reasonable care in the transportation and carriage of said cattle by the defendant.

Wherefore the consideration of the premises, the plaintiff says that it has been damaged by the acts, negligencies and want of due and reasonable care on the part of the defendant, in the sum of forty-two thousand six hundred twenty-one and 37/100 ($42.621.37) dollars, for which sum, together with interest thereon, and the costs of this suit, the plaintiff prays judgment.

R. E. BALL,
Attorney for Plaintiff.

Received copy of the foregoing amended petition, this ..... day of December, 1904.

.....
Attorney for Defendant.

Indorsed: 8157. Minnesota & Dakota Cattle Co., Plff., vs. Atchison, Topeka and Santa Fe Railway, Deft. Amended Petition. Filed Jan. 16, 1905. Geo. F. Sharitt, Clerk. R. E. Ball, Atty. for Plff.

34 In the Circuit Court of the United States for the District of Kansas.

The Minnesota and Dakota Cattle Company, Plaintiff,
No. 8157. vs.
The Atchison, Topeka & Santa Fe Railway Company, Defendant.

Amended Answer to the Amended Petition.

Now comes the defendant in the above entitled cause and for amended answer to the plaintiff's amended petition filed therein, denies each and every allegation therein contained, except as hereinafter expressly admitted or stated.

2. For a second and further defense the defendant says that it is a corporation duly created and existing under the laws of the State of Kansas, and as such is engaged in the operation of a line of railroad into and through the States of Illinois, Iowa, Missouri, Kansas, Colorado, California, and Texas, and into and through the Territories of Oklahoma, Indian Territory, New Mexico and Arizona; but denies that it is engaged in the operation of a line of railroad to or from the station of Kenna, in the Territory of New Mexico, or the station of Bovina, in the State of Texas; but alleges that it received the cattle mentioned in plaintiff's petition from a connecting carrier to be transported over a portion of its line of railroad and delivered to a connecting carrier to be forwarded to the destination of said cattle, upon the terms and under the provisions of ten (10)

certain written and printed contracts, executed and entered into between the said plaintiff or its duly authorized agents and the railroad companies to which said cattle were delivered for shipment at said station of Kenna, in the Territory of New Mexico and Bovina in the State of Texas; copies of which said written and printed contracts are hereto attached, made a part of this answer, and marked respectively Exhibits A, B, C, D, E, F, G, H, I and J, and upon no other terms and conditions than those fully expressed in said written and printed contracts. That at the time of making the said contracts this defendant operated a line of railroad connecting with the railroad of the Southern Kansas Railway Company of Texas, at Higgins, on the State line of Texas, which latter line of railway connected with the railway of The Pecos & Northern Texas Railway Company, and extending thence to the City of Topeka, in the State of Kansas, and to the City of Kansas City, in the State of Missouri, and also a line of railroad extending from said City of Topeka, to the City of Atchison, in the State of Kansas. That at said city of Atchison, it formed a connection with the railroad of the Kansas City, St. Joseph & Council Bluffs Railroad Company, a line of railroad constituting a part of what is known as the Burlington Route, which latter road extended northward and connected with certain lines of railroad connecting with the Chicago, Milwaukee and St. Paul Railway, which extended to the point of destination. That the defendants line of railway connected also at Kansas City, Missouri, with several lines of railway extending northward, including the Missouri Pacific Railway which connected with other lines of railway and with the Chicago, Milwaukee & St. Paul Railway extending to the point of destination, and that over either of said routes or lines of railway, by way of Atchison, Kansas, or Kansas City, Missouri, through or joint rates existed between the point of origin and point of destination of said shipment of cattle, and either of said routes or lines, to Atchison, Kansas, or to Kansas City, Missouri might well be selected by said defendant to transport said cattle and to make delivery thereof to some connecting line in the route. That it received the said cattle at the said station of Higgins for transportation, under and in pursuance of the foregoing contracts, over its line or lines of railroad to be delivered to a connecting carrier for transportation and to be delivered at the point of destination. That while said animals were being transported over its line of railway and before they arrived at said city of Topeka, this defendant was informed by the Kansas City, St. Joseph & Council Bluffs Railroad Company, that it could not receive said cattle at Atchison, Kansas, and could not transport the same,

on account of a washout on the line of its road, and that
36 it would decline and refuse to receive the same for such transportation. That there existed no adequate or sufficient stock yards at said City of Atchison in which to hold said cattle until delivery could be made there to said connecting line, or to some other connecting line, and in the meantime the said line of the defendant between the Cities of Topeka and Atchison became impassable on account of water rising above the railroad tracks so that such line could not be used by this defendant, and it could not safely make delivery to a connecting line at Atchison. That thereupon it entered into negotiations with The Missouri Pacific Railway Company to receive said cattle at Kansas City, Missouri, and transport the same northward and deliver the same to some connecting carrier for delivery to the Chicago, Milwaukee and St. Paul Railway Company, which last named company could transport said cattle to the place of destination. That said defendant was advised by the said The Missouri Pacific Railway Company that it could and would receive said cattle upon their arrival at Kansas City, and thereupon, with the knowledge consent and acquiescence of the plaintiff, this defendant proceeded to and did transport said cattle to Kansas City, Missouri, for delivery to said The Missouri Pacific Railway Company and upon arrival of said cattle at said Kansas City did deliver twenty car loads of said cattle containing 760 head of said cattle, to the said The Missouri Pacific Railway Company to be by it transported and delivered to the Chicago, Milwaukee & St. Paul Railway Company, and the said The Missouri Pacific Railway Company received said twenty car loads of cattle for that purpose, and this defendant did deliver the remainder of said cattle to the Union Stock Yards, at said City and placed them in that portion of said stock yards where cattle are usually placed when the same are to be reloaded for shipment over the said Missouri Pacific Railway Company's lines, which is the usual and customary manner of handling live stock shipments through Kansas City, to hold the same until the said Missouri Pacific Railway Company would be able to load and transport said cattle. That said cattle arrived at Kansas City Stock Yards on the evening of May 29th and the morning of May 30th, 1903. That before said cattle could be removed from said stock yards at said Kansas City the waters of the Kaw
River and the Missouri River at and adjacent to Kansas
37 City, suddenly arose to an extraordinary and unprecedented height and overflowed their banks and inundated said Kansas City Stock Yards and destroyed the tracks of all railroads entering Kansas City. That said flood was unusual, extraordinary, and unprecedented, and constituted in law

an act of God. That all the injury to said cattle or any of them, and all damages sustained by plaintiff on account of the injury to said cattle was proximately caused by an act of God in the nature of an unusual extraordinary and unprecedented flood on the 30th and 31st days of May, 1903, and was not proximately caused by any negligent act or omission on the part of said defendant railway company or any of its officers, agents employes or servants.

Defendant further says that the said plaintiff wholly failed and neglected to give notice in writing of its claim for damages on account of the loss and injury to said cattle to any officer of said defendant company, or to its nearest station agent, or to the nearest station agent of the last carrier making delivery of said cattle, before said stock were removed from the place of destination above mentioned, or from the place of delivery of the same to consignee, and before said stock were slaughtered or intermingled with other stock, and failed and neglected to make written claim for such damages to the defendant company within ninety-one days after said loss and injury to said cattle occurred, as a condition precedent to said plaintiffs right to recover damages for such loss and injury to said cattle; as provided in the eighth paragraph of the shipping contracts under which said cattle were transported.

3. As a cause of action and counter-claim against the said plaintiff and in favor of the said defendant, The Atchison, Topeka and Santa Fe Railway Company, the said defendant, making all of the allegations of the second count of this answer a part of this count as far as the same are applicable, as fully as though the same had been sent forth at length herein, says that after said cattle arrived at Kansas City and before they could be removed from said stock yards the waters of the Kaw River and the Missouri River at and adjacent to Kansas City suddenly arose to an extraordinary and unprecedented height and overflowed their banks and inundated the said Kansas City stock yards and destroyed the tracks of all railroads
38 entering Kansas City; that such flood was unusual, extraordinary and unprecedented, and constituted in law an act of God. That when the said Kansas City stock yards became inundated the Stock Yards Company, in its efforts to preserve said cattle, and with the knowledge and consent of the persons in charge thereof, drove them into overhead passages or viaducts on the premises of said stock yards company and fed them and cared for them until the flood subsided. That but for the prompt action of the said Stock Yards Company, acting in the emergency provided by the flood, all of said cat-

tle would have been destroyed. That the reasonable value of the hay and other food given to said cattle by the said Stock Yards Company while they were so in such viaducts or overhead passages, and while they were in the Stock Yards, and the reasonable value of the services rendered in caring for them, was and is twenty four hundred and twenty-eight and 60/100 dollars ($2428.60); that the said defendant company, as is the general custom, well known to the said plaintiff, in cases where cattle in the possession of railway companies in the course of transportation are fed, watered and cared for by a stock yards company, paid to the said Stock Yards Company the sum of $2428.60 and took from the said Stock Yards Company an assignment of its said account and lien for feed charges upon said cattle, as aforesaid, and is now the owner of said account.

Defendant further states that after the flood waters of Kansas City subsided the said cattle were in such a weak and impoverished condition that they were unfit for immediate shipment to destination, and it became and was necessary that said cattle should be put upon pasture in order that they might gain sufficient strength to be able to be shipped to destination; that with the consent and at the request of the owner of said cattle they were taken by the defendant to Emporia, Kansas, and there put upon pasture and kept for a space of about twenty-two days, until they had gathered sufficient strength to be transported on to destination. That the reasonable value of the pasturing bill incurred in respect of said cattle in so being pastured is twenty-eight hundred and twenty and 38/100 dollars ($2820.38) which said sum the said plaintiff, the
39 owner of said cattle refused to pay, and the defendant paid the amount thereof and took an assignment of said account and the lien therefor. Defendant further states that no part of said bills for feed or pasturage has been paid by the owner of said cattle, the said plaintiff, to the defendant, and that the same and every part thereof is due and owing to the said defendant.

Defendant further states that while said cattle were on pasture at Emporia, Kansas, and before it had paid the bills hereinbefore referred to, a controversy arose between the said defendant and the said plaintiff, as the owner of said cattle, as to the legal liability of such owner for said pasturage bills and feed charges, and it was thereupon agreed between the said plaintiff and the said defendant that the said cattle when ready for shipment, should be forwarded to destination, without prejudice to the rights of either of the parties; and accordingly a written agreement was entered into between the plaintiff

and the defendant herein, whereby the plaintiff became bound to defendant in the sum of ten thousand dollars, conditioned that the plaintiff should well and truly pay all proper expense, feed, and pasture bills which might ultimately be adjudged to be a proper claim against the owner of said cattle, or to have a lien therefor, whether in favor of the defendant or in favor of any one to whose right the defendant has succeeded; a verified copy of which said bond is hereto attached, made a part hereof, and marked Exhibit "K".

Defendant further states that by reason of the facts above recited the said charges for feed and pasturage bills were proper claims against the owner of said cattle, and that a lien existed therefor according to the laws of the State of Kansas, and that the defendant has succeeded to the rights of the persons in whose favor such liens existed.

The defendant therefore prays judgment against the said plaintiff for the sum of fifty-two hundred and forty-eight and 98/100 dollars ($5248.98) with interest thereon at the rate of six per cent per annum from the date of said payment, and the costs of this action.

A. A. HURD,
ANGEVINE & CUBBISON,
Attorneys for Defendant.

EXHIBIT A.

Form 67 Regular. Read this Contract carefully, as numerous changes have been made. No.....14.....

LIVE STOCK CONTRACT (LIMITED LIABILITY.)

The Pecos Valley & Northeastern Railway Company.

RULES AND REGULATIONS FOR THE TRANSPORTATION OF LIVE STOCK.

NOTICE—This Railway has Two Rates on Live Stock.

The rate given under this contract is lower than the rate made by the Railway Company and connections for the transportation of stock at carrier's risk and without limitation of liability, and is based upon the conditions and agreements found in this contract and upon the valuations therein fixed. The shipper by accepting this contract is deemed to accept the lower rate upon the terms and conditions specified as part of this contract.

No station agent or station master of this Company has any power or authority to bind this Company in regard to the shipment of Live Stock, except by written contract; nor to agree for the Company that cars shall be furnished at his or any other station for shipment of Live Stock at any special date, or that any particular kind or class of cars will be furnished for such purpose, or that Live Stock will be forwarded on any particular train, or be delivered at destination at any special time or for any particular market, or to transport stock beyond the line of this Company's road. No one but a general officer of the Company, and he only in writing, has power to make such contract.

No. of Cars.	Initials.
2396	4 C
523	"
3435	S W S
1194	4 C
5922	P. V.
54304	A T
60035	S J V
52529	A T

THIS AGREEMENT, Made at Portales, N. M. Station.

May 25, 1903, between and on behalf of the above named Railway Company, hereinafter called the Company, and the connecting carriers severally, of the first part and Minnesota & Dakota Cattle Co. of Kenna, N. M., hereinafter called the shipper, of the second part:

WITNESSETH, THAT, WHEREAS, the Company transports live stock as per rules and regulations, all of which are made a part of this contract;

NOW, THEREFORE, in consideration of the foregoing and of the mutual covenants and conditions hereinafter contained, the Company agrees to transport for the shipper, upon its own road only, the live stock described below, as herein provided, viz.:

10 cars, said to contain 393 head of cattle

, from Kenna, N. M. Station, on the Company's road

consigned to Minnesota & Dakota C. Co. at Evarts, S. D.

to be carried by said Company to said place of destination, if the same be upon the line of road of said Company, but if such place of destination be beyond the line of road of said Company, then to deliver or tender such shipment at the connecting point on the line of its road to the connecting carrier, to be forwarded to the place of destination, and on so delivering to such connecting carrier all liability whatever of the Company for carriage of or on account of said stock shall be thereby ended, it being understood that the Company assumes no obligation whatever on account of the carriage of said stock beyond its road, and that the Company shall not be liable for any damage to, injury of or delay of said stock, or of anything whatever that may happen to the same after such delivery or tender of delivery in case such connecting carrier shall refuse to receive the same. Each carrier in the route shall receive such stock when delivered to it and transport the same over its road to the succeeding carrier in the route, and it is distinctly understood that the responsibility of each carrier shall not begin until it receives said stock from the consignor or from the connecting carrier, and shall cease when it delivers the same to the connecting carrier, or, if the last carrier, at the place of destination.

It is also understood and agreed that the Company shall not be held liable for any damages whatever that may accrue to the

54104	"
54466	"

shipper or to the stock in case the other carrier or carriers shall refuse to carry or deliver the stock on the payment of said rates, but shall only be liable to pay to the shipper, on thirty days' notice in writing from the shipper, the amount which he may have been compelled to pay in excess of the rate given, which shall be in full satisfaction and discharge of the guarantee of the Company of the through rate. It is understood and agreed that such guarantee shall not in any wise be construed to extend the liability of the Company on account of said stock beyond the delivery or tender thereof, as hereinbefore stated.

In consideration of the foregoing, it is further mutually agreed between the parties hereto as follows:

FIRST. That the live stock covered by this contract is not to be transported within any specific time nor delivered at destination at any particular hour, nor in season for any particular market.

SECOND. The Company agrees to stop cars at any of its stations for watering and feeding where it has facilities for so doing whenever requested to do so in writing by the owner or attendant in charge, and the party of the second part agrees not to confine his stock for longer period than 28 consecutive hours without unloading the same for rest, feeding and water, for a period of at least five consecutive hours, provided he is not prevented from doing so by storms or other accidental causes.

THIRD. The shipper hereby represents and agrees that his live stock does not exceed in value the prices below named, and it is understood that the rate given is based upon such limit of valuation and that in case of loss or damage from any cause for which the Company may be liable, payment will be made therefor on the basis of the actual cash value at the time and place of shipment, but in no case to exceed the following, which is understood not to exceed to be the value as held by the shipper, and which is the highest value accepted for the lower rate, animals of a higher value being charged a higher rate, to-wit:

Each horse or pony, gelding, mare or stallion, mule or jack, per head,	$100	Each calf.....per head.	$10
Each ox, bull or steer.....	" 50	Each hog.....	" 10
Each cow	" 30	Each sheep or goat.....	" 3

FOURTH. The shipper agrees at his own cost and expense to properly bed the cars in which the stock are to be transported, and in all respects to put them in proper condition for shipment of said stock, and also agrees before the cars in which said stock is to be transported leave said first named station, that he will carefully examine the same, and that if any defect or deficiency whatever be found in any of said cars, that he will at once report the fact to the station agent of the Company and demand, in writing, another car or cars in lieu thereof; and if the shipper shall fail to make such demand, it shall then be conclusively presumed that said cars and each of them are in all respects suitable for transportation of said stock, and the shipper agrees to assume and hold the Company not liable for any damage that may occur to the stock on account of any defect in the cars or any of them, which were not so reported to the Company's said agent.

The shipper further agrees to see that the cars are securely fastened, so as to prevent the escape of stock therefrom, and that he will not hold the Company responsible for any loss or damage that may result from failure or neglect on his part, or of his agents or employés, to do so; and also agrees to assume all risk of injury or loss of or to said stock because of any defect in said cars, or because of the stock being wild, unruly, weak, or maiming each other or themselves, or because of heat, suffocation or other results of being crowded in the cars, or of being injured or destroyed by fire on any account whatever, and especially because of the burning of hay, straw or other material used in bedding or feeding the stock, or for any other purpose; and for any injury or damage to said stock while in transit, it shall be presumed that the same resulted from overloading, or from the neglect or inattention of the shipper or his employés, for which the Company shall in no respect be liable.

FIFTH. That at his or their own risk and expense, the shipper will load the stock at the first named station, take care of, feed and water and attend to same while they may be in the stock yards of the Company or lots where awaiting shipment, and while the same is being loaded, transported, unloaded and reloaded, and to load, unload and reload the same at feeding and transfer or other points wherever the same may be unloaded for any purpose whatever, and will properly attend to and care for the stock while in the cars in transit or otherwise, and hereby agrees that the Company shall not be liable for any loss or damages to said stock while being so in the shipper's charge, and so cared for and attended to by the shipper or his or their employés as aforesaid; and in cases where the Company shall furnish laborers to assist in the loading, unloading or reloading of said stock, it is understood they are furnished for the accommodation of the shipper, and they shall be entirely subject to the shipper's orders, and shall be deemed the shipper's employes while so engaged, and the Company shall in no wise be liable for their acts or negligence.

SIXTH. The shipper hereby assumes and releases the Company from risk of injury or loss which may be sustained by reason of any delay in such transportation of said stock or injury thereto, caused by any mob, strike, threatened or actual violence to real or personal property, or by the refusal of the Company's employés to work or otherwise, or by failure of machinery, engines or cars, or injury to tracks or yards, storms, washouts, escape or robbery of any of said stock, overloading cars, fright to animals, or crowding one upon another, or from any and all other causes whatever; the liability of the carrier or any fact essential thereto in any instance or case shall not be presumed, but the burden of establishing such liability is assumed by the shipper in the event of a suit.

SEVENTH. The shipper further agrees that at the end of every division or wherever the train conductor shall be changed, on request of the conductor, the party in charge of the stock (and if there be more than one, all of them) shall make out and sign a statement (causing the signature or signatures to be witnessed by some third party) showing fully the condition of the stock, the damage, if any, thereto, and the time and place and cause thereof, and the delays, if any, on such division, and the time and cause thereof, and everything unusual or exceptional that may have occurred to the stock, specifying all his complaints as to the manner in which the train and stock were handled on such division, and to deliver the same to the conductor on that division; and whenever the same shall be unloaded at any station, before they leave such station, the party in charge (and if more than one, all of them) shall make, sign and deliver to the station master a statement of the condition of said stock and of anything unusual or exceptional that may have occurred at such station, specifying all complaints as to the manner in which the stock have been handled or treated at such station, and the shipper shall be conclusively estopped from denying the truth of such statements or any or every of them, and the failure to deliver any and every of such statements herein provided shall conclusively bar and discharge any right of action of the shipper for loss or damages to said stock from whatever cause.

EIGHTH. In order that any loss or damage to be claimed by the shipper may be fully and fairly investigated and the fact and nature of such claim or loss preserved beyond dispute and by the best evidence, it is agreed that as a *condition precedent* to his right to recover any damages for any loss or injury to his said stock during the transportation thereof, or at any place or places where the same may be loaded or unloaded for any purpose on the Company's road, or previous to loading thereof for shipment, the shipper or his agent in charge of the stock will give *notice in writing* of his claim therefor to some officer of said Company, or to the nearest station agent, or if delivered to consignee at a point beyond the Company's road, to the nearest station agent of the last carrier making such delivery, before such stock shall have been removed from the place of destination above mentioned, or from the place of delivery of the same to the consignee, and before such stock shall have been slaughtered or intermingled with other stock, and will not move such stock from said station or stock yards until the expiration of three hours after the giving of such notice; and a failure to comply in every respect with the terms of this clause shall be a complete bar to any recovery of any and all such damages. The written notice herein provided for can not and shall not be waived by any person except a general officer of the Company, and he only in writing. Nor shall any such damage be recoverable unless written claim therefor shall be presented to the Company within ninety-one days after the same may have occurred.

NINTH. It is further agreed that no suit or action against the Company for the recovery of any damages accruing or arising out of said shipment or of any contract pertaining to the same, or the furnishing of facilities for such shipment, shall be sustained in any court of law or equity unless such suit or action shall be commenced within six months next after the loss or damage shall have occurred. The failure to institute suit within said time shall be deemed conclusive evidence against the validity of such claim or cause of action, and shall be a complete bar to such suit.

In the event this agreement for institution of suit within six months should be held invalid, then no such suit or action shall be maintainable unless instituted within two years next after the occurrence of the loss or damage, and the expiration of such two years shall be a complete bar to any recovery of damages.

TENTH. And whereas the through rate made for the said transportation to destination, and guaranteed by the above named Company, is the rate fixed by said Company and the companies or carriers operating the connecting lines of railroad to the point of destination in their tariffs or schedules for similar shipments at owner's risk, under and in view of the limitations and exemptions contained in this agreement, and is less than the rate fixed where such shipments are made without limitation of liability, or at carrier's risk:

It is further understood and agreed that each and all of the provisions, limitations and exemptions in this contract applicable to or in favor of the Company, shall also apply to and inure separately in favor of each of the several connecting carriers to the point of destination, and that each of such carriers shall only be obligated to transport said stock over its own road and deliver to the next connecting carrier, and the last carrier to the place of destination, under the provisions of this agreement, and no carrier or carriers shall be liable, in any event, for any loss or damage which may occur upon the road or roads, connecting or otherwise, of any other carrier or carriers; that each of the connecting carriers shall transport said stock over its own road under said through rate, in accordance with the provisions of this agreement, and that this agreement is entered into by the above named Company in its own behalf and as agent, for and, severally and not jointly, on behalf of, each of the connecting carriers operating roads forming part of the route over which said stock may be shipped to the point of destination above mentioned; that no other contract shall be required or be executed to cover the movement of the shipment over the line of any carrier in the route, it being understood that this contract is hereby adopted by the shipper and each of such carriers as the several contracts between said shipper and each of such carriers respectively, provided for their mutual rights and obligations.

ELEVENTH. The shipper shall hold the carrier harmless from any and all claims for injuries to persons accompanying said cattle for said shipper, resulting from the carrier's or employés negligence or otherwise, and will indemnify it for any damages it may be required to pay by reason thereof, or any expense it may be put to or damages it may be required to pay by reason of the introduction of said cattle into a country, territory or state against the quarantine or other laws of the United States or of any state, territory, people or community. In case the carrier shall be obliged to pay damages on account of the loss of or injury to said cattle, it shall be subrogated to the shipper's right to any insurance thereon.

It is also expressly agreed that the Company shall not be liable for any delay or damage sustained by the stock or any expense incurred by the shipper by reason of any enforcement or attempted enforcement by government officers of quarantine regulations, either state or federal, whether such officers act lawfully or unlawfully, and the shipper further agrees that the Company shall not be liable for any mistake or inaccuracy in any information furnished by the Company or any of its agents or officers as to quarantine regulations, state or federal, it being expressly understood that if any such information is furnished by the Company, it is furnished as pure gratuity, and without any warrant or guarantee of its accuracy.

TWELFTH. *It is distinctly understood and agreed that all prior understandings or Agreements concerning the furnishing of cars or facilities for said shipment or concerning the transportation of said stock or said shipment, are hereby merged and contained in this written agreement, and this written agreement contains all the terms, conditions and provisions relating in any manner to the shipment or transportation of said stock.*

THIRTEENTH. *In making this contract the shipper expressly acknowledges that he has had the option of making this shipment under the tariff rates either at carrier's risk or at a limited liability, and that he has selected the rate and liability named herein, and expressly accepts and agrees to all the stipulations herein named.*

FOURTEENTH. If the whole or any part of any provision of this instrument shall be adjudged void by a tribunal of competent jurisdiction, the remaining provisions or parts of provisions, in themselves valid, shall not be affected thereby, but shall be as valid and enforceable as if the invalid provision or part of provision had not been inserted herein.

The signature of the shipper or his agent hereto is and shall be conclusive evidence that said second party fully understands and assents to all the provisions and conditions of the foregoing contract.

Minnesota Dak. Co.
Shipper.

By Will Welch
Agent.

Witness R. L. Simmons
(To be other than either of the contractors.)

THE PECOS VALLEY & NORTHEASTERN RAILWAY COMPANY.
And Connecting Carriers.

By B. F. Pearman
Its Agent.

NOTE.—Agents must see that this contract is signed by the shipper, or in his name by his authorized agent, before commencing to load any of said stock, and that all blanks are properly filled in, and point of destination inserted must not be beyond a line of road in the Sante Fe Route unless special instructions otherwise provide.

NOT NEGOTIABLE.

DROVER'S RETURN PASS.

GOOD FOR CONTINUOUS PASSAGE ONLY.

Return transportation on this contract is available only for the parties that actually accompanied the stock shipment and whose autograph signature or signatures are secured hereon by Agent at shipping point, who will cancel the remaining blank lines.

Furthermore it will not be good for Return Passage until countersigned by Stock Agent or Agent at the station where the stock is unloaded or leaves our line.

Passenger Conductors Will Punch Here.

O O O O O

Agent at Point of Return Will Stamp or Insert Date Below.

From

Date

NO STOP-OVER ALLOWED.

PASS

.....

.....

.....

Countersignature:

.....

Stock Agent or Agents.

Return transportation will be for continuous passage only. No stop-over allowed, and the journey must be commenced on the day the contract is executed for return passage.

This contract will not be accepted for return passage, and conductor will take it up and collect full fare if any alteration, addition or erasure has been made hereon, or if presented by any other than the original holder or holders, whose signature or signatures are hereon. The holder or holders will write his or their signatures below as required.

.....

.....

.....

.....

H., J. A. & Co. 5M. 10—16–02.

No. .....

(Form 67 Regular.)

LIVE STOCK CONTRACT.

.....Kenna, N. M.....

TO

.....Evarts, S. D .....

..... May 25th .....1903....

Shipper ..... Minnesota & Dakota Cattle Co. .....

Consignee ..... Minnesoto & Dakota Cat. Co. .....

Forwarding Agent's Stamp.

Peros Valley & N. E Ry Co.
May 25, 1903
Portales

.....

Freight Conductors Will Punch Here. O

Pass.....W. Welch.....

.....

.....

parties in charge and accompanying stock.

..... B. F. Pearman ..... **Agent.**

The Agent at the station where the stock is loaded must enter on the back of the Contract the name or names only of the owners or employés in charge who are entitled to pass free with the stocks without regard to passes required by number of cars. Agents must know correct names are entered, and run a pen through remaining lines.

Where a shipment is destined to any point on the lines of The Atchison, Topeka & Santa Fe Railway Company, Gulf, Colorado & Santa Fe Railway Company, The Atchison, Topeka & Santa Fe Railway Company, Coast Lines, Southern California Railway Company, Southern Kansas Railway Company of Texas, The Pecos Valley & Northeastern Railway Company, The Pecos & Northern Texas Railway Company, Pecos River Railroad Company, the Agent of this Company may fill out this pass to such point of destination, but in so filling out such pass this Company acts only as the agent of such other company or companies, and it is distinctly understood by the shipper that the same shall not render this Company liable for any damage or injury to person or property occurring on the lines of such other company or companies.

[41] [18]

We, the undersigned, owners or in charge of the live stock mentioned in the within contract in consideration of the free pass granted, issued by the within named Company, over its and connecting lines, hereby agree that the within named Company, and each and every connecting carrier which may honor said pass shall not be liable to either of us for any injury or damage of any kind suffered by us or either of us while in charge of said live stock or while in course of transportation or on our return passage.

And whereas travel by freight trains is necessarily more dangerous than upon passenger trains, we hereby assume all the risks incident thereto and of the manner in which such trains are operated, and we hereby further agree to observe the following regulations, and we hereby release said Company, and each and every connecting carrier which may honor said pass, from all liability for any injury or damage suffered by any of us, if injured while violating any of said regulations, and to identify ourselves and each of us whenever required to do so by any conductor:

FIRST. Remain in a safe place in the caboose attached to the cars while the train is in motion.

SECOND. Get on and off said caboose only while the same is still or stationary.

THIRD. Will not get on or be on any freight car while switching is being or is to be done at stations or other places.

FOURTH. Will not walk or stand on any track or station or other places at night without a lantern, and will not be upon or attempt to cross any track while switching is being or is about to be done thereon, but will first use every effort to ascertain whether it is safe to go upon or cross such track or tracks.

FIFTH. Will be advised that freight trains do not stop at stations or other places where it is usually made safe to alight from trains, but are advised of the fact that freight trains frequently stop upon bridges and at places along the line of the road where it is not safe to alight from the caboose without first ascertaining by examining the surrounding ground that it is safe to alight thereat, and will therefore not attempt to alight from the caboose or car whenever the train may stop for any purpose without first making careful examination from the steps of the caboose (with a lighted lantern if at night time) and ascertain the condition of the ground, and first determine by every available means that it is safe to step down from the caboose or car at such place or places, and in this respect will not rely, except at our own risk, on any assurance or statement of the conductor or other Railway employé.

In consideration of the foregoing and of the free transportation, we and each of us hereby agree to assume all the risks of injury from alighting from the caboose or car on account of the condition of the ground or on any account, and agree that in case of any accident, wreck, mishap or other casualty, howsoever caused, in which we or either of us may or shall receive any personal injury, the one so injured shall notify ***in writing*** the Company or carrier upon whose road the accident or casualty may have happened, through his home agent or through the nearest and most convenient local agent of such Company or carrier, of such injury, and of the time, place and all the circumstances and extent thereof, and of the names and addresses of witnesses, within thirty days after the happening of such injury, and as ***a condition precedent*** to the right to maintain any suit or action or recovery on account of such alleged injury; and it is understood that such notice in writing cannot be waived by such home or local agent of the Company or carrier; and we and each of us further agree that we or either of us shall not have any cause or right of action or maintain any action for any injury except that of which notice as aforesaid shall be given to said Company or carrier, as aforesaid, and that no Company or carrier shall be liable for or on account of any injury or damage occurring on the road of any other Company or carrier.

Will Welch.....

.....

.....

Parties in charge of and accompanying live stock.

.....B. F. Pearman..... .....R. L. Simmons.....

Witness.

NOTE.—The agent must witness the signatures to the above release of all parties going in charge of the stock herein contracted for. If the agent making return passes or any conductor suspects the person presenting this contract is not the party who signed above, he will require him to write his name in his presence and compare the signatures.

..... hereby declare the valuation of live stock covered by within contract does not exceed, for

Each horse, pony, gelding, mare, stallion, mule or jack, per head..... $.....

Each ox, bull or steer, per head..... $.....

Each cow, per head..... $.....

Each calf, per head..... $.....

Each hog, per head..... $.....

Each sheep or goat, per head..... $.....

and the reduced rates as given are based upon such valuation.

* * * * * * * * *

("It is stipulated that Exhibits B. to J. attached to the Amended Answer are identical in terms with Exhibit 'A', except in the number of cattle mentioned and the number and initials of the cars, and except that Exhibits D. E. G. are endorsed 'Kenna, N. M. to Atchison, Kas.' and Exhibits H. I. and J. are endorsed 'Bovina, Tex. to Atchison, Ks' ".)

60 EXHIBIT K.

Know All Men By These Presents, that we, the Minnesota and Dakota Cattle Company, a corporation organized under the laws of the State of South Dakota, and M. Mullen, T. B. Tomb, L. A. Allen and Charles Stuebe, are held and firmly bound to The Atchison, Topeka and Santa Fe Railway Company in the penal sum of ten thousand ($10.000) dollars, for the payment of which well and truly to be made, we bind ourselves, our successors, heirs, executors and administrators, jointly and severally, firmly by these presents.

Witness our hands and seals this 9th day of July, 1903.

The condition of this obligation is such that,

Whereas, the said Minnesota & Dakota Cattle Company did on the 25th and 26th of May, 1903, ship forty-three carloads of cattle from Kenna, New Mexico, consigned to Evarts, South Dakota, and did on the 26th day of May, 1903, ship seventeen car loads of cattle from Bovina, Texas, consigned to Evarts, South Dakota, all of said shipments to be transported over the line of The Atchison, Topeka & Santa Fe Railway Company, or its connections, as shown by the stock contract, to Atchison, Kansas, and thence forwarded to Evarts, South Dakota, the point of destination; and

Whereas, said cattle were taken to the Kansas City stock yards and held there until the flood subsided and then put on pasture, and are now about to be shipped; and

Whereas, said The Atchison, Topeka and Santa Fe Railway Company proposes to forward said cattle consigned to Evarts, South Dakota, in accordance with the existing stock contract; and

Whereas, bills and charges for yardage and pasturage for a large amount are claimed by said railroad company, or by the Kansas City Stock Yards Company against said owners of said cattle, which bills are denied by the above bounden Minnesota & Dakota Cattle Company and payment thereof refused; and

Whereas, said The Atchison, Topeka & Santa Fe Railway Company have agreed to forward the remainder of the
61 cattle so shipped without requiring the payment of such bills and charges for feed and pasturage, upon the giving of a bond conditioned for the payment of said charges, if it shall be ultimately determined that it is liable therefor, or that a lien existed therefor; and

Whereas, the above bounden has agreed to pay the freight on said shipment promptly at destination;

Now Therefore, if the above bounden Minnesota & Dakota Cattle Company and M. Mullen, T. B. Tomb and L. A. Allen, and Charles Stuebe, or any of them, shall well and truly pay all proper expense, feed and pasture bills, which may be ultimately adjudged to be a proper claim against the owner of said cattle, or to have been a lien therefor, whether in favor of said railway company or in favor of any one to whose right the railway company has succeeded, then this obligation shall be void, otherwise it shall be and remain in full force and effect. If the said charges for feed and pasturage are held to be proper charges, then the proportion to be charged against the cattle mentioned herein may be determined on a pro rata basis.

It is expressly understood, however, that neither the said Minnesota & Dakota Cattle Company or the said The Atchison Topeka & Santa Fe Railway Company, by the giving and taking of this bond waive any of their respective rights under the contracts of shipment of said cattle, but all of such rights on the part of both parties shall be and remain as they may be finally determined and agreed upon, or finally adjudged by the courts.

MINNESOTA & DAKOTA CATTLE CO.
By M. Mullen, President.

M. MULLEN
[Seal] THOMAS B. TOMB
CHARLES STUEBE
L. A. ALLEN

Indorsed: No. 8157. Minnesota & Dakota Cattle Company vs. Atchison, Topeka & Santa Fe Railway Company. Amended Answer to Amended Petition. Filed Jan. 16, 1905. Geo. F. Sharitt, clerk.

62 In the Circuit Court of the United States for the District of Kansas, First Division.

The Minnesota & Dakota Cattle Company, Plaintiff,
No. .... vs.
The Atchison, Topeka & Santa Fe Railway Co., Defendant.

Reply.

Now comes at this day, the plaintiff in the above entitled cause and replying to the answer of defendant filed herein, says:

I.

That it denies each and every allegation and averment in defendant's answer contained, and in each and every paragraph and count thereof.

Wherefore, having fully replied, plaintiff prays judgment as in and by its petition herein.

II.

Plaintiff further replying to said answer, states that on June 10, 1903, and just at the time when the flood mentioned in the plaintiff's petition and in defendant's answer, was subsiding at Kansas City, Missouri and while plaintiff's cattle mentioned in the petition herein were still in the custody and control of the defendant, and after defendant and its general officers in charge of and directing the handling of said cattle, knew that a large number of the same had died and been lost by reason of the matters alleged in plaintiff's petition herein, and after the said defendant and its said officers and agents knew that the residue of plaintiff's said cattle that were still living had been greatly damaged and injured as stated in the petition herein, but before either the plaintiff or the defendant knew the exact number of said cattle that had died, or the full extent of the injury to the remainder thereof, the plaintiff duly notified the defendant in writing, and defendant's general agent and officers at Kansas City, Missouri,
63 were then fully advised in writing, and otherwise, that plaintiff claimed and asserted that all damage and loss which plaintiff had suffered or might suffer by reason of the matters and things stated in the petition, plaintiff claimed were so suffered by reason of the acts, negligences and omissions on the part of the defendant, stated in the petition, and that defendant was liable to the plaintiff, therefor. That at said time it was perfectly understood between the plaintiff and the defendant's live stock agent and general

counsel, in numerous conferences, that plaintiff would look to and would claim against the defendant reimbursement for and payment of all loss and damages that had occurred to said shipments of cattle; that at said time both the plaintiff and defendant agreed that the condition of the remnant of said cattle was such that they could not be at once safely transported to their destination in South Dakota on account of their enfeebled condition, resulting from the matters stated in the plaintiff's petition; that plaintiff and defendant, through its said general officers, agreed at said time it to be necessary for the preservation, as far as possible of the remainder of said cattle, and for the purpose of minimizing the loss thereon, that defendant might and should pasture the same until they regained sufficient strength to justify their further shipment to said point of destination. That defendant on said June 10, 1903, and pursuant to the arrangement and agreement arrived at between plaintiff and defendant, after several conferences, removed said remnant of cattle to its pastures at Emporia, Kansas plaintiff consenting thereto, but on the express understanding and notice in writing, given at that time to defendant's assistant general live stock agent at Kansas City, Missouri, that the same should be moved and pastured at the instance, risk and expense of defendant, and in giving said consent the plaintiff did not in any manner waive it- claim for the damages and loss which it had incurred by reason of the matters stated in the petition. That thereafter repeated demands or requests were made by defendant of plaintiff, through defendant's general officers and agents at Kansas City, Missouri, to consent to take said cattle from the defendant, and relieve the defendant from further shipment thereof, but plaintiffs refused to accept said remnant of cattle otherwise than at the point of destination to which, as stated in the petition, they had been originally shipped.

64 That thereafter defendant, after pasturing said cattle on pastures rented and controlled by it near Emporia, Kansas; continued and resumed the transportation of said cattle to said point of destination. That at or about the time of the resumption by defendant of the shipment of said remnant of cattle to the point of destination, the plaintiff gave the defendant an obligation in writing, whereby the plaintiff and certain sureties bound and obligated themselves to the defendant to pay certain charges which defendant claimed plaintiff should pay, which said charges plaintiff asserts were caused and occasioned by reason of the matters complained of in the petition, and plaintiff gave such obligation upon the condition that it should not be bound to pay the same

unless it was ultimately adjudged in any proper litigation to be liable therefor.

Plaintiff further states that all of the damages sued for and claimed by it in this suit, were directly suffered when said consignments of cattle were in the charge, control and custody of defendant; that not only the local agent at Kansas City, Missouri, but the general live stock agent and assistant general live stock agent, and the general solicitor for the defendant, were fully advised at the times mentioned in the petition, and in the answer, of the situation and peril of said cattle, but they and each of them, recognized fully, in the various conferences occuring between said general officers of the defendant and the plaintiff and its representatives, that plaintiff claimed that defendant was liable and responsible to plaintiff for any loss that it had or might suffer in the premises stated in the petition, while defendant denied such liability solely on the ground that such loss was caused entirely by the flood and was occasioned by what is known in law as "the act of God"; that no question was made or raised in any of said conferences that the defendant or its said representatives were not fully advised that plaintiff claimed and asserted defendant's liability for said loss. That defendant and each of its said general officers were at said times fully advised in the premises and knew and know that at the time defendant took the remnant of said cattle to its said pastures, and at the time of the re-shipment thereof, and that at the time of the giving by the plaintiff of the obligation aforesaid for the payment of said extra charges, it was
65 impossible to state definitely and in detail the extent of the loss on said cattle, or the number of them that had died or by reason of the premises would die, or the amount and extent of the injury to the remnant thereof; that nevertheless and as soon as these items of damage and loss could be ascertained, the plaintiff on the .... day of August, 1903, and within the time limited by paragraph eight of the shipping contracts, attached to the answer, itemized and detailed, as nearly as at that time it could, and as a further and separate notice to the defendant, the damages suffered by the plaintiff by reason of the matters and things alleged in the petition; that it again served in writing the defendant, through its general live stock agent at Kansas City, Missouri, with its claim and the items thereof as set forth in the petition, on said .... day of August, 1903, and within the time limited by said paragraph eight of said shipping contract; that prior thereto said general live stock agent and his assistants had referred the matter of the adjustment of plain-

tiff's claim against defendant, to its general counsel at Kansas City, Missouri; that plaintiff through its counsel, upon serving the itemized claim aforesaid on defendant's agent, at once thereafter, and on September 1, 1903, notified defendant's general counsel for Missouri and Iowa, located at Kansas City, Missouri, of the fact of the service of said notice of plaintiff's claim, and requested before taking action, a definite answer as to whether defendant would make any proposition looking to the adjustment of the claim. That thereafter defendant's said counsel advised plaintiff's counsel, in writing, that it would make no proposition of adjustment of the claim, for the reason that in defendant's view, the loss had occurred by reason of what in law constituted the act of God. That by reason of the premises plaintiff has fully complied with the provisions of paragraph eight of said shipping contract and any construction thereof; that by reason of the premises the defendant having been fully advised as aforesaid, has entirely waived any notice under said contract.

Wherefore plaintiff prays judgment as prayed in its petition.

III.

66 The plaintiff further replying and answering to the third count of defendant's answer and counter-claim filed herein, says:

1. That it alleges herein and adopts every allegation as a part of this count of its reply, contained in paragraph two hereof, so far as the same may be applicable.

2. That it denies generally each and every allegation and averment contained in said third count of defendant's answer and counter-claim.

3. That the costs and expenses incurred and laid out by the defendant, if any there be, which are sought to be recovered herein, were incurred and caused directly by the acts, negligences and omissions by the defendant of its duty as a common carrier, all as fully set forth and detailed in the plaintiff's petition herein, and plaintiff herein adopts as part of this reply to said third count of said answer and counter-claim, each and every allegation of its said petition, and says that therein and thereby the defendant is estopped to claim or to recover of plaintiff any such charges and expenses, if any there be.

Wherefore, having fully replied, the plaintiff prays judgment against the defendant as in its petition.

R. E. Ball,
Attorney for Plaintiff.

Indorsed: No. 8157. The Minnesota & Dakota Cattle Company, Plaintiff vs. The Atchison, Topeka & Santa Fe Railway Company, Defendant. Reply of Plaintiff. Filed May 4, 1904. Geo. F. Sharitt, clerk. Refiled Jan. 16, 1905. Geo. F. Sharitt, Clerk.

67 United States of America,
District of Kansas—ss.

At a term of the Circuit Court of the United States of America for the District of Kansas (First Division) begun and held at the city of Kansas City, Kansas, in said District on Monday the 9th day of January A. D. 1905, proceedings were had and appear of record in words and figures as follows, to-wit:—

Monday January 16, 1905

Empire State Cattle Company, et al
8155 vs.
Atchison, Topeka and Santa Fe Railway Co.

The Minnesota & Dakota Cattle Company a corporation
8157 vs.
Atchison, Topeka & Santa Fe Railway Company, a corporation.

By consent of parties, it is ordered by the court that the above entitled cases be tried together, and the jury is directed to find a separate verdict in each of said cases.

68 United States of America,
District of Kansas—ss.

At a term of the Circuit Court of the United States of America, for the District of Kansas, (First Division) began and held at the city of Kansas City, Kansas, in said District on Monday the 9th day of January A. D. 1905, proceedings were had and appear of record in words and figures as follows, to-wit:—

Monday, January 16, 1905

The Minnesota & Dakota Cattle Company, a corporation
8157 vs.
Atchison, Topeka & Santa Fe Railway Company, a corporation.

Now comes the plaintiff herein by R. E. Ball its attorney; and the defendant by A. A. Hurd, O. J. Wood, Angevine & Cubbison, its attorneys, and also come a jury to-wit:—F. E. McClain, Geo. H. Goudy, J. H. C. Brewer, W. H. Harchbarger, T. J. Beall, H. H. Kern, Ed Speakman, E. W. Glenn, E. L. Cummings, Geo. Bell, H. D. Alcott and S. N. Perry, twelve good and lawful men of the body of the First Division of the District of Kansas, who being duly impaneled and sworn to well and truly try the matters submitted to them in this action, and a true verdict give according to the law and evidence, and thereupon the trial of this case is proceeded with, and not being concluded at the time of adjournment, the jurors are admonished by the court as to their duties herein and the further hearing postponed until tomorrow.

69 United States of America,
District of Kansas—ss.

At a term of the Circuit Court of the United States of America, for the District of Kansas, (First Division) began and held at the city of Kansas City, Kansas, in said District on Monday the 9th day of January A. D. 1905, proceedings were had and appear of record in words and figures as follows, to-wit:—

Tuesday, January 17, 1905.

The Minnesota & Dakota Cattle Company, a corporation
8157 vs.
Atchison, Topeka & Santa Fe Railway Company, a corporation.

Now come the parties herein same as on yesterday, and the jurors empaneled herein being called and all being present, the trial of this cause is proceeded with, and not being concluded at the hour of adjournment the jurors are admonished by the court as to their duties herein and the further hearing postponed until tomorrow.

70 United States of America,
District of Kansas—ss.

At a term of the Circuit Court of the United States of America, for the District of Kansas (First Division) began and held at the city of Kansas City, Kansas, in said District

on Monday the 9th day of January A. D. 1905, proceedings were had and appear of record in words and figures as follows, to-wit:

Wednesday, January 18, 1905.

The Minnesota & Dakota Cattle Company, a corporation
8157 vs.
Atchison, Topeka & Santa Fe Railway Company, a corporation.

Now come the parties herein same as on yesterday, and the jurors empaneled herein being called, and all being present, the trial of this cause is proceeded with, and not being concluded at the hour of adjournment, the jurors are admonished by the court as to their duties herein and the further hearing postponed until to-morrow.

71 United States of America,
District of Kansas—ss.

At a term of the Circuit Court of the United States of America, for the District of Kansas (First Division) began and held at the city of Kansas City, Kansas, in said District on Monday the 9th day of January A. D. 1905, proceedings were had and appear of record in words and figures as follows, to-wit:

Thursday, January 19, 1905.

The Minnesota & Dakota Cattle Company, a corporation
8157 vs.
Atchison, Topeka & Santa Fe Railway Company, a corporation.

Now come the parties herein same as on yesterday, and the jurors empaneled herein being called, and all being present, the trial of this cause is proceeded with, and not being concluded at the hour of adjournment, the jurors are admonished by the court as to their duties herein and the further hearing postponed until tomorrow.

72 United States of America,
District of Kansas—ss.

At a term of the Circuit Court of the United States of America, for the District of Kansas, (First Division) began and held at the city of Kansas City, Kansas, in said District on Monday the 9th day of January A. D. 1905, proceedings were had and appear of record in words and figures as follows, to-wit:

Friday, January 20, 1905.

The Minnesota & Dakota Cattle Company, a corporation
8157 vs.
Atchison, Topeka & Santa Fe Railway Company, a corporation.

Now come the parties herein same as on yesterday, and the jurors empaneled herein being called, and all being present, the trial of this cause is proceeded with, and not being concluded at the hour of adjournment the jurors are admonished by the court as to their duties herein and the further hearing postponed until tomorrow.

73 United States of America,
District of Kansas—ss.

At a term of the Circuit Court of the United States of America, for the District of Kansas, began and held at the city of Kansas City, Kansas, in said District, on Monday the 9th day of January A. D. 1905, proceedings were had, and appear of record in words and figures as follows, to-wit:

Saturday, January 21, 1905.

The Minnesota & Dakota Cattle Company, a corporation,
Plaintiff
8157 vs.
Atchison, Topeka & Santa Fe Railway Company, a corporation,
Defendant.

Now come the parties herein same as on yesterday, and the jurors empaneled herein being called and all being present the trial of this cause is proceeded with, and not being concluded at the hour of adjournment, the jurors are admonished by the court as to their duties herein and the further hearing postponed until Monday morning.

74 In the Circuit Court of the United States for the District of Kansas, First Division.

The Minnesota and Dakota Cattle Company, Plaintiff,
vs.
The Atchison, Topeka & Santa Fe Railway Company,
Defendant.

Demurrer to Evidence.

The defendant demurs to the evidence introduced by the plaintiff for the reason that such evidence is insufficient to warrant a verdict for the plaintiff.

The defendant therefore prays the court to render judgment in favor of the defendant.

A. A. HURD,
ANGEVINE & CUBBISON,
THOMAS REYNOLDS,
Attorneys for Defendant.

Indorsed: No. 8157. The Minnesota & Dakota Cattle Company vs. The Atchison, Topeka & Santa Fe Ry. Co. Demurrer to Evidence. Filed Jany. 21, 1905. Geo. F. Sharitt, Clerk.

75 United States of America,
District of Kansas—ss.

At a term of the Circuit Court of the United States of America, for the District of Kansas, began and held at the city of Kansas City, Kansas, in said District, on Monday the 9th day of January, A. D. 1905, proceedings were had, and appear of record in words and figures as follows, to-wit:

Monday, January 23, 1905.

The Minnesota & Dakota Cattle Company, a corporation, Plaintiff,
8157. vs.
Atchison, Topeka & Santa Fe Railway Company, a corporation, Defendant.

Now come the parties herein same as on Saturday last, and the jurors empaneled herein being called, and all being present, the trial of this cause is proceeded with, and not being concluded at the hour of adjournment the jurors are admonished by the court as to their duties herein and the further hearing postponed until tomorrow.

76 United States of America,
District of Kansas—ss.

At a term of the Circuit Court of the United States of America, for the District of Kansas, began and held at the city of Kansas City, Kansas, in said District, on Monday the 9th day of January, A. D. 1905, proceedings were had, and appear of record in words and figures as follows, to-wit:

Tuesday, January 24, 1905.

The Minnesota & Dakota Cattle Company, a corporation, Plaintiff,

8157 vs.

Atchison, Topeka & Santa Fe Railway Company, a corporation, Defendant.

Now come the parties herein same as on yesterday, and the jurors empaneled herein being called and all being present, the trial of this cause is proceeded with and not being concluded at the hour of adjournment, the jurors are admonished by the court as to their duties herein and the further hearing postponed until to-morrow.

77 United States of America,
District of Kansas—ss.

At a term of the Circuit Court of the United States of America, for the District of Kansas, began and held at the city of Kansas City, Kansas, in said District, on Monday the 9th day of January A. D. 1905, proceedings were had, and appear of record in words and figures as follows, to-wit:

Wednesday, January 25, 1905.

The Minnesota & Dakota Cattle Company, Plaintiff,

8157. vs.

Atchison, Topeka & Santa Fe Railway Company, Defendant.

Now on this January 25th, 1905, again come the parties to the said suit by their attorneys, also comes the jury, and thereupon defendant by leave of court, dismisses its counter-claim against the plaintiff, without prejudice to a future action, and the evidence of the parties herein having been concluded, defendant prays the court to peremptorily instruct the jury to return a verdict for the defendant, which prayer is granted by the court and said peremptory instruction to return a verdict in favor of the defendant and against the plaintiff is by the court granted and given to which action of the court in granting and giving such peremptory instruction, plaintiff at the time excepted. Thereupon pursuant to said peremptory instruction of the court, the jury made and returned in open court the following verdict:

"In the Circuit Court of the United States for the District of Kansas.

The Minnesota & Dakota Cattle Company, a corporation, Plaintiff,

Case No. 8157. vs.

Atchison, Topeka & Santa Fe Railway Company, a corporation, Defendant.

We, the jury in the above entitled case, duly impaneled and sworn, upon our oaths find for the defendant.

F. E. McLain, Foreman."

78 And thereupon all and singular the premises being seen and heard, it is considered, ordered and adjudged that the plaintiff take nothing by its suit, and that the defendant go hence without day with its costs in this behalf laid out and expended. And thereupon on the application of the plaintiff in this cause, it is by the court ordered that the plaintiff be given sixty days from this date in which to prepare and file a bill of exceptions in this cause.

79 In the Circuit Court of the United States for the District of Kansas, First Division.

The Minnesota and Dakota Cattle Company, Plaintiff

vs.

The Atchison, Topeka & Santa Fe Railway Company, Defendant.

1. The defendant requests the court to instruct the jury to return a verdict for the defendant.

Given and excepted to by Plffs.

J. C. P.
Judge.

Indorsed: No. 8157. Instruction requested by defendant. Filed Jany. 25, 1905. Geo. F. Sharitt, clerk.

80 In the Circuit Court of the United States for the District of Kansas, First Division.

The Minnesota & Dakota Cattle Company, Plaintiffs

v.

The Atchison, Topeka & Santa Fe Railway Company, Defendants.

Plaintiff prays the court to instruct the jury as follows:

The jury is instructed to find a verdict for the plaintiffs and against the defendant.

Refused and excepted to by plaintiffs.

J. C. P.
Judge.

Indorsed. No. 8157. Instruction requested by plaintiff. Filed Jany. 25, 1905. Geo. F. Sharitt, clerk.

* * * * * * * * *

89 In the Circuit Court of the United States for the District of Kansas, First Division.

The Minnesota & Dakota Cattle Company, Plaintiff
vs.
The Atchison, Topeka and Santa Fe Railway Company, Defendant.

Now on this 9th day of March, 1905, before said court in open session appear the said parties by their respective attorneys, and thereupon it is made to appear to the Court that the said defendant was served on February 17, 1905, with a bill of exceptions herein, and the defendant desiring further time, it is now by consent of parties ordered that the time for settling, serving, signing and filing the said bill of exceptions be and the same is hereby extended for an additional period of sixty (60) days from and after the termination of the sixty days heretofore given for filing said bill of exceptions, which leave was given on January 25, 1905.

It is further ordered by the court that the defendant have until and including March 31, 1905, within which to prepare and to serve plaintiff's attorneys with amendments to said bill of exceptions, and that thereafter the matter of settling, certifying and signing said bill of exceptions may be brought before the court on five days' notice from either party.

JOHN C. POLLOCK,
Judge.

Indorsed: No. 8157. Order extending time for Bill of Exceptions. Filed Mch 9, 1905. Geo. F. Sharitt, clerk.

90 In the Circuit Court of the United States for the District of Kansas, First Division

The Minnesota & Dakota Cattle Company, Plaintiff
vs.
The Atchison, Topeka & Santa Fe Railway Company Defendant.

Now on this 1st day of April A. D. 1905, it is ordered by the court by consent of both parties that the defendant have until and including the 10th day of April, 1905, within which

to prepare and serve plantiff's attorneys with amendments to the Bill of Exceptions prepared and served in this case, and that except as herein modified the order made in this case on March 9th, 1905, remain as then ordered.

JOHN C. POLLOCK,
Judge.

Indorsed: No. 8157. Order. Filed April 1, 1905. Geo. F. Sharitt, clerk.

* * * * * * * * *

988 In the United States Circuit Court for the District of Kansas, First Division.

Minnesota & Dakota Cattle Company, Plaintiff
No. 8157 vs.
Atchison, Topeka & Santa Fe Railway Company, Defendant.

Journal Entry.

Come again, this 12" day of May, 1905, said parties plaintiff and defendant by their attorneys, and thereupon plaintiff tenders to the court a bill of exceptions herein, and the defendant having examined the same, said bill of exceptions is approved and duly certified, signed and filed and hereby ordered to be made and the same is hereby made a part of the record in this cause, and thereupon said bill of exceptions is filed with the Clerk.

And thereupon at the same time plaintiff file herein its assignment of errors in this cause. And thereupon plaintiff tenders to the court a writ of error to the United States Circuit Court of Appeals for this Circuit, duly approved and allowed by the Judge of this court, and at the same time plaintiff tenders to the court a citation on said writ of error which citation is signed by the Judge of this court.

And thereupon at the same time said plaintiff tenders to the Court its bond for costs on its writ of error herein in the sum of $500.00 which bond is by the court examined and approved and ordered to be filed.

JOHN C. POLLOCK, Judge.

989 Indorsed: No. 8157. Minn & Dakota Cattle Co. v. A. T. & S. F. R. W. Co. Journal Entry. Filed May 12, 1905. Geo. F. Sharitt, Clerk.

990 In the Circuit Court of the United States for the District of Kansas First Division.

Minnesota & Dakota Cattle Company, Plaintiff,
No. 8157. vs.
The Atchison, Topeka & Santa Fe Railway Company, Defendant.

Assignment of Errors.

The plaintiff in this action, in connection with its petition for writ of error, makes the following assignment of errors which it avers occurred upon the trial of the cause, to-wit:

1. The court erred in rejecting the evidence offered by the plaintiff of Gardiner Lathrop, S. W. Moore and W. A. Coombs, by which plaintiff offered to show that the remnant of the cattle in controversy, after the subsidence of the flood, were in charge and control of defendant railway company; that on or about June 10, 1903, and for several days prior thereto, a number of conferences were held between the plaintiffs and their counsel on one part, and Mr. Coombs, the assistant general live stock agent of the defendant, and Mr. Lathrop, of counsel for the defendant, in reference to the disposition by the defendant of the remnant of plaintiffs cattle; that the defendant, through its said agent, Coombs, and its attorneys, recognized and admitted that the remnant of the shipments of cattle in question, was in their charge and control, that they requested the plaintiffs to receive and accept these cattle at Kansas City; that defendant, through its said agents and counsel, as well as the plaintiff, in said conferences recognized and admitted that the remnant of said cattle were so weakened and debilitated that they were not then in a condition to be further shipped to their destination, and that it was necessary, in order to avoid further loss, to pasture the cattle somewhere until they attained enough strength to enable them to endure shipment to their destination.

990a 2. The court erred in refusing to give, at the conclusion of all of the testimony, the instruction and charge tendered and requested on behalf of the plaintiff, that under all of the evidence the jury should find that the defendant was liable, and to find for the plaintiff.

3. The court erred, after the refusal of the said peremptory instruction, in refusing to give and charge the jury at plaintiffs request, instructions numbered as follows, and in refusing to give each of them, to-wit: Instructions numbered one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve and thirteen.

4. The court erred in sustaining the motion and request of defendant Railway Company, to direct and in directing the jury to render a verdict for the defendant and against the plaintiff.

5. The court erred in its opinion, shown in the record, in saying "It therefore follows, on the main case, the request for instructions to the jury to render a verdict for the defendant must be sustained, and the like request of the plaintiff must be denied. This will be done."

Wherefore, the plaintiff prays that writ of error be granted and citation duly issued to the defendant, and that the judgment of the Circuit Court of the United States for the District of Kansas, First Division in this cause, be reversed and that said Circuit Court be directed to grant a new trial of said cause.

R. E. BALL,
Attorney[s] for Plaintiffs.

Indorsed: No. 8157. Minnesota and Dakota Cattle Company, Plaintiff, vs. Atchison, Topeka and Santa Fe Railway Company, Defendant. Assignment of Errors and Petition for a Writ of Error. Filed May 12, 1905. Geo. F. Sharitt, Clerk.

991 In the United States Circuit Court for the District of Kansas, First Division.

Minnesota & Dakota Cattle Company, a corporation, Plaintiff,
No. 8157. vs.
The Atchison, Topeka & Santa Fe Railway Company, Defendant.

Bond for Costs on Writ of Error.

Know All Men By These Presents, That we, The Minnesota & Dakota Cattle Company, a corporation, as principal, and American Bonding Company of Baltimore as sureties acknowledge ourselves to owe and to be indebted to the Atchison, Topeka & Santa Ge Railway Co. in the sum of $500.00 lawful money of the United States to the payment of which well and truly to be made we jointly and severally bind ourselves, our successors, executors administrators and assigns firmly by these presents, sealed with our seals and dated this 13th day of February, 1905.

The above and foregoing obligation is made subject to the following conditions: Whereas lately at a session of the Circuit Court of the United States for the District of Kansas, First Division in a suit pending in said court between the said principal as plaintiff and said Railway Company as defendant, a final judgment was rendered against said plaintiff and in favor of said defendant and said plaintiff has obtained a writ of error to reverse the judgment in the aforesaid suit in said Circuit Court and a citation directed to said Atchison, Topeka & Santa Fe Railway Company is to be issued citing and admonishing it to appear at a session of the United States Circuit Court of Appeals for the Eighth Circuit.

Now Therefore, the condition of the above obligation
992 is such that if said bounden principal shall pay and answer all costs that may be awarded against it and if it fails to make said appeal good, then the above obligation shall be null and void, otherwise to remain in full force and effect.

MINNESOTA & DAKOTA
CATTLE CO. [Seal]
By M. Mullin, Prest.
M. Mullin [Seal]
Charles Stuebe [Seal]
AMERICAN BONDING COMPANY
OF BALTIMORE
By Wash Adams
Vice-Prest.
Attest: Harry D. Walker, [Seal]
Asst. Secty.

Approved this 12th day of May, 1905.
JOHN C. POLLOCK,
Judge Dist. Court of Kas, presiding in U. S. Circuit Court of Kas. First Div.

Indorsed: No. 8157. Minnesota & Dakota Cattle Co. vs. A. T. & S. F. R. W. Co. Bonds for costs on writ of error. Filed May 12, 1905. Geo. F. Sharitt, Clerk.

993 United States of America,
District of Kansas—ss.

I, Geo. F. Sharitt, Clerk of the Circuit Court of the United States of America, for the District of Kansas, do hereby certify the foregoing to be a true, full and correct copy of the record and proceedings in said court in Case No. 8157, wherein The Minnesota & Dakota Cattle Company, a corporation is Plaintiff and The Atchison, Topeka and Santa Fe Railway Company, a corporation is Defendant.

I further certify that the Original Citation and the Original Writ of Error are hereto attached and returned herewith.

The Seal of the Circuit Court of the United States District of Kansas 1862.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at my office in Topeka, in said District of Kansas, this 1st day of June, A. D. 1905.

GEO. F. SHARITT, Clerk.

Filed Jun 24, 1905. John D. Jordan, Clerk.

38 (Clerk's Certificate to Printed Record.)

United States Circuit Court of Appeals. Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing printed record of thirty-seven pages in the case of The Minnesota and Dakota Cattle Company, Plaintiff in Error, vs. The Atchison, Topeka and Santa Fe Railway Company, No. 2277, was printed under my supervision and is identical with the printed record upon which said cause was heard and decided in the Circuit Court of Appeals.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals, at office in the City of St. Louis, Missouri, in the Eighth Circuit, this twenty-eighth day of November, A. D. 1906.

[Seal.]

(Signed) JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

1 Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the May Term, 1906, of said Court, begun and held at the United States Court House in the City of St. Paul, Minnesota, on the first Monday in May, to-wit: the seventh day of May, A. D. 1906, before the Honorable Walter H. Sanborn, the Honorable William C. Hook and the Honorable Elmer B. Adams, Circuit Judges.

Attest:
[Seal]

(Signed) JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to-wit: on the twenty-fourth day of June, A. D. 1905, a transcript of record, pursuant to a writ of error directed to the Circuit Court of the United States for the District of Kansas, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein The Minnesota and Dakota Cattle Company was Plaintiff in Error, and The Atchison, Topeka and Santa Fe Railway Company was Defendant in Error, which said transcript of record was filed and docketed in said Circuit Court of Appeals as No. 2277.

That thereafter the following proceedings were had in said cause, in said Circuit Court of Appeals, viz:

2 (Appearance of Counsel for Plaintiff in Error.)

On the third day of July, A. D. 1905, the appearance of Mr. R. E. Ball, as counsel for the plainti in error, was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals. Eighth Circuit.

The Minnesota and Dakota Cattle Company, Plaintiff in Error,
No. 2277. vs.
The Atchison, Topeka & Santa Fe Railway Co.

The Clerk will enter my appearance as Counsel for the Plaintiff in Error.

R. E. BALL.

Endorsed: U. S. Circuit Court of Appeals, Eighth Circuit. No. 2277. The Minnesota and Dakota Cattle Company, Plaintiff in Error, vs. The Atchison, Topeka & Santa Fe Railway Co. Appearance. Filed Jul. 3, 1905, John D. Jordan, Clerk. R. E. Ball, Counsel for Plaintiff in Error.

(Appearance of Mr. R. F. Walker as Counsel for Defendant in Error.)

And on the third day of July, A. D. 1905, the appearance of Mr. R. F. Walker, as counsel for the defendant in error, was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals. Eighth Circuit.

The Minnesota and Dakota Cattle Company, Plaintiff in in Error,
No. 2277. vs.
The Atchison, Topeka & Santa Fe Railway Company.

The Clerk will enter my appearance as Counsel for the Defendant in Error.

3 R. F. WALKER.

Endorsed: U. S. Circuit Court of Appeals, Eighth Circuit, No. 2277. Minnesota and Dakota Cattle Co., Plff. in Error, vs. Atchison, Topeka and Santa Fe Ry. Co. Appearance. Filed Jul. 3, 1905, John D. Jordan, Clerk. R. F. Walker, Counsel for Deft. in Error.

(Appearance of Mr. Gardiner Lathrop and Mr. C. Angevine as Counsel for Defendant in Error.)

And on the nineteenth day of December, A. D. 1905, the appearance of Mr. Gardiner Lathrop and Mr. C. Angevine,

as counsel for the defendant in error, was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals. Eighth Circuit.

The Minnesota and Dakota Cattle Company, Plaintiff in Error,
No. 2277. vs.
The Atchison, Topeka and Santa Fe Railway Company.

The Clerk will enter my appearance as Counsel for the Defendant in Error.

GARDINER LATHROP,
C. ANGEVINE.

Endorsed: U. S. Circuit Court of Appeals, Eighth Circuit. No. 2277. The Minnesota & Dakota Cattle Company, Plaintiff in Error, vs. The Atchison, Topeka & Santa Fe Railway Company. Appearance. Filed Dec. 19, 1905, John D. Jordan, Clerk. Gardiner Lathrop, C. Angevine, Counsel for Deft. in Error.

(Argument Commenced.)

And on the eighteenth day of December, A. D. 1905, in the record of the proceedings of said Circuit Court of Appeals is an entry in said cause, in the words and figures following, to-wit:

4 United States Circuit Court of Appeals, Eighth Circuit.

December Term, 1905. Monday, December 18, 1905.

Empire State Cattle Company, et al., Plaintiffs in Error,
No. 2276. vs.
The Atchison, Topeka and Santa Fe Railway Co.

In Error to the Circuit Court of the United States for the District of Kansas.

and

The Minnesota and Dakota Cattle Company, Plaintiff in Error,
No. 2277. vs.
The Atchison, Topeka and Santa Fe Railway Co.
In Error to the Circuit Court of the United States for the District of Kansas.

These causes having been called for hearing in their regular order, argument was commenced by Mr. James S. Botsford in behalf of the plaintiffs in error, but the hour of adjournment having arrived before the conclusion thereof, the fur-

ther hearing of these causes was postponed until tomorrow morning.

(Order of Submission.)

And on the nineteenth day of December, A. D. 1905, in the record of the proceedings of said Circuit Court of Appeals is an order of submission in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals. Eighth Circuit.

December Term, 1905. Tuesday, December 19, 1905.

Empire State Cattle Company, et al., Plaintiffs in Error,
No. 2276. vs.
The Atchison, Topeka and Santa Fe Railway Company.

In Error to the Circuit Court of the United States
5 for the District of Kansas.

and

The Minnesota and Dakota Cattle Company, Plaintiff in Error,
No. 2277. vs.
The Atchison, Topeka and Santa Fe Railway Company.

In Error to the Circuit Court of the United States for the District of Kansas.

These causes having been called this day for further hearing, argument was continued by Mr. James S. Botsford for the plaintiffs in error and by Mr. Gardiner Lathrop and Mr. C. Angevine for the defendant in error and concluded by Mr. R. E. Ball for plaintiffs in error.

Thereupon the causes were submitted to the Court upon the transcripts of record from said Circuit Court and the briefs of counsel filed herein.

(Opinion.)

And on the ninth day of July, A. D. 1906, an opinion of said United States Circuit Court of Appeals was filed in said cause, in the words and figures following, to-wit:

6 United States Circuit Court of Appeals Eighth Circuit.

No. 2277.—May Term, A. D. 1906.

The Minnesota and Dakota Cattle Company, Plaintiff in Error,
vs.
The Atchison, Topeka and Santa Fe Railway Company Defendant in Error.

In Error to the Circuit Court of the United States for the District of Kansas.

Mr. R. E. Ball for the plaintiff in error.

Mr. Gardiner Lathrop and Mr. C. Angevine (Mr. Robert Dunlap, Mr. Wm. R. Smith and Angevine & Cubbison were with them on the brief) for the defendant in error.

Before Sanborn, Hook and Adams, Circuit Judges.

By Hook, Circuit Judge:

This case is like that of the Empire State Cattle Company just decided. The two cases were tried together and the facts with some exceptions not material here, were the same, as were also the proceedings in the trial court. For the reasons stated in the opinion in the proceeding case the judgment in this is affirmed.

Filed July 9, 1906.

7 (Judgment.)

And on the ninth day of July, A. D. 1906, in the record of the proceedings of said Circuit Court of Appeals is a judgment in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals. Eighth Circuit.

May Term, 1906. Monday, July 9, 1906.

The Minnesota and Dakota Cattle Company, Plaintiff in Error,

No. 2277. vs.

The Atchison, Topeka and Santa Fe Railway Company.

In Error to the Circuit Court of the United States for the District of Kansas.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Kansas and was argued by counsel.

On consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said Circuit Court, in this cause, be, and the same is hereby, affirmed with costs; and that The Atchison, Topeka and Santa Fe Railway Company have and recover against The Minnesota and Dakota Cattle Company the sum of twenty dollars for its costs herein and have execution therefor.

July 9, 1906.

8 (Motion of Plaintiff in Error for Order enlarging Time to file Petition for Rehearing.)

And on the third day of August, A. D. 1906, a motion of plaintiff in error for an order enlarging the time to file a petition for a rehearing was filed in said cause, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals For the Eighth Circuit.

Minnesota & Dakota Cattle Company, [Plaintiffs] in Error,
No. 2277. vs.
Atchison, Topeka & Santa Fe Railway Company, [Defendants] in Error.

Motion of [Plaintiffs] in Error for Extension of Time to File Petition for Rehearing.

Now comes the [plaintiffs] in error in the above entitled cause and show the Court that the judgment and decision of the Court therein, was rendered on the 9th day of July, 1906; that [plaintiffs[in error are advised that the term of Court at which the judgment in the above cause was rendered, will be finally adjourned August 31st, 1906, and the next term thereafter will convene on the first Monday in September, 1906, at Denver, Colorado; that the decision and judgment of this Court is rendered at a time when the Judges of the Court are on vacation, and the [plaintiffs] in error desire additional time to consider the opinion and decision of the Court.

Therefore the [Plaintiffs] in error move the Court for leave to file a petition for a re-hearing in this cause at any time during the term of this Court beginning on the first Monday in September, at Denver, Colorado.

R. E. BALL,
Attorney for Plaintiff in Error.

Endorsed: No. 2277. Minnesota and Dakota Cattle Co., Plaintiff in Error, vs. The Atchison, Topeka and Santa Fe Railway Company. Motion Plaintiff in Error for order enlarging time to file petition for rehearing. Filed Aug. 3, 1906, John D. Jordan, Clerk.

9 (Order enlarging time to file Petition for Rehearing Until November 1, 1906.)

And on the seventh day of August, A. D. 1906, in the record of the proceedings of said Circuit Court of Appeals is an order enlarging the time to file a petition for a rehearing until November 1, 1906, in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

May Term, 1906. Tuesday, August 7, 1906.

Minnesota & Dakota Cattle Company, Plaintiff in Error,
vs.
Atchison, Topeka & Santa Fe Railway Company.

In Error to the Circuit Court of the United States for the District of Kansas.

On motion of the Plaintiff in Error in the above entitled cause, the Court having duly considered the same, it is ordered that the time for plaintiff in error to file a petition for rehearing, if it be so advised, be extended, so that the same may be filed at any time prior to the 1st day of November, 1906.

August 7th, 1906.

(Petition for Rehearing.)

And on the twentieth day of September, A. D. 1906, a petition of plaintiff in error for a rehearing was filed in said cause, in the words and figures following, to-wit:

—IN THE—

United States Circuit Court of Appeals

EIGHTH CIRCUIT.

THE MINNESOTA AND DAKOTA CATTLE COMPANY, *Plaintiff in Error,*
vs.
THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, *Defendant in Error.*

No. 2277.

Error to the Circuit Court of the United States for the District of Kansas.

PETITION OF PLAINTIFF IN ERROR FOR A REHEARING.

To the Honorable Judges of the Circuit Court of Appeals, Eighth Circuit:

The above named plaintiff in error respectfully petitions this Honorable Court that the order and judgment heretofore entered affirming the judgment of the Circuit Court of the United States for the District of

Kansas, be set aside and a rehearing of this cause be granted, for the reasons and on the grounds following, to-wit:

I.

The Court in its opinion overlooked the fact that the petition of the plaintiff in the above cause on which this suit has been prosecuted asserted liability of the defendant herein on two separate and independent grounds. First, that the defendant was liable by reason of the deviation of the shipments from the Topeka to Atchison route, to Kansas City. Second, that the defendant was liable on the several grounds of negligence charged in the petition.

The cases cited in the opinion of the Court in this cause were all cases where the plaintiff sought to recover on a single ground of liability and that ground of liability involved a question of fact for trial by a jury. As appears from the opinions in this cause, the opinion of this court is the only one which recognizes the rule decided by the court in this cause as proper in cases where the plaintiff rests his claim of liability on a single proposition and that a proposition of fact. The decision of the Supreme Court of the United States and the decisions of the other courts of appeal cited in the opinion in this cause, all seem to recognize that, even in cases where the plaintiff's case rests on a single proposition of fact; the asking of a peremptory instruction does not waive the right to have the case submitted to a jury, if at the time of the submission of the peremptory instruction the party also submits instructions to be given to the jury, if the peremptory instruction is denied.

But if the rule adjudged by the court in its opinion in this case is erroneous and unjust as applied to a case where the plaintiff rests his case on a single proposition

of fact, how much more would that result be true in the case at bar? In this case the plaintiff, from the beginning to the end of its case, rested its claim of liability of the defendant on two propositions, one a proposition of law and the other a proposition of fact.

The question of liability based on the deviation arising as it did upon the undenied fact of deviation without plaintiff's consent, presented a question of law pure and simple. That question was one for decision by the court. That is, while the whole case on both propositions was a case for determination by the jury, the question of liability on the ground of deviation was one for decision by the court on a peremptory instruction to the jury given or denied by the court.

The questions of liability on the ground of negligence, presented by plaintiff in its other instructions, all presented questions for decision by the jury. Therefore the case of plaintiff required of necessity from its very nature a decision of one branch by the court and a decision of the other branch by the jury. Of course, if there had been a favorable decision to plaintiff on the issue of law arising on the question of deviation, it would have been unnecessary to submit the questions of fact to the jury, except the amount of damages, but before judgment in the case under any possible circumstances could be lawfully pronounced against the plaintiff, it was entitled to hearings and decisions by the two tribunals of court and jury on both issues. Plainly and undeniably, if the issue of law was decided against the plaintiff on the question of deviation, it was still entitled to the judgment of the jury on the remaining question of fact arising on the issues of negligence. The only proper way in which the court could decide the issue of law arising on the question of deviation, was by giving or refusing plaintiff's peremptory

instruction to the jury. The court decided that issue by refusing plaintiff's peremptory instruction, and it is said now that the court acted properly in refusing to submit the issues of fact to the jury because plaintiff precluded itself from the right to have the case submitted to the jury on the issues of negligence because of its prayer for a peremptory instruction on the issue of law, on the question of deviation.

We submit that this does not follow. We repeat that before judgment could rightfully be pronounced in the trial court against plaintiff it had a right to the trial of both issues by the appropriate tribunals. To say that in a case where plaintiff claims a right to recover on two separate, distinct grounds, judgment must be given against him on both grounds upon an unfavorable decision against him, on either ground, states a proposition which, as it seems to us, finds no support in the law. In effect, it would be giving judgment against a party without due process and without a hearing.

The court in this case says it is precluded from considering and determining whether plaintiff offered sufficient evidence to take the case to the jury on the issues of negligence because it asked the court to decide the questions of law arising on the issue of deviation, by its peremptory instruction. This in in effect giving judgment against the plaintiff on the issues of negligence, without a hearing or decision by either the court or a jury of those issues. It is true that the trial court, in passing on the peremptory instruction asked by plaintiff, decided that the evidence in the case did not warrant a submission to the jury of the issues of negligence, but while that is true, this court holds, although in full possession of the entire case on this writ of error, that this court cannot consider the questions of

law arising on the refusal of the trial court to submit the cause to the jury on the issues of negligence because plaintiff asked a peremptory instruction devoted to obtaining the judgment of the court on the issue of deviation. This, in effect, is a judgment by this court affirming the action of the trial court in holding that the case could not be submitted to the jury on the issues of negligence without a hearing and decision by this court on that branch of the case. We submit, that this is in effect a judgment and decision without a hearing and is in effect a denial of due process.

The point in this case that plaintiff's case rests on two propositions and that therefore it had the right to ask a peremptory instruction and the other thirteen instructions to the jury at the same time, is distinctly presented at pp. 54-55 of our brief and argument in this case, and since that point is entirely overlooked in the decision of the court, it seems to us that on this ground alone the court should grant a rehearing, set aside its judgment of affirmance and affirm the liability of the carrier on the ground of deviation, or hold that the case should have gone to the jury on the issues of negligence.

II.

Briefly summarized the acts of negligence on the part of the Railroad Company, amply proven by the evidence cited and set forth in the statements of the cases (Original Brief pp. 1-52 and 145-169), are:

(a) Its act of bringing these cattle to Kansas City at all, under the existing conditions.

(b) Its act of holding them at Kansas City, one train from Friday evening, May 29th, and the remainder from Saturday morning, the 30th, until overtaken by the flood Sunday.

(c) Its refusal to allow the Burlington to take out the shipments when advised that it was ready and offered to do so. This is a fact *undisputed* and in our judgment should be held negligence as a matter of law.

(d) Its act in itself throwing down the arrangement once made with the Missouri Pacific to take the cattle, *an undeniable fact,* (Rec. 179-195, Brief 152 *et seq.*), which in our judgment constitutes negligence as a matter of law. It will be noted from the evidence of General Manager J. E. Hurley that not all of the correspondence between defendant and the Missouri Pacific was produced, though called for by the notice.

(e) Its act, through its agent, the Stock Yards Company, in crowding the cattle into the overhead viaducts instead of taking them to the highlands.

This in our judgment nearly approached negligence as a matter of law.

There are other acts of negligence, but for the purpose of this point they need not be specified.

We respectfully ask a rehearing for the reason that the foregoing facts should work a reversal under any decision of the question of practice referred to. Sufficient of them in our judgment should be held negligence as a matter of law to meet the exaction of the rule announced by the court, and none of them we submit ought to be judicially declared to be such acts and omissions as are free from negligence, as a matter of law.

III.

The court in its decision in this case has also overlooked the decision of the other question, being the question of law distinctly presented in this case, that the carrier by the deviation of the shipment assumed all consequences of such deviation and made itself absolutely

liable. This proposition of law which runs through the entire case and which is discussed from pp. 119 to pp. 143 of our brief, and affirmed and supported by an unbroken line of authorities, is entirely overlooked in the opinion of the court in this case. In that part of our brief there is a full citation of the authorities on the proposition that where, as in this case, there is a deviation of the shipment without the consent of the shipper, the carrier assumes all responsibility and consequences. and is absolutely liable. The decision of that question fairly arose under the peremptory instruction asked by the plaintiff, with or without a prayer for the other instructions to the jury. This court nowhere in its opinion makes any response to that proposition of law.

On this ground we submit that the court should grant a rehearing.

Robert E. Ball

James S. Botsford

Attorneys for Plaintiffs in Error.

We hereby certify that in our opinion the foregoing motion and petition for a rehearing is well founded in law and should be sustained.

Robert E. Ball

James S. Botsford

Of Counsel.

Endorsed: Filed Sep. 20, 1906, John D. Jordan, Clerk.

17 (Order Denying Petition for Rehearing.)

And on the sixteenth day of November, A. D. 1906, in the record of the proceedings of said Circuit Court of Appeals is an order denying the petition for a rehearing in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

September Term, 1906. Friday, November 16, 1906.

The Minnesota and Dakota Cattle Company, Plaintiff in Error,

No. 2277. vs.

The Atchison, Topeka and Santa Fe Railway Co.

In Error to the Circuit Court of the United States for the District of Kansas.

This cause came on this day to be heard upon the petition for a rehearing filed by Counsel for the Plaintiff in Error.

On Consideration Whereof, it is now here ordered by this Court, that said petition for a rehearing of this cause be, and the same is hereby, denied.

November 16, 1906.

18 (Clerk's Certificate.)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing seventeen pages contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of said Circuit Court of Appeals (except the transcript of the record from the Circuit Court of the United States for the District of Kansas), in a certain cause in said Court wherein The Minnesota and Dakota Cattle Company is Plaintiff in Error, and The Atchison, Topeka and Santa Fe Railway Company is Defendant in Error, as full, true and complete as the originals of the same now remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals, at office in the City of St. Louis, Missouri, in the Eighth Circuit, this twenty-eighth day of November, A. D. 1906.

[Seal]

(Signed) JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

In the Supreme Court of the United States.

File No. 20499. Case No. 534.

MINNESOTA & DAKOTA CATTLE COMPANY, Plaintiff,
vs.
ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, Defendant.

Stipulation.

Whereas, in the above entitled cause the plaintiff filed an application in the Supreme Court of the United States for a writ of certiorari therein; and

Whereas, in connection with the plaintiff's application for said writ a certified copy of the transcript of the record was duly filed in the Supreme Court of the United States and nine uncertified copies of the transcript of the record in said cause were also filed, so that the complete record of said case is already on file in the Supreme Court of the United States; and

Whereas, said Court on the 22d day of January, 1907, issued its writ of certiorari removing the above entitled cause from the Circuit Court of Appeals of the Eighth Circuit;

Now therefore, it is stipulated by and between the parties in this case, that the certified transcript of the record that *are* already on file in the Supreme Court of the United States may be taken and treated as the return to said writ, and that the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit may, in lieu and instead of a transcript of the record as required by said writ, send to the Supreme Court a copy of this stipulation, and that said cause may proceed and be heard with the same force and effect as if the said Clerk of said Court of Appeals had duly certified the record of said cause in obedience to the writ of certiorari issued therein. It being the intention of this stipulation that the records already filed in connection with the application of plaintiff for the writ, shall be taken and treated as a full return to said writ, and that the cause shall be heard and considered as if a return to the writ had been made.

R. E. BALL AND
JAMES S. BOTSFORD,
Attorney- for Plaintiff.
GARDNER LATHROP,
ROBERT DUNLAP,
Attorneys for Defendant.

(Endorsed:) File No. 20499. Case No. 534. Minnesota and Dakota Cattle Company, Plaintiff, *vs.* Atchison, Topeka and Santa Fe Railway Company, Defendant. Stipulation as to Return to Writ of Certiorari. Filed Feb. 7, 1907, John D. Jordan, Clerk.

FILED.
JUL 22 1907
JAMES H. McKENNEY
CLERK

—IN THE—

Supreme Court of the United States.

OCTOBER TERM, 1907.

EMPIRE STATE CATTLE COMPANY, a Corporation, W. E. WAITE, E. F. WAITE, W. H. FROST, P. H. KELLOGG, C. L. MILLETT and J. D. CARR, *Petitioners,*

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY.

No. 178.

THE MINNESOTA AND DAKOTA CATTLE COMPANY, *Petitioner,*

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY.

No. 179.

On Writ of Certiorari to the United States Circuit Court of Appeals, Eighth Circuit.

Statements, Specifications of Errors, Briefs and Arguments for Petitioners.

NOTE:—These two cases are alike, involve the same questions of law and fact, were tried together below, and by agreement are to be heard and submitted together here.

JAMES S. BOTSFORD,
BUCKNER F. DEATHERAGE,
ODUS G. YOUNG,
Attorneys for Empire State Cattle Company, et al., in No. 178.

R. E. BALL,
Attorney for the Minnesota and Dakota Cattle Company, in No. 179.

PANTAGRAPH PRINTING CO. 909 WYANDOTTE ST., KANSAS CITY, MO.

—IN THE—

Supreme Court of the United States.

EMPIRE STATE CATTLE COMPANY, a Corporation, W. E. WAITE, E. F. WAITE, W. H. FROST, P. H. KELLOGG, C. L. MILLETT and J. D. CARR, *Petitioners.*

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *Defendant.*

No. 178.

THE MINNESOTA AND DAKOTA CATTLE COMPANY, *Petitioner,*

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *Defendant.*

No. 179.

It is agreed by and between the attorneys of the several parties in the above entitled causes, that the same may be briefed for the petitioners in the two cases in one brief, and for the defendant railway company in both cases in one brief, and that said causes may be argued and submitted together the same as they were argued and submitted together in the Circuit Court of Appeals; and that the stipulations, of the parties in the Circuit Court of Appeals in said causes, to be found page 660 to 663 in the Empire State Cattle Company case, shall apply to the argument, submission and consideration of said two cases in this court.

JAMES S. BOTSFORD,
BUCKNER F. DEATHERAGE,
ODUS G. YOUNG,
Attorneys for Empire State Cattle Company, et al., Petitioners.

R. E. BALL,
Attorney for Minnesota and Dakota Cattle Company, Petitioner.

GARDINER LATHROP,
ROBERT DUNLAP,
Attorneys for Atchison, Topeka & Santa Fe Railway Company.

—IN THE—

Supreme Court of the United States.

OCTOBER TERM, 1907.

EMPIRE STATE CATTLE COMPANY, a Corporation, W. E. WAITE, E. F. WAITE, W. H. FROST, P. H. KELLOGG, C. L. MILLETT and J. D. CARR, *Petitioners,*

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY.

No. 178.

Statement of the Case, Brief and Argument of Petitioners,

Empire State Cattle Company, et al.

STATEMENT OF THE CASE.

This case, and the case immediately following it, namely, *The Minnesota and Dakota Cattle Company* v. *The Atchison, Topeka and Santa Fe Railway Company*, No. 179, were and are companion cases. The two ceses were brought at the same time in the trial court and were tried together by the court with the same jury. The evidence which is set out in the Bill of Exceptions in this case was introduced in both cases, and the evidence and

instructions given and refused, with all of the rulings thereon, were the same in the trial court in both cases, and the Bill of Exceptions in this case is identically the same, word for word, with the Bill of Exceptions in The Minnesota and Dakota Cattle Company case. Separate Bills of Exceptions, exactly alike, were filed in the two cases and separate writs of error and citations were sued out and served, and complete transcripts in both cases were filed in the U. S. Circuit Court of Appeals, 8th Circuit, and the cases now come before this court by writs of *certiorari* from this court to that court of appeals, but it is the understanding and agreement in this court, as it was in the trial court and in the court of appeals, that the two cases are to be heard by this court and submitted together. It has been arranged that while there are separate statements and briefs, they will be printed in this one book under the same cover. While the counsel of The Minnesota and Dakota Cattle Company will make a separate statement, brief and argument, following this statement, brief and argument in this case, we have thought it best to make this statement at this point so that the court, in reading this statement, brief and argument in The Empire State Cattle Company case, may have in mind the identical propositions of fact and law in The Minnesota and Dakota Cattle Company case. About the only difference between the case of The Minnesota and Dakota Cattle Company case and this consists in the fact that while the cattle in both cases were shipped out from Texas about the same time, the cattle in The Minnesota and Dakota Cattle Company case were stopped for feed and water at Wellington, while the cattle in this, The Empire State Cattle Company case, were stopped for feed and water at Strong City. Another difference is the claim of the railway company that some of the Minnesota company

cattle were delivered to the Missouri Pacific Railway Co. The history of the case in the Circuit Court of Appeals, and the arguments urged in support of a reversal of its judgment fully appear in our printed petition for the *certiorari* granted herein, to which petitions we here refer and which we hereby make a part of this statement, brief and argument. See appendix herein containing a reprint and copy of said petition for the *certiorari.*

With this preliminary statement of both cases, we will now proceed with the statement of this, The Empire State Cattle Company case as tried in the trial court.

This is an action at law, tried in the trial court by the court with a jury.

The suit was brought in the trial court by plaintiffs in error and petitioners as plaintiffs, against the defendant railway company as defendant. The action was brought to recover damages for the negligence and wrong of the defendant respecting a shipment of cattle by plaintiffs over the defendant's railway.

The defense of the defendant was and is that the injury to plaintiff's cattle while being shipped over defendant's railway was due to the flood at Kansas City in May, 1903, which is pleaded and relied upon by defendant as an act of God, and as an excuse for the injury to plaintiffs' cattle.

At the conclusion of all the evidence, the trial court gave a peremptory instruction to the jury to return a verdict for the defendant, and plaintiffs excepted at the time to the giving of this peremptory instruction, and the jury having rendered their verdict accordingly, and final judgment having been given by the court thereon in favor of defendant, the plaintiffs in due time filed their Bill of Exceptions containing all the evidence and their

exceptions, and the case came to the Court of Appeals by writ of error and citation. (Record, pages 1 and 2.) The Court of Appeals gave a judgment of affirmance, and the case comes here by writ of *certiorari*. (690, Rec.)

The petition of the plaintiffs was filed in the lower court, November 13, 1903. (Record, pages 3 to 8.) The petition states that the plaintiff, Empire State Cattle Company, was and is a corporation, created and existing under the laws of South Dakota, with its principal offices in that state, and that said cattle company, and the other plaintiffs, were and are citizens and inhabitants of said state of South Dakota; that the defendant railway company was and is a corporation, created under the laws of the state of Kansas, with its principal place of business at Topeka therein, and that the defendant railway company, in 1903, and at the other times mentioned in the petion, owned and operated as a common carrier a railway from Amirillo, Texas, to Atchison, Kansas, by way of Topeka, Kansas, and that as such defendant engaged as a railway company in the transportation for hire of passengers, freight and live stock over said railway.

The petition of the plaintiffs stated the following further facts: That on May 25th, 1903, plaintiffs were the owners of 798 head of cattle, at Hereford, Texas, and the plaintiffs shipped from said Hereford said 798 head of cattle for transportation, by rail, from that point to Evarts, South Dakota; that said shipment was made over three lines of railway, to-wit, from Hereford, Texas, to Amirillo, Texas, over the Pecos & Northern Texas Railway; from Amirillo, Texas, to Atchison, Kansas, over defendant company's railway, and from Atchison, Kansas, to Evarts, South Dakota, over such connecting line of railway as should receive said cattle from said defendant railway company. Said 798 head of cattle were delivered to defendant at said Amirillo, Texas, for

shipment over defendant's railway to Atchison, Kansas, and to be there delivered by it to said connecting railway company, and said defendant on May 25th, 1903, accepted from plaintiffs said 798 head of cattle for shipment from said Amirillo, Texas, to said Atchison, Kansas, over its line of railway between those points; and said 798 head of cattle were transported by defendant as such common carrier from Amirillo, Texas, to Strong City, Kansas, which was and is a station on defendant's line of railway between Amirillo, Texas, and Atchison, Kansas, and at said Strong City, Kansas, on May 26th, 1903, said 798 head of cattle were by defendant unloaded to be fed and said 798 head of cattle having been fed at said Strong City, on the night of May 26th, 1903, the same were ready to be reloaded and for the transportation and carriage thereof to be resumed and continued on the morning of May 27th, 1903. That at and prior to the morning of May 27th, 1903, and in consequence of the continuous rains which had prevailed over Colorado, Kansas, Nebraska, Iowa and Missouri, an unprecedented flood had commenced in the waters of the Kaw and Missouri rivers, extending from the source of the Kaw river to its mouth, and extending down the Missouri river to a point where said Kaw river empties into said Missouri river. That said 798 head of cattle were detained by said defendant at Strong City, Kansas, from the morning of said May 27th, 1903, to May 29th, 1903, and during the time of which detention, defendant twice loaded and unloaded from the cars in which they were being transported said cattle of plaintiffs. That during all of the time of said detention of said cattle at Strong City, Kansas, said flood in both said Kaw and Missouri rivers was daily and hourly becoming higher, as defendant's officers and agents well knew. That on said 29th day of May, 1903, defendant again reloaded said cattle at

Strong City, Kansas, and instead of continuing their transportation to said Atchison, Kansas, by way of Topeka, Kansas, on its regular line, deviated on its, the defendant's own motion, the transportation of said cattle by carrying them to Kansas City, and that on the arrival of said cattle at Kansas City, on the morning of May 30th, 1903, defendant, instead of leaving said cattle on the uplands where they would have been safe from the continued rise of the said flood in said Kaw river, deposited said 798 head of cattle in pens along by the side of the said Kaw river and near the mouth thereof, and where, as defendant and its officers and agents well knew, the waters of said flood in said Kaw river for several days had been continually rising, and at which point in said Kaw river, on said May 30th and 31st, 1903, said flood reached its climax, and extended far back from the ordinary channel of said Kaw river from each side thereof so as to fill and cover the said pens in which defendant so deposited said 798 head of cattle of plaintiffs.

It was further stated in said petition, that on May 31st, 1903, defendant, in order to save said cattle from being drowned, drove the said 798 head thereof into the viaducts extending over said pens and above the waters, which in consequence of said flood had submerged said pens, and that in so driving said cattle into said viaducts, defendant mixed and intermingled said 798 head with 2,200 head of other cattle that were in said pens at said time, and that said 798 head of cattle remained in said viaducts from said May 31st, 1903, to June 7th, 1903; that said waters, so made by said flood, extended from said May 31st to June 7th, back from said pens a distance of three-quarters of a mile and more, and were of a depth from eight to fifteen feet, and that in consequence of said waters, and of the placing of said cattle in said

viaducts, it was impossible to feed or water said cattle during said period of seven days; that by reason of the location of said cattle and the mixing of the same with said 2,200 head, it was impossible for either defendant or plaintiffs to sufficiently feed or water said 798 head of cattle; that by reason of said insufficient feeding and watering of said 798 head of cattle 99 head thereof died; that all of said 798 head of cattle, both at the time of their shipment at Hereford, Texas, and at the time they were shipped from Strong City, Kansas, were in good condition, and were each worth the sum and price of $25.00, and that by the death of said 99 head of cattle plaintiffs sustained a loss of $2,475; that by reason of the driving of said cattle in and on to said viaducts, 8 head thereof were fatally injured and crippled so as to rendered them totally valueless, whereby the plaintiffs lost the further sum of $200. That after deducting from said bunch of 798 head said 99 head, and said 8 crippled head of cattle, there remained 690 head, but that said 690 head were so injured and damaged by reason of the said insufficient feeding and watering of the same, as to cause a diminution in value of each said 690 head in the sum of $10 per head, so that plaintiffs lost on said 690 head the further sum of $6,900.

The petition of plaintiffs shows further damages, making the entire loss of plaintiffs in excess of $12,000.

The petition further avers that it was the duty of defendant as such railway company and common carrier to exercise due and reasonable care in the carriage and transportation of said cattle from Amirillo, Texas, to said Atchison, Kansas, but that defendant was guilty of negligence in the following particulars, to-wit:

1st. Defendant did not exercise due and reasonable care, but was negligent in the detention of said cattle at Strong City, Kansas, from May 27th, 1903, to May 29th,

1903, and in not carrying and transporting on May 27th, 1903, said cattle from said Strong City, Kansas, to Atchison, Kansas, by way of Topeka, Kansas, so that said cattle might have been by defendant, at said Atchison, Kansas, delivered to a continuing and connecting carrier at that point.

2nd. Defendant did not exercise due and reasonable care in the transportation and carriage of said cattle, but was negligent in not detaining said cattle at Strong City, Kansas, on said May 29th, 1903, until the said unprecedented flood in said Kaw river had subsided, so that the transit of said cattle might be safely resumed without liability to damage or injury thereto.

3rd. Said defendant did not exercise due and reasonable care, but was negligent and acted wrongfully and without plaintiff's consent in the deviation of the shipment of said cattle by defendant to Kansas City, from which last point and city, defendant had and has no connecting line extending to Atchison, Kansas.

4th. Defendant did not exercise due and reasonable care in the transportation and carriage of said cattle by carelessly and negligently endeavoring to head off the flood of said Kaw river by landing and depositing said cattle in the pens on the bank of said Kaw river, at the mouth thereof several days after the rise and increase of the flood of said Kaw river, and plaintiffs say that defendant by its agents and servants in charge of the transportation of said cattle of plaintiffs had actual knowledge of said flood from said May 27th, 1903, and well knew of said flood, and of the continued rise and increase thereof on said May 30th, 1903, when said defendant so deposited said cattle of plaintiffs in said pens by the side of said Kaw river at the mouth thereof.

5th. That defendant having wrongfully transported said cattle to Kansas City as aforesaid, carelessly

and negligently failed and neglected to move or cause to be moved the same from their position of peril aforesaid at Kansas City, Missouri, as it had reasonable time and opportunity to do, before the arrival at said Kansas City of said flood, but the same were overtaken by said flood.

The concluding averments of plaintiffs' petition were, that by reason of the foregoing facts plaintiffs had sustained damage in the sum of $15,000, for which sum, together with costs of this suit, plaintiffs prayed judgment. The foregoing constitutes the substance of plaintiffs' petition.

The answer of defendant, which was filed April 22nd, 1904, contains, first, a general denial of every allegation contained in plaintiffs' petition.

The second paragraph of defendant's answer professes to be a special plea or special statement of facts and circumstances attending this shipment and accompanying the answer was the shipping contracts, marked exhibits "A," "B" and "C," filed therewith, upon which the cattle of plaintiffs were shipped. Said paragraph of defendant's answer shows that said contracts were made with the Pecos & Northern Texas Railway Company, for transportation, as averred in plaintiffs' petition, by that company from Hereford, Texas, to Amirillo, Texas, and said answer admits that defendant received said cattle for shipment over its line of railway to be delivered by defendant to a connecting carrier for transportation and to be delivered at the point of destination, and that paragraph concludes with the plea that the injuries complained of to said cattle were caused by the flood of May 30th, 1903, and that said flood was in its nature unusual, extraordinary and unprecedented, and that the injuries were proximately caused by said flood as an act of God, and was not proximately caused by any negligent act or omission on the part of the defendant railway company

in the transportation of said cattle. The concluding paragraph of defendant's answer pleads that plaintiffs wholly failed and neglected to give notice to defendant in writing of plaintiffs' claim for damages to said cattle to any officer of defendant company, as provided in the 8th paragraph of said shipping contract. The answer of the defendant and said shipping contracts may be found in the record from pages 9 to 19 thereof. To said answer plaintiffs filed a reply, denying each and every allegation, averment and matter of whatsoever kind in said answer contained. (Record, pp. 19 to 21.)

Plaintiffs in their reply by way of reply to the last paragraph of defendant's answer, respecting the subject of notice, stated, that on June 8th, 1903, and as said flood was subsiding at Kansas City, and while plaintiff's cattle were still in defendant's possession, and after both plaintiffs and defendant knew that a large number of plaintiffs' cattle had died by reason of the matters set up in plaintiffs' petition, and after plaintiffs and defendant both knew that the residue of plaintiffs' herd had been greatly damaged as mentioned in plaintiffs' petition, but before either plaintiffs or defendant knew the exact number of cattle that died, or either the exact or full extent of the injury to the residue of said herd, plaintiffs delivered to W. A. Combs, assistant general live stock agent of the defendant, at Kansas City, Missouri, a notice in writing, notifying defendant that plaintiffs would claim damages for injuries to said cattle mentioned in plaintiffs' petition, such damages resulting from negligence of the defendant, its officers, servants, agents and employees in the handling and shipping of said cattle.

It was further stated in said reply that thereupon defendant notified plaintiffs that the residue of said herd of cattle could not be safely transported to the point of their destination in South Dakota without being first

pastured in some good pasture, so that said cattle could recuperate from their feeble condition, so as to be able to be transported to said destination; that thereafter and on June 10th, 1903, plaintiffs served on said defendant at said Kansas City, through said Combs, as such general assistant live stock agent, a notice and consent that defendant might temporarily, before continuing the shipment of said cattle to said destination, put said cattle, or the residue thereof, upon pasture, and consented that defendant might do so at the expense and risk of defendant, and that in giving such consent, all rights were reserved to plaintiffs as they existed before said consent was given, that no right under the contract of shipment, and no right to damages either to said cattle, in detail, or otherwise, was waived. It was further stated in said reply that repeated demands were made at Kansas City by defendant through defendant's general attorneys, at said Kansas City, to plaintiffs, to consent to take said cattle from said defendant and relieve defendant from further shipment of said cattle, but that plaintiffs steadfastly declined so to do, and that on or about the first day of July, 1903, defendant took the remnant of said herd to its pastures at Emporia, Kansas, and kept said cattle on its pasture at Emporia, Kansas, until July 15th, 1903, when defendant resumed the transportation of said cattle over its line of railway to the point of destination in connection with the connecting carrier. That at the time defendant resumed the shipment of said cattle from defendant's pasture at Emporia, Kansas, defendant requested plaintiffs to give, and plaintiffs gave, defendant a certain obligation in writing whereby plaintiffs bound themselves to pay to defendant certain charges which defendant claimed should be paid by plaintiffs if in any proper litigation in court it should be held that plaintiffs were liable to pay said charges for the keeping of said

cattle in the stock yards in Kansas City, and in said pastures of defendant at Emporia, Kansas.

It was further stated in reply that, on July 25th, 1903, plaintiffs gave defendant an itemized list of damages claimed by plaintiffs as stated in the petition herein; that plaintiffs prior to said July 25th, 1903, were unable to give defendant said itemized list, but that during all of said period from June 1st, 1903, to July 25th, 1903, defendant had full knowledge of the injuries to plaintiffs' cattle complained of in the petition in this cause, and had frequent and continuous negotiations with plaintiffs with reference to said cattle and the damage and injury thereto, and the reply of plaintiffs concluded with an averment that defendant waived the giving by plaintiffs to defendant of any other notice than those which were given as specified in said reply.

The case was tried by the trial court with a jury in January, 1905 the trial continuing for a period of nine days from January 16th, 1905, to January 25th, 1905. (pp. 21 to 28, Record.)

The bill of exceptions in the case extends from page 29 to page 656 of the printed record, and said bill of exceptions contains all the evidence offered by both parties at the trial (p. 637, Record). Said bill of exceptions also contains thirteen instructions which were prayed by plaintiffs to be given by the court to the jury, and the refusal of the court to give said thirteen instructions and plaintiffs' exceptions thereto (pp. 638 to 644, Record). Said bill of exceptions also contains the written opinion of the learned trial judge, given by him in sustaining defendant's motion for a peremptory instruction to the jury (pp. 645 to 655, Record).

The testimony at the trial below, and set out fully in the bill of exceptions, shows the following facts: A stipulation was read between the parties that said Em-

pire State Cattle Company was, and is, a corporation, created under the laws of the state of South Dakota, and that said cattle company and said other plaintiffs were and are all residents of and citizens of the state of South Dakota, and that defendant was, and is, a corporation duly created and existing under the laws of the state of Kansas, and a resident of that state (Record, pp. 29 and 30).

We will first give in this statement a history of the rise and climax of the flood of May, 1903, and the knowledge of defendant of that flood at and prior to the reception by defendant for shipment of plaintiffs' cattle.

One of the plaintiffs' witnesses at the trial was Mr. Patrick Connor, of Kansas City, Missouri, who in 1903, and for some time prior thereto and since that time had charge of the United States Weather Bureau office at Kansas City, Missouri (p. 300, Record). Mr. Connor testified in substrance as follows:

That the Republican and Smoky Hill, Saline, Solomon and Big Blue rivers all empty into the Kaw river, and that said other rivers drain practically the north half of Kansas, and also the southern part consisting of the two lower tiers of counties of Nebraska, and also a small portion of Colorado. That the rainfall which in the aggregate brought on the flood of 1903 of the Kaw river and at Kansas City, Missouri, commenced to fall and started in April, 1903; that any rains that saturated the ground would tend to diminish the capacity of the ground to hold moisture, but the chief rains which brought on that flood fell in the month of May. That the rains which fell in the first half of May, 1903, were quite heavy. A tabulated report made by the witness of the rainfall during a portion of the month of May was given in evidence and may be found at page 300 of the record. Mr. Connor testified that the average fall of rain during the first

fifteen days of May was much heavier than usual. That the rainfall during the month of May was unusually heavy and that it averaged from two and a half to three inches in the western part, eight to ten inches in the eastern part, in excess of the normal amount that falls during the month of May. That the rains through the month of May, 1903, were quite general throughout the month; that there may have been a cessation of rains about the 15th to the 18th. That there was not much diminution of rain except the first few days in the month of May, probably two or three days, or three or four days, and then a slight cessation around the middle of the month; that otherwise the rains were continuous, according to the best of his recollection; that the rainfall at nights was the same as in the day times. Said statement furnished by Mr. Connor also shows the stages of the water each morning in May, 1903, at the foot of the Hannibal bridge in Kansas City, which bridge is the one used by the C., B. & Q. Railroad Company. Mr. Connor further testified that during the last eleven days of May, 1903, the enormous quantity of nearly seven inches of rain fell in the central and eastern thirds of Kansas, not scattered downpours, but general rains during that period; that the normal rainfall at Kansas City during May of each year is little more than four and one-half (4½) inches (page 320, Record). Mr. Connor also furnished a table of the rainfall during May, 1903, at Manhattan, Kansas, on the Kaw river, and his table shows that the total rainfall at that place in May, 1903, was 9.6 inches (pages 317 and 322, Record). That on Tuesday, May 26th, 1903, witness commenced to issue warnings of the rise of the flood, and with these warnings were made between four and five hundred maps, which were sent out daily from his office about 10 o'clock each morning, and that those maps were furnished to large bus-

iness institutions, and a number of them were mailed within the limits of Kansas City, Missouri, and Kansas City, Kansas, and that the remainder were sent outside of Western Missouri, and over the state of Kansas pretty generally; that nearly all of the business institutions of any consequence had been on the map list of the United States Weather Bureau at Kansas City for years which received maps of this kind, and that the Kansas City Stock Yards Company was one of those cases. The warnings so given by the witness during the flood of 1903 were identified by him and introduced in evidence, and may be found from page 301 to page 303 of the record.

Respecting these warnings Mr. Connor testified it was the wish of his office to give just exactly to the public the cause or causes leading up to the flood and the augmentation or diminution each day, and the consequences are always referred to, the character of the water which obtained over that territory whenever mentioning the flood question as to whether or not rains had occurred and whether or not they were light or heavy. In substance the witness stated in these reports that owing to the tremendous quantity of water which had fallen it would necessarily raise or cause a flood at Kansas City.

Respecting a question asked Mr. Connor how long it would take water at a certain height in the Kaw river at Topeka to obtain the same height at Kansas City, Missouri, Mr. Connor answered, it would not take very long, and that the crest of the flood moved at the rate of two miles and six-tenths per hour in the Kaw river. The distance from Topeka to Kansas City is about sixty miles, and according to this testimony it would take about twenty-four hours for the flood at Topeka to reach the same height at Kansas City.

Mr. Connor further testified that taking into consid-

eration the differences in the height of the valley of the Kaw between Topeka and Kansas City, it would take about thirty hours in the case of a great flood for the flood at Topeka to reach Kansas City.

Mr. Connor further testified that the flood in the Kaw river of 1881 attained a stage of 26 and .2 feet above zero. He further testified that there was practically no flood condition north of St. Joseph in the Missouri river in 1903; that there was not much damage from flood between St. Joseph and Atchison, Kansas; that the flood between Atchison, Kansas, and St. Joseph, Missouri, was moderate; that from Leavenworth south the flood in the Missouri river was more severe. He also testified of the flood of the year 1904, and that the flood of the latter year was nine or ten feet below the height of the flood of 1903 (Record, 320).

Another witness in the case was T. B. Jennings, who has charge of the United States Weather Bureau of the state of Kansas, with office at Topeka, Kansas. Mr. Jennings has held that position since 1886. His testimony may be found at page 219 of the record.

Mr. Jennings testified that the rainfall for the first twenty days of May, 1903, averaged about four inches, or possibly a little over four inches, through the territory east of Norton and Trego counties, north of Smoky Hill river; then from the 21st to the 28th of May, 1903, it averaged another four inches, and on the 28th of May came the tremendous rainfall, which was about five inches and a quarter at Salina and was evidently considerable more, because that washed out the rain gauge in Abilene and the river was already bank full when this water came. That "we got a month's rainfall during the first twenty days of May, we got an average May rainfall, then during the next seven days that was repeated and on the 28th we had the tremendous downpour in the cen-

tral counties extending from Saline county northeastward into Marshall. About the normal amount of rain for the month of May fell during the first twenty days.

The territory I have in mind in what I have stated above as to rainfalls during the month of May, is the territory east of Norton and Trego counties and north of the Smoky Hill and Kaw rivers; it is the Kaw river watershed. The Smoky Hill passes through Trego and the Solomon and the forks of the Republican cut through this way, and it is the counties east of that portion of the state. The rainfall that I have described is in the Kaw river watershed; I am giving the rainfall that fell in the territory that flows its waters into the Kaw river finally; the Kaw draws from ten miles south of the Platte river in Nebraska; draws all the water to ten miles south of the Kaw in Kansas; in other words, the Kaw river watershed is all on the north side of the river. The most of the rainfall the latter part of May occurred on the 28th; there was but little rainfall west of Manhattan after that; we had a rain Sunday, the 31st; it rained up to Sunday here, Sunday the 31st.

We received a request from the Kansas City stock yards on the 29th and 30th to wire them the conditions every three hours; all we could do was to wire them the rise of the river from one period to another because there was no gauge here. The main streams that flow into the Kaw above Topeka are the Blue river, which comes in at Manhattan, the Republican river, which comes in at Junction City, and the Salina and the Solomon; the Solomon comes in at Solomon City; the other streams are mainly creeks; the Smoky Hill and Kaw rivers are one and the same stream; that is they commence calling it Kaw river after the Republican joins the Smoky Hill at Junction City; the Saline and Solomon rivers rise in the western counties of Kansas, Trego and Sheridan

counties; the Republican rises in the eastern part of Colorado and the northwestern part of Kansas; the Blue rises up in Nebraska, in the neighborhood of Lincoln, that is it covers quite a block of counties south of Lincoln, Nebraska."

Another witness for the plaintiffs was W. E. King (Record, 223), assistant city engineer, of Topeka, Kansas. Mr. King testified that the rains in the month of May, 1903, were exceptionally heavy; "we had considerable work here in the city, and were laid out by the continuous rains. I took the first observation in the rise of the Kaw river at Topeka on the morning of May 28th, at 8:30 o'clock; the Kaw river was then 6.0′ above city datum; that is a base from which we establish to make calculations; it is an imaginary base that is 10.8′ above low water mark; low water mark is the stage of the river at ordinary times. When I say that the water was 6.08′ above city datum, that means 16 feet and .88 or eleven inches above low water mark on the morning of the 28th at 8:30. The Kaw river continued to rise after that. I kept men stationed at that point until the crest of the flood; I have a thirty minutes continuous report from May 28th at 8:30 to June 6th at 10:30. The crest of the flood was reached at 9 p. m. May 30th; between 8:30 the morning of the 28th and 9 p. m. of May 30th the water rose ten feet and one-tenth."

Another witness for the plaintiffs was Theron S. Cafferty (225, Record), of Topeka, Kansas, and who was roadmaster of the defendant since 1887. Mr. Cafferty testified that he remembered the flood of 1903, in the Kaw river, and when the defendant's railroad from Topeka to Atchison became impassable on account of said flood. He testified that it became impassable on May 29th, 1903; that the last train that went from Topeka to Atchison left Topeka May 29th at 6 a. m., and

at that train got as far as Valley Falls, which is a sta-
on between Topeka and Atchison, and that witness saw
e condition of things there was so bad that he sent this
ain to Leavenworth and that he came back to Topeka
a hand car; that that train which left Topeka on the
orning of May 29th was the last train from Topeka to
tchison until the flood subsided. That the tie-up of all
ssenger trains, freight trains and stock trains for Atch-
on at Topeka began on the 29th; that there was no ob-
ruction on that line prior to the 29th from Topeka to
tchison."

Another witness for plaintiffs was W. A. Dyal (290,
ecord), of Topeka, Kansas. Mr. Dyal testified that
was in Topeka, Kansas, in May and June, 1903, and
membered the flood. That he was in the scrap iron
d metal business at 214-216 North Kansas avenue;
at his place of business was five hundred feet from the
aw river on the south side. "I could not get to our
ace of business on May 30th. I know the rainfall along
e Kaw river at Topeka, and in Kansas, during the
onth of May, 1903, was very heavy; it began to be
avy along about the 15th of May, I should judge; I
ould say that the rain continued from the 15th of May
heavy; the river kept rising, the rains after the 15th
ust have been pretty heavy up the Kaw judging from
e way the river came up; the river began to rise at
kepa along about the 15th, possibly as late as the 20th
May; I should say the grade floor of our building was
the neighborhood of 18 or 20 feet above the Kaw
er at low water mark; the water reached our grade
or the night of the 29th of May; the height of the
ter on the 20th of May was high, I couldn't say how
gh; if I remember right the water did not fall much
ter it commenced rising; we were preparing to get
ay, and the river kept up so I staid at home on ac-

count of it. I should say it commenced to get high between the 15th and 20th; the flood got four feet higher than our grade floor. It reached that height of four feet above our grade floor I suppose about the 30th, we could not get down there after I left there the night of the 29th about 10 or 11 o'clock, and it was just commencing to get in our grade floor, then the morning of the 30th I could not get there."

Another witness for the plaintiffs was C. T. McLellan (Record, 292), of Topeka, Kansas, wo was and is division superintendent of the defendant railway company. His division as such superintendent included the defendant's railway from Argentine to Emporia, by way of Topeka, and from Holliday to Emporia and by way of Topeka to Atchison and St. Joseph and Wilder to Hawthorne by way of Leavenworth and Alma branch, Burlingame to Alma.

Mr. McLellan testified he remembered the flood of 1903, and that we had frequent rains and some of them heavy in the month of May, 1903; that about the 27th or 28th of May he got reports from the Rock Island office in Topeka by 'phone as to the conditions of the water in the vicinity of Manhattan; that on the 27th of May witness was at Lakeview, on defendant's line of railway, between Lawrence and Topeka, and that these telephone communications to Topeka from Manhattan by way of the Rock Island were telegraphed to witness at Lakeview by his chief clerk in his office at Topeka; that at that time he was protecting the right of way between Lakeview and Lawrence where the river was high; that in consequence of the rains and the flood, the last time the trains passed over defendant's road between Topeka and Lawrence was on the morning of May 29th, 1903, about 4:30 and 5:30 in the morning; that was the last wheel that moved on the track between Topeka and Law-

rence during that flood period. No other trains passed over that line until the 8th of June. "A stock train leaving Strong City and coming to Kansas City over that line could not have come over our road by way of Topeka after 5 o'clock Friday morning, May 29th. I was attending personally to the work, looking after flood conditions on the different points of our road between Topeka and Kansas City and I was getting reports from every point on the division where we were threatened. The Kaw river at Topeka, I think, commenced to rise early in May, but the rise was very gradual and slow. I think by the 14th or 15th, middle of the month, the flood was rising slowly; there was not a steady rise, there was times when it was at a standstill and fell slowly. The rains during the period were very nearly continuous. I tried to keep fully informed from time to time of the state of the weather at Topeka. The track between Lang and Emporia was flooded on the 30th and a portion of the 31st of May. Our trains discontinued running between Topeka and Emporia the morning of May 30th. Lang is on our main line between Emporia and Topeka about eight miles east of Emporia." Being asked up to what time the trains continued to run from Strong City to Emporia and Topeka up to Atchison, the witness answered, "we discontinued train service to Atchison on the morning of the 29th, that the last train that went through was a freight, which left Topeka about 3 o'clock in the morning and reached Atchison about 8 o'clock the same morning. In consequence of the floods, the running of trains was discontinued after the morning of the 29th between Topeka and Atchison, between Topeka and Leavenworth and between Topeka and Kansas City; trains between all those points on our road were discontinued on the morning of the 29th; the running of trains on our road from Wilder to Leavenworth were also

discontinued; all of the lines of the Santa Fe system in Kansas, north of the Kaw river, were discontinued on the morning of May 29th; we were still open and operating trains between Holliday and Kansas City. Our lines from Topeka to Atchison became flooded at Valley Falls. The Delaware river, which is one of the tributaries of the Kaw, overflowed the main line at Valley Falls; the Delaware river empties into the Kaw river opposite Lecompton, sixteen miles east of Topeka. The track of our railroad at Topeka was flooded and the track became impassable at noon on the 29th. There was a break across the Kaw river on our road, in the direction of Atchison, at Topeka, and at noon on the 29th I was informed by the office force of our company that they had not been able to put anything over the Kaw at Topeka after train 122, which left Topeka at 3 a. m. that morning. The water was over our road at Holliday all day on the 29th; there is a sag in the track of our road at that point, the railroad is low and the bank of the river is low. The last train over our road at Holliday was a stock train and went over our road at that point about 10:15 or 10:30 the night of May 29th, east bound; that train came to Holliday by way of the Ottawa cut-off from Emporia to Holliday. After the morning of May 29th there was no trains came east by way of Holliday except by that cut-off."

The witness further testified that the business of the defendant railway company is and during its entire existence has been that of a common carrier engaged in the carrying of passengers and freight for hire.

He further testified that the office of the general superintendent, train master, and of the witness as division superintendent, C. W. Cook as assistant general freight agent, and W. J. Hurley, both at the time of the giving of witness' testimony and in the year 1903, were

and had been at Topeka, and that these gentlemen in May and June, 1903, had their offices in the Atchison, Topeka & Santa Fe Building, opposite the capitol in Topeka, Kansas.

Another witness in the case, who testified as a witness for the defendant, was H. W. Sharp (Record, 593), of Kansas City, Missouri, who was general superintendent of terminals of defendant at Kansas City. He testified that Mr. J. E. Hurley, the general superintendent of the defendant railway company, with offices at Topeka, was with witness on Saturday, May 30th, and the night following; that superintendent Hurley went with witness to Argentine, which is a suburb of Kansas City, about 10 o'clock Saturday morning, May 30th, 1903; that Mr. Hurley and witness started from the Santa Fe freight house at the corner of Hickory and Joy streets, in Kansas City, Missouri, to go to Argentine, on the top of a box car, so that they might see the extent of the water as much as possible; that superintendent Hurley and witness went to Argentine at that time to size up the situation and see the extent of the water and figure on the probable and possible further rise; that they rode on top of the car to get a better and plainer view of the surroundings.

Witness Sharp further testified that Mr. Hurley was in communication with the Santa Fe Topeka offices during Saturday in regard to the flood situation; that the witness saw the telegrams which passed between Superintendent Hurley and the Topeka office in regard to the flood; that witness talked personally with Superintendent Hurley about the flood situation; that the meeting of witness and Superintendent Hurley on Saturday was for the purpose of discussion of the flood situation. "Some parts of our railroad between Topeka and Kansas City were under water at that time. Superintendent Hurley

and I staid at Argentine that morning some time, we left Kansas City about 10 o'clock and got back about 12:30 o'clock; the condition at Argentine while we were there was pretty hard; there was about four inches of water over the rail of the main line, just west of the Rex Mills; there was about the same amount of water there was at Argentine. Rex Mills is between Argentine and Kansas City; there was no water at that time at Kansas City on our tracks. Superintendent Hurley and I thought from the information which we had that the crest of the flood had about reached Argentine, and we figured that even in the lowest part of the yard, we believed if we got as much as two feet more, that the contents of the cars would not be damaged; Argentine was our storage yards and unloading yards for all business passing through Kansas City. Our yards at Kansas City and Argentine both had something over fourteen hundred loads and sixteen hundred empties; most of them were at Argentine. We estimated at 12:30 Saturday, May 30th, that we could stand a further rise of two feet or two and a half feet without injury to the property in our yards."

The witness further testified that along in the evening of the same day, probably along from 6 to 7 o'clock. he first obtained information from Argentine yards as to the dangerous condition of the flood there. Witness says in this connection, the water seemed to be rising right along, still rising slowly and it continued to rise slowly all the evening, until 8 or 9 o'clock in the evening the water was getting up pretty well.

Witness further testified that about 4 o'clock in the afternoon of May 30th they commenced moving out of their yards at Argentine their engines and coaches to the south end of the Kansas City yard right along north of the mule barns of Sparks Brothers. "The place to which we moved those engines and cars from Argentine was

the highest land in the Kaw valley available for moving cars and engines."

Said J. E. Hurley, the general superintendent of defendant, was also a witness in the case (Record, 172). Mr. Hurley testified (Record, 196) that the last train between Topeka, Kansas, and Atchison before the high water was train No. 122, which left Topeka at 3 o'clock a. m. May 29th; the track between Strong City and Emporia was not disabled.

There was other testimony in the case in relation to the flood and its continuation during said month of May, 1903, and the knowledge by the defendant, its officers and agents, but we will not pursue the statement thereof any further here, but the same will appear incidentally from the other facts brought out in the testimony and referred to hereafter.

Respecting the first specification of negligence in the plaintiffs' petition, that the defendant did not exercise due and reasonable care, but was negligent in the detention of the cattle at Strong City from May 27th, 1903, to May 29th, 1903, in not carrying and transporting said cattle on May 27th from Strong City to Atchison by way of Topeka so that said cattle might have been by defendant at said Atchison delivered to the continuing and connecting carrier, the testimony was as follows:

One witness for the plaintiffs was W. H. Frost (Record, 37). Mr. Frost was one of the plaintiffs and accompanied the shipment of cattle mentioned in plaintiffs' petition from Hereford, Texas, to Kansas City. Said Frost represented the plaintiffs as owners of said cattle and had a man with him looking after the shipment of the cattle by the name of Albert Newton. Mr. Frost testified that he bought this train load of cattle about one hundred miles south of Hereford, Texas; that there was 798 head in the train; that these cattle were

loaded at Hereford, about 9:30 p. m., May 25th, 1903; that the train carrying these 798 head of cattle consisted of 21 cars. That the train carrying said cattle was taken over the line of the Pecos Valley railroad from Hereford to Amirillo; that said train reached Amirilla about 11 o'clock in the evening of May 25th; that after remaining at Amirillo about an hour the cars containing said cattle were taken over the line of the Atchison, Topeka & Santa Fe railroad to Strong City, and there unloaded; that said train reached Strong City about 11 o'clock in the evening of Tuesday, May 26th; that said cattle were unloaded at Strong City by a crew in the stock yards of the defendant at that place; that the said cattle were fed and watered the morning of May 27th about 8 or 9 o'clock, and that said cattle could have been loaded out from Strong City at 11 o'clock a. m. on Wednesday, May 27th.

Witness further testified that nothing was done with the cattle at Strong City until the evening of the 27th, when they were reloaded out for transportation; that the train containing the said cars was pulled down on the sidetrack and set on the track awhile and then ordered back; that they were loaded about 4 o'clock that evening and remained on the side track about an hour and then the train was backed up and the cattle unloaded again in the yard. That witness was not consulted at any of the times when the cattle were unloaded or reloaded and unloaded again; that said cattle were reunloaded the second time about 7 o'clock Wednesday evening, May 27th; the cattle were then put back in the yards.

Witness further testified that the cattle were reunloaded again the next day in the forenoon, but that the entire train was not loaded up at that time; that witness thinks that about half of the cattle were loaded up at that time; that they consumed perhaps half an hour in load-

ing up at that time; then the cattle were again put back into the yards. "I was not consulted in the unloading or loading up again by anybody." The cattle were again loaded up on Friday morning of the 29th of May, 1903, about half past 7 o'clock, or 8 o'clock. The cars containing the cattle were loaded and run down on the side track, where they remained about three hours, then they were pulled out about one or half past one that day to go to Emporia.

Thus it will be seen by the testimony of Mr. Frost, one of the plaintiffs in the case, that plaintiffs' cattle were detained at Strong City from Wednesday until Friday. Mr. Frost testified, as we have seen or page 39 of the record, that the cattle had finished being fed and watered and were ready for transportation to be resumed at 11 o'clock on Wednesday, May 27th, 1903; he testified that the cattle were still held at Strong City until one or half past one of Friday, May 29th (Record, 41), when they pulled out to go to Emporia. This testimony shows therefore, that the cattle were detained two whole days at Strong City, Kansas, and the contention of the plaintiffs is that the defendant company had ample time during that two days by continuing the transit of the cattle to have shipped them out so as to have delivered them to the connecting line at Atchison, and that if that had been done, the cattle would have reached their destination at Evarts, South Dakota, without injury or damage from the flood.

In this connection we desire to call the attention of the court to the testimony of two witnesses, one G. W. Cloyd (Record, 31). Mr. Cloyd's testimony shows that Mr. Frost, whose testimony we have just referred to, at the time he, Frost, bought the train load of 21 cars containing the 798 head of cattle in controversy in this case, bought as a part of the same transaction, another bunch

of cattle, which filled up another train load consisting of twenty cars, and the witness Cloyd was in charge of this other train load. As already stated, the two train loads were bought together at the same time by Mr. Frost as parts of one transaction and to make up one entire shipment, but the shipment was divided into two train loads. The train load in controversy was in charge of Mr. Frost, accompanied by Newton, while the other train load was in charge of the witness Cloyd, with one Keiser. The train load in charge of the witness Cloyd left Hereford about 5:30 in the afternoon of May 25th, while as we have seen the train load in charge of Mr. Frost left Hereford about 9 o'clock or 9:30 o'clock the same evening. It is thus seen that the two trains in leaving Hereford, Texas, were about four hours apart. Witness Cloyd says that his train load came over the Pecos Valley to Amirillo, which was reached about 8 o'clock the same evening; that they remained at Amirillo about forty-five minutes and that they went from Amirillo with his train to Strong City over the Atchison, Topeka & Santa Fe Ry. Mr. Cloyd further testifies that his train reached Strong City about 5:30 p. m. on the evening of Tuesday, 26th of May, and in this connection it will be remembered that Frost testified that his train reached Strong City about 11 o'clock the same day, and thus it is seen that the two train loads were about the same distance, three and a half or four hours, apart on reaching Strong City that the trains were apart when they left Hereford. The witness Cloyd (Record, 32) further testified that his train remained at Strong City until the evening of Wednesday, 27th, about 8:30. By comparing the testimony of Mr. Frost with that of Mr. Cloyd, it will be seen that the two train loads were at Strong City all day on Wednesday the 27th. Witness Cloyd further testified (Record, 35) that his train, which left Strong

City at 8:30 p. m., Wednesday evening, May 27th, went through to its destination at Evarts, South Dakota; that his train was not caught in the flood anywhere. The other witness referred to was J. D. Carr, and one of the plaintiffs in this action (Record, 116). Mr. Carr testified that the first train load of cattle, which was the train load accompanied by the witness Cloyd, and to which we have referred above, was seen by the witness Carr in Sioux City, where he met that train; that he met Cloyd's train on the last Sunday in May (May 31), and that he (Carr) accompanied the shipment of that first train load from Sioux City to Evarts, South Dakota, where that train load arrived uninjured on Monday, June 1st, 1903; that in that shipment there was 763 head of cattle of the same ages and the same kind of cattle as the cattle in the train accompanied by Mr. Frost, which is the train load in controversy.

It is thus seen from the testimony of Messrs. Frost, Cloyd and Carr that if the train load of 798 head of cattle in controversy in this case had been continued in its transit by the defendant from Strong City, the same as the transit of the other train load in charge of Cloyd was continued from Strong City, by defendant, the train load of cattle in controversy in this case would have reached its destination uninjured and that the death and injury of the cattle by the flood would have been avoided. Cloyd's testimony shows that his train was detained twelve hours or more by reports of high water and then continued from Strong City.

There is no evidence in the record controverting the foregoing facts proven by the testimony of Messrs. Frost, Cloyd and Carr; there is and can be no denial or question on the part of the defendant that if the train load of cattle in controversy had been shipped out from Strong City by the defendant, as the other train load was shipped

out, the injury to these cattle would have been avoided. The contention of the plaintiffs is that in view of the shipment out of the train load in charge of Cloyd, the detention of the train load of cattle in controversy at Strong City during the two days they were there was negligence on the part of the defendant and that that negligence either caused or contributed to produce the loss sued for in this action.

The next charge in the petition to which we desire to invite the court's attention, in the statement of facts, is the second charge that defendant did not exercise due and reasonable care in the transportation and carriage of said cattle, but was negligent in not detaining said cattle at Strong City, Kansas, on said May 29th, 1903, until the said unprecedented flood in said Kaw river had subsided so that the transit of said cattle might be safely resumed without liability to damage or injury thereto.

The contention of the defendant in the trial court was, and the same contention will doubtless be renewed here, that the defendant was not negligent in detaining plaintiffs' cattle at Strong City said two days, said detention having been caused, as it contends, by the flood which as we have aready seen was prevailing throughout the watershed of the Kaw river.

In this connection, referring back to the testimony of Messrs. King, Cafferty, Dyal and McLellan, the substance of whose testimony we have already given above, it will be remembered that all of the lines of railway of the defendant which afforded any possible outlet to the train of cattle in controversy were flooded on the morning of Friday, May 29th, 1903. The uncontradicted testimony of Messrs. Frost and other witnesses is that the train load of cattle in controversy did not leave Strong City until Friday noon (Record, 41). The witness Newton also testified (Record, 135) that he accompanied

Frost on the train in controversy, and testifies to the same effect that the train load in controversy was reloaded on Friday, the 29th, and run out on the track until about half past one, and that they remained there about two hours and a half, and both Frost and Newton testified that during the two days that the train in controversy was detained at Strong City the railway agent of the defendant at Strong City informed them that the detention was on account of high water along the line of the defendant's railway; and since it is claimed by the defendant that the detention of plaintiffs' train load of cattle in controversy at Strong City for the two days they were held there was in consequence of the flood and high water, and since the uncontradicted evidence of King, Cafferty, Dyal and McLellan shows that defendant's several lines of railway from Emporia north going both to Kansas City and Atchison were flooded early in the morning of Friday, May 29th, plaintiffs contend that the shipment of the cattle in controversy from Strong City at noon of Friday, the 29th, with a view of encountering the flood in the Kaw river and which flood covered all the lines of railway of defendant, was negligence on the part of defendant.

This contention is emphasized by the consideration of the various telegrams between the general offices of the defendant respecting the transit of the train load of cattle in controversy. Those telegrams are eighty in number and may be found from page 178 to 194 of the record. Those telegrams are classified according to the dates, beginning with the telegrams sent on Tuesday, May 26th, 1903, and continuing down to the last telegram, which was sent on May 30th, 1903. It will be observed by an examination of all of those telegrams that they related solely to the situation of the flood as it affected this shipment of cattle. Three of those telegrams

were sent as early as May 26th. An examination of those several telegrams sent from the 26th until the 30th of May will show that the movements of this train in controversy all emanated from the general offices, and under the direction of the general superintendent, Mr. Hurley, and other general officers of the defendant at Topeka, Kansas, and those telegrams show that the situation in regard to the movements of the train in controversy were so exceptional as to call forth from the first arrival of the cattle at Strong City the interposition of the general officers of the defendant company. Twenty-four of those telegrams were sent on Wednesday, the 27th, and when read together show that the defendant, from Tuesday, the 26th, by its general officers at Topeka, were acquainted with the flood conditions in the Kaw river and along the lines of their railway, and that two days before Friday, the 29th, when this train load was shipped from Strong City, conditions were such as to make it extremely hazardous, dangerous and negligent to move those cattle from Strong City, until the flood, which the defendant knew on Wednesday, the 27th, was on, had fully subsided. Thirty-five of those telegrams passed to and from between the general officers of the defendant respecting the flood conditions as affecting the shipment of the cattle in controversy on Thursday, May 28th, 1903, and those telegrams, taken as a whole, show the extreme dangerous situation as it existed on Thursday, May 28th, and that condition was known to the general officers of the defendant railway company. The same observation is true of ten or more of the telegrams which passed to and from the officers of the defendant Friday, May 29th. These telegrams, taken in connection with the other evidence to which we have referred, make it conclusive, as it seems to us, that defendant in not detaining plaintiffs' cattle at Strong City until the

flood had entirely subsided was negligent, and that but for such negligence plaintiffs' cattle would not have been damaged as complained of in plaintiffs' petition.

We will next present the evidence which supports the 3rd specification in plaintiffs' petition, that said defendant did not exercise due and reasonable care, but was negligent and acted wrongfully and without plaintiffs' consent in the deviation of the shipment of said cattle by defendant to Kansas City, from which last point said defendant had and has no connecting line extending to Atchison, Kansas. It will be observed in this third specication two propositions of fact are stated, one that the deviation of the shipment of plaintiffs' cattle to Kansas City was wrongful and the other that such deviation was negligent. It will be conceded that if that deviation was negligent, defendant was liable to plaintiffs for the injury which ensued, and it will not probably be denied that if independently of the question of negligence the deviation without plaintiffs' consent of the shipment was *per se* wrongful, then defendant is also liable.

Upon the question whether the deviation was wrongful, we call the court's attention, first, to that part of the record which shows that the cattle in controversy were to go from Amarillo, Texas, to Atchison, Kansas, by way of Topeka, and to be there delivered to the C., B. & Q. railroad for shipment to Council Bluffs, and shipped from there to Evarts, South Dakota, by way of the Chicago, Milwaukee & St. Paul railway, and that the route thus designed, did not contemplate a shipment of cattle under any circumstances to Kansas City.

On this branch of the case we call attention, first to the contracts for shipment appended to defendant's answer as exhibits. Copies of those contracts of shipment, will be found between the blank page 12 and page

19 of the record. On the back of each one of the contracts is the following:

"Live stock contract, Hereford, Tex.,
To Atchison, Kansas.
May 25th, 1903."

This endorsement is on the back of each one of the contracts and the testimony of the witness, Newton, who accompanied the plaintiff, Frost, with these cattle, is to the effect that he saw these contracts at the time the shipment commenced, and that the contracts indicated that the cattle were to go by way of Atchison (Record, 158 to 160). The bills of lading for the train load in controversy, were offered in evidence by plaintiffs, and a copy of one of those bills of lading may be found at pages 121 and 122 of the record. The bills of lading show that the cattle in controversy, were shipped from Hereford, Texas, destined to Evarts, South Dakota, on May 25th, 1903, and that they were routetd to go by way of the junction to Amarillo and thence with the Atchison, Topeka & Santa Fe Railroad company and over that line to Atchison, where they were to be taken by the Kansas City, St. Joseph & Council Bluffs railroad, which is a part of the Burlington system, to Council Bluffs, and from thence by the way of the Chicago, Milwaukee & St. Paul to Evarts, South Dakota. This is the line over which the cattle were routed to go by the bills of lading made by defendant and the bills of lading are in harmony with the endorsements on the back of the contracts which routed the cattle to go by way of Atchison. On this point Mr. Hurley, the general superintendent of defendant company (Record, 173) testified that cattle shipped over its railway from Amarillo, Texas, to go north would pass both Strong City and Emporia, by way of Atchison; that the feeding points on defendant's railway north from Amarillo, Texas, were Wellington and

Strong City, Kansas, and at page 174 Mr. Hurley distinctly testifies that the usual and customary route from Strong City to Atchison is across the Kaw river at Topeka, and that trains pass north from Strong City to Atchison through Osage City, Burlingame, Topeka, Valley Falls and Nortonville to Atchison, Kansas, and that that is the customary route for all trains of live stock, dead freight, passenger, and everything between Amarillo, Texas, to Atchison, Kansas, and was the customary route in 1903. (See also testimony of Mr. Hurley, Record, 176.)

In that connection on that page, Mr. Hurley also testified that the deviation of the train of cattle, in controversy, in this case, from the customary and usual route by way of Topeka to Atchison, from Emporia to Kansas City, was made by his, Mr. Hurley's order, and the testimony of Mr. Hurley (Record, 195) shows that he, Superintendent Hurley, in making his several orders or telegrams and otherwise directing the movements of plaintiffs' cattle in controversy, and taking them to Kansas City, acted without any communication between him, Hurley, and anybody representing the plaintiffs, and the testimony of both Mr. Frost and Mr. Newton shows that neither of those persons were consulted in any way by any representative of the defendant company in the movement of the train of cars in controversy. All of the movements of the train of cars in controversy, whether consisting of the loading or unloading of the cattle, or the reloading, or the reunloading, or the movements or detentions, or the deviation to Kansas City, were by the defendant through its general officers, without any consultation or communication with Mr. Frost or any other persons representing the plaintiffs. The testimony of Mr. Frost on this point will be found (Record, 41) and the testimony of Mr. Newton on this point (Record, 156

and 157). There is no testimony in the record contradicting the testimony of Mr. Frost and Mr. Newton, that the defendant's officers did not consult with Mr. Frost or other representatives of the plaintiffs in connection with the movement of this train. Upon the proposition that it was within the contemplation of these parties that the cattle were to be shipped from Amarillo to Atchison, by way of Topeka, the learned trial court in its opinion in this case (Record, 653) recognized the route to Atchison as within the route originally contemplated by the parties, and the learned Judge, in his argument on that branch of the case treats the line that was originally in the contemplation of the parties as the line from Strong City to Emporia, thence by way of Topeka to Atchison.

The facts bearing upon the question of negligence of defendant company in deviating the shipment to Kansas City, are as follows: There is no evidence in the case that the yards of the defendant company at Strong City, Kansas, where plaintiffs' cattle were detained for two days, was an insufficient place at which to hold the cattle until the flood had subsided. And it must be taken as conceded that there was no necessity, in the situation of the cattle at Strong City, which required their removal from that point, and if there was any danger from a flood at Strong City, the defendant company could have escaped that danger by the removal of the cattle to pastures of defendant twenty or thirty miles distant, which were situated near Emporia, Kansas, where the plaintiffs' cattle were taken by the defendant company after the injury and damage to the cattle was inflicted. And it will not be seriously contended by the railway company that there was any necessity for removing the cattle from Strong City; they had been safely kept at Strong City for two days and could have been as safely kept there for ten or fifteen days longer until the flood had sub-

sided. (See testimony of Superintendent Hurley, pages 210-211, Record.) At the time of the removal of plaintiffs' cattle from Strong City, Friday noon, May 29th, the flood was on in the Kaw river at Topeka, all of the lines of the defendant company were flooded, and the evidence shows that the cattle of plaintiffs were taken to Kansas City, not over any of the defendant's lines, but over the line of the St. Louis & San Francisco Railway Company by Olathe, on a roundabout line of transit. The evidence of Messrs. Jennings, King, Cafferty, Dyal and McLellan, to which we have referred repeatedly in this statement, show that from May 1st to May 28th, eight inches of water had fallen in the Kaw river water shed, and that on May 28th there was the tremendous downpour of five inches, and other testimony shows that on Friday, May 29th, in consequence of the said downpour of May 28th, there was a tidal wave in the Kaw river at Topeka, of about nine feet. This was the situation when the defendant deviated the shipment of plaintiffs' cattle from Emporia to Kansas City. The defendant by that deviation made the effort to outrun the flood in its descent down the Kaw river from Topeka to Kansas City. Defendant company, and its agents and officers well knew of the tidal wave at Topeka, and the evidence of Mr. Connor, and the other witnesses show that that tidal wave which reached Topeka on Friday the 29th, was bound to reach Kansas City within twenty-four or thirty hours thereafter. Thus the uncontradicted evidence shows that the defendant, by the deviation, carried the cattle of the plaintiffs into certain danger and destruction by attempting to cross the Kaw river at Kansas City, when everybody knew that the crossing at Topeka was an impossibility, and that within a few hours at best, it would be likewise impossible to cross at Kansas City. The contention of the defendant is, that

defendant deviated the shipment to Kansas City because it had an arangement with the Missouri Pacific Railway Company to take the cattle from the defendant company at Kansas City and carry them to Omaha or Council Bluffs, where their transit could be continued to the point of destination. The defendant claims that it had been informed by some of the telegrams, to which we have referred, that the Burlington Railroad company, over whose line from Atchison to Council Bluffs the transit of the cattle was originally designed, could not carry the cattle from Atchison, because of the flood conditions above that point, but the Missouri Pacific railroad from Atchison to Omaha runs up the same valley that the Burlington runs from Atchison to Council Bluffs. As a matter of fact, however, the evidence shows that the defendant company did not have any arrangement with the Missouri Pacific Railroad company at the time the defendant deviated the shipment of plaintiffs' cattle from Emporia to Kansas City to carry these cattle from Kansas City to Omaha or Council Bluffs. This is shown by the evidence of the witness Douthitt (Record, 267). Mr. Douthitt was the live stock agent of the Missouri Pacific Railway company at Kansas City, and as shown by his testimony any arrangement respecting the transit of these cattle from Kansas City to Omaha by the Missouri Pacific Railway company would have to be made through his as such live stock agent. Mr. Douthitt is positive and emphatic that no arrangement was made between the defendant company and the Missouri Pacific Railway company for the transfer of these cattle by the defendant company to the said Missouri Pacific Railway company at Kansas City, for their continued transportation north, and that no arrangement whatever was made for the reception by the Missouri Pacific Railway company of the cattle at Kansas City. The only arrangement made with

Mr. Douthitt and the Missouri Pacific Railway company, which he represented, was for the reception of these cattle by the Missouri Pacific Railway company at Atchison. In this connection we invite attention to page 268, where a telegram is copied from C. W. Cook, the agent of the defendant at Topeka, to Witness Douthitt, at Kansas City, and which telegram reads as follows: "Account of washout with Burlington want to deliver Missouri Pacific at Atchison about three trains of cattle for Evarts, S. D., and routed via Council Bluffs, care of C., M. & St. P. Presume you will join accepting north of Atchison same division Burlington accept. Rush answer."

This telegram was sent on May 27th, and on the same day as it appears from page 269, Mr. Douthitt sent back to Mr. Cook at Topeka, the following telegram (page 269, Record):

"Yours dated Q 2.52; will move the three trains cattle, Atchison to Omaha accepting division allowed Burlington, which I understood is $13 per car; advise when shipment will be delivered our line. N. Douthitt."

We think the evidence of Mr. Douthitt taken in connection with the telegrams printed in the record will show that the defendant's general officers and agents who manipulated the movements of these cattle in this case lost their heads and became so nervous and excited as to be incapable of transacting business at or about the time of the deviation of plaintiffs' cattle from Emporia to Kansas City.

The facts to which we have called the court's attention in this statement in support of the third proposition of the plaintiffs' petition that there was a negligent as well as a wrongful deviation of the shipment to Kansas City, support the fourth specification of negligence in plaintiffs' petition.

The fifth specification in plaintiffs' petition is as follows: Defendant company wrongfully transported said cattle to Kansas City as aforesaid, carelessly and negligently failed and neglected to move or cause to be moved, the same from their position of peril aforesaid, at Kansas City, Missouri, as defendant had reasonable time and opportunity to do, before the arrival at said Kansas City of said flood, but the same were overtaken by said flood. This specification is supported by the following evidence at the trial of said cause. Among the witnesses in the case was a Mr. William M. Kendrick. (Record, 283.) Mr. Kendrick was the live stock agent at Kansas City of the C., B. & Q. Railroad company. This was the railroad company which was to take the cattle of the plaintiffs' as they were originally routed from Atchison to Council Bluffs. Mr. Kendrick testified that on the arrival of these Cattle Saturday morning, May 30th, he took steps to have them hauled out over the Burlington railroad from Kansas City north to Council Bluffs, but he learned in some way that it was the desire of the defendant company to ship out by the Missouri Pacific Railway company. As will be seen by the testimony of Mr. Douthitt and other witnesses, the defendant company learned early in the day of Saturday, May 30th, that the Missouri Pacific Railway company would not endeavor to take the cattle over its road, and the testimony of Mr. Kendrick, live stock agent of the Burlington (Record, 287-288), shows that the Burlington railroad, on that day had plenty of engines and cars with which to haul out these cattle from Kansas City north over the Burlington railroad to Council Bluffs. The testimony of Mr. Kendrick also shows that on Saturday evening, May 30th, 35 cars were shipped out of Kansas City on the Burlington. The testimony of Mr. Kendrick on this point is as follows:

Q. Did you send any cattle trains out by the Burlington Saturday?

By Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial.

By the Court: Objection sustained; plaintiffs then and there duly excepted.

Q. Do you know of any trains going out in the part of the yards where these cattle were and clearing the flood on Saturday?

By Mr. Angevine: Objected to by defendant as incompetent, irrelevant and immaterial.

By the Court: Objection overruled; defendant duly excepting.

A. I don't know just where those cattle were yarded; we loaded out cattle there on Saturday evening.

By Mr. Angevine: Defendant objects to the answer as not responsive to the question; sustained.

Q. If they were yarded in what is known as the shipping division?

By Mr. Angevine: Objected to by the defendant; the witness says he don't know.

By the Court: Overruled; defendant duly excepting.

A. We loaded out, I think it was two trains, if I remember correctly; I think 35 cars Saturday evening.

Q. What time did they go out? A. I don't know exactly, I think between five and six o'clock.

Q. Where were they destined?

By Mr. Angevine: Objected to by defendant as incompetent, irrelevant and immaterial.

By the Court: Objection sustained; plaintiffs then and there duly excepting.

Q. Did they clear the flood?

By Mr. Angevine: Objected to by defendant as incompetent, irrelevant and immaterial.

By the Court: Objection sustained; plaintiffs then and there duly excepting.

Q. What road did they go on? A. Burlington.

Q. Which direction? A. East.

Q. When were they loaded? A. Saturday evening.

Q. What time were they loaded? A. Possibly, I think they left the yard between five and six o'clock.

Q. What time were they loaded? A. About that time; pulled them out as soon as they were loaded.

This evidence was elicited by the plaintiffs for the purpose of showing that the cattle of the plaintiffs in controversy in this case could have been shipped out by defendant Saturday, May 30th, 1903, as bearing upon the question of negligence specified in the said fifth paragraph of the plaintiffs' petition recited above. In this connection we invite the attention of the court in its perusal of the evidence in this case to repeated rulings of the trial court sustaining objections to the admission of evidence offered by plaintiffs. The learned trial court did not seem to look with favor on plaintiffs' case throughout. (The court's remark at page 172, Record, is a sample.) However, under the rulings cited hereafter in our brief, we ask that the court in considering the evidence in this case will consider that which was rejected by the trial court as well as that which was admitted. As bearing upon the proposition that the defendant, after the arrival of the flood at Kansas City, could still have saved plaintiffs' cattle from loss by driving them out of the stock yards, and that defendant was negligent in that respect, we refer to the testimony of W. C. Sparks, page 345, Record. The witness Sparks was a member of the firm of Sparks Brothers, engaged in the mule business at Kansas City, and the yard where that firm kept their mules was at Seventeenth and Genessee streets, and within a block of the shipping division of the stock yards where the plaintiffs' cattle were contained in the Kansas City Stock Yards after they were deposited therein. The evidence shows that plaintiffs' cattle arrived in Kansas City on the morning of Saturday, May 30th, 1903, and were at

once unloaded into the Kansas City Stock Yards, and the testimony of Mr. Sparks shows that between six and seven hundred head of mules in the said yards and barns of Sparks Brothers, within a block of where plaintiffs' cattle were lodged in the stockyards, were driven out of the said yards and barns of Sparks Brothers on Sunday Morning, May 31st, between 8 and 11 o'clock on that day, and said six or seven hundred head of mules were driven out of the yards six miles south of Kansas City in the country. This testimony proves that if the defendant company had exercised ordinary care it could have driven the plaintiffs' cattle out of the stock yards up out of the Kaw valley on the uplands, where said mules were driven by said firm of Sparks Brothers.

Another witness for the plaintiffs was L. A. Allen (Record, 226). On page 238 of the record Mr. Allen testified as follows:

Q. Got them out to a place of safety? A. They could all have been driven out or taken out or shipped out in a few hours, all day Saturday.

Mr. Allen was and is a member of a live stock commission firm at Kansas City, Missouri, and was present during the flood of May, 1903. Mr. Allen was recalled as a witness (Record, 622) and testified as follows:

Q. State whether or not there was any available way to get these cattle out of the yard on Saturday night and Sunday? A. Yes, sir.

Q. Now state how and in what way that could have been done, what means were available for the purpose? A. They could have been driven out in the country any time during that time.

Q. How long would it have taken to have gotten them from the shipping pens where they were to the highlands? A. 20 or 30 minutes.

Referring to what available means there were to move the cattle out the following testimony was given:

Q. What were they? A. Men and horses.

Q. How many? A. About the yards about 300

horses and three or four hundred men there all of the time; some commission men, some salesmen, some cattle drovers, speculators and traders.

Q. Did they have horses and men which were available for moving cattle? A. There were two stables there which hired horses.

Q. About how many men and horses would have been reasonably sufficient to drive those cattle and handle them through the streets and out to the highlands? A. Eight or ten men.

Q. Could they have handled the cattle so as to prevent their scattering and going all over the city? A. Yes, sir.

As to the extent of the loss and damage and injury to the plaintiffs' cattle by being driven upon the viaducts, the evidence fully sustains the averments in the petition. The cattle were driven up on the viaducts on Sunday, May 31st, and in consequence of the inability of anybody to give them water and feed, the plaintiffs sustained the injuries by the death and injury to the residue as specified in the petition. The 2,200 head mentioned in the petition as having been mixed along with the plaintiffs cattle as they were driven up on the viaducts, were the cattle of the Minnesota & Dakota Cattle Company, which are the subject of controversy in the companion case to this between said Minnesota & Dakota Cattle Company and this defendant. The circumstances attending the driving of these cattle up into the viaducts may be found from the testimony of W. H. Frost (Record, 37, 123, 298), Albert Newton (Record, 130), L. A. Allen (Record, 226), and Charles Stube (Record, 384). The uncontradicted evidence in the case shows that defendant, after depositing said cattle of plaintiffs, without the consent of plaintiffs in the Kansas City Stock Yards, on Saturday morning, May 30th, gave them no further attention or care. The defendant seems to have adopted the theory that the defendant company, when it

delivered the cattle to the Kansas City Stock Yards, owed no further duty to plaintiffs respecting said cattle or respecting their care in any way. The evidence of H. P. Child (Record, 529), and J. W. S. Hutchins (Record, 542), was introduced by the defendant for the purpose of showing that where a shipment of cattle is made to pass through Kansas City and the cattle thus shipped are delivered by the railway company bringing them to the Kansas City Stock Yards, where another company is to take the cattle from Kansas City, the delivering company is under no further obligations after delivering the cattle to the Kansas City Stock Yards. The contention of the plaintiffs in the trial below and here, was and is, that that evidence is not applicable to this case, for the reason that it was not within the contemplation of the parties to this suit that the cattle in controversy were to be shipped to Kansas City, or that they were under any circumstances to be delivered to the Kansas City Stock Yards. The evidence shows that the defendant did not intend to give, and did not give, as already stated, any attention to plaintiffs' cattle after they were deposited in the Kansas City Stock Yards.

Mr. G. A. Roberts (Record, 522-523) who was the local live stock agent of the defendant company at Kansas City, on cross-examination by plaintiffs' counsel, testified as follows:

Q. Why didn't you people get that train out of here? A. I don't know.

Q. You knew about the other three trains coming in Friday morning about 6:30, didn't you? A. No, sir.

Q. Saturday morning I mean? A. I suppose I knew it in a general way; yes, sir.

Q. Why didn't you get them out? A. I might say we did not get them out because it was not our business to get them out; we had hauled them in and it was up to the connecting line to get them out.

As we have seen there was no connecting line in this case, whose business it was, in the way the shipment was made, to receive the cattle from the defendant company at Kansas City; the routing of the cattle did not contemplate that they were to be brought to Kansas City by the defendant company or hauled from Kansas City by defendant or any other company, much less was there any evidence to show that it was the design of the parties in the routing that the connecting company in the transit were to take the cattle from the defendant company at Kansas City.

The reason, therefore, given by the witness, Roberts, that the defendant company gave the cattle no further attention after they were deposited in the stock yards, because the defendant company had hauled them in and "it was up to the connecting line to get them out," is wholly insufficient as a reason in this case, for the reason that there was no connecting line, and that the defendant's duty could not, and did not, end until it delivered the cattle safely to the connecting carrier at Atchison, Kansas. A delivery at Atchison, Kansas, is the only delivery by the defendant that satisfied the contract in this case. As a matter of fact, however, the defendant recognized itself as still in possession of the cattle from and after the flood. This is shown by the way bills read in evidence (Record, 121). A reference to the way bill there which accompanied these cattle from Hereford, Texas, to Evarts, South Dakota, shows the following endorsement on the bill of lading: "Reloaded July 10th, 1903, Lang, Kansas." This endorsement on the way bill was made under the following circumstances: The defendant company, after the flood had subsided and the cattle in controversy had been taken down again into the stock yards, reloaded the plaintiffs' cattle and took them out to its pastures near Lang, Kan-

sas, the next station to Emporia, Kansas, and on July 10th the cattle having been revived sufficiently by their pasturage there to be reshipped, were reloaded by the defendant and hauled from Emporia and Lang, Kansas, by way of Topeka to Atchison, and there delivered to the Burlington as the connecting carrier, and taken on through to Evarts, South Dakota. The use of this original way bill made at Hereford, Texas, to accompany the shipment through by the defendant company in reloading and taking the cattle after the flood, shows that the defendant regarded its duty as to carrying the cattle through as still existing after the flood, notwithstanding the previous delivery by the defendant company of the cattle to the Kansas City Stock Yards company, which latter company held the cattle as defendant's bailee. As further bearing on this point, the evidence shows that the defendant company paid the charges of the Kansas City Stock Yards company when the defendant received the cattle back from that company and when the cattle were shipped from Lang, Kansas, as already stated, by the defendant company, to go through to their destination at Evarts, South Dakota, the defendant company exacted from the plaintiffs, and the plaintiffs gave the defendant a bond (Record, 127-128). This bond is a distinct recognition by the defendant company that the defendant company had possession of plaintiffs' cattle before, during and after the flood, and the purpose of that bond was to secure the defendant company in the charges paid by the defendant company for the cattle while in the Kansas City Stock Yards, and the charges of defendant company for pasturage at Emporia and Lang, Kansas, if, in the course of the litigation, which it was understood would follow, the plaintiffs should be held liable for those charges. And as further bearing on this point, we call attention to the deposition (Record, 422) of

Gardiner Lathrop, who was then the general attorney of the defendant for Missouri, and is now the honored general solicitor of the defendant company for all of its lines. After the flood at Kansas City, and after the cattle of the plaintiffs were taken down from the viaducts into the stock yards, there were interviews between Mr. Combs, the general live stock agent of the defendant, and Mr. Lathrop, its attorney, and the attorneys of the plaintiffs in this case, and of the Minnesota & Dakota Cattle Company in the other case. At one of these interviews, Mr. Lathrop, speaking for the defendant company, desired plaintiffs in these actions to take the cattle off of the hands of the defendant company, so as to relieve the defendant from the duty and burden of the further shipment of the cattle to their point of destination in South Dakota. On this point Mr. Lathrop (Record, 423) testified as follows: "I remember this that we had wanted that the plaintiffs in this case should take the cattle off of our hands and take charge of them and ship them to destination and take care of them until ready to ship, and that offer was declined."

As further supporting the proposition of fact that the defendant gave no attention to the plaintiffs' cattle after the deposit of the cattle by defendant in the Kansas City Stock Yards, we refer to the evidence of Mr. A. W. Combs (Record, 580). Mr. Combs was the assistant general live stock agent of the defendant company at Kansas City, and testified as a witness for the defendant in this case. Mr. Combs testified as follows:

"Q. It has been suggested in evidence or in questions of counsel that you might have removed those cattle from the stock yards here, why didn't you do it? A. Why, it never entered into the heads of anybody in the stock yards I don't think, to move any stock out of the stock yards; we never thought of such a thing, and there never was any such a suggestion made by anybody,

and did not deem it necessary; I talked with the stock yards foreman, Mr. Hutchings, Saturday evening. * * *

Q. Was there any other reason why you did not attempt to move the cattle in question? A. We supposed that we had the cattle delivered to the Stock Yards company and other carriers, connecting carriers.

Q. You may state whether or not, from your experience there and the custom of the yards, you considered what had been done as a delivery of the cattle? A. Yes, sir; we did everything that is customary to do in delivering cattle to the connecting carrier; it was done in the same usual manner that it is the custom always to do; we delivered those cattle to the Stock Yards company for the connecting carrier, and those which were to go through without feeding we delivered to the Missouri Pacific."

As we have already seen, the defendant in this case was not excused from looking after the cattle and removing them from the stock yards after the cattle were deposited by defendant in the stock yards on the ground of a connecting carrier, because there was no connecting carrier in this case to receive the cattle from the defendant company in Kansas City, and for the further reason that the defendant, during and ever since the flood, has recognized as we have seen, in various ways, the defendant company as always being in possession of plaintiffs' cattle until they were delivered by the defendant to the connecting carrier at Atchison, and finally shipped out to their destination at Evarts, South Dakota, inclusive of the time the cattle were in the stock yards. The contention of the defendant below was, and is here, that it did not owe any duty to plaintiffs' cattle after they were delivered into the stock yards. It is not denied by the defendant, if it owed the duty to plaintiffs to care for plaintiffs' cattle after they were delivered into the stock yards, the same as if defendant had never delivered them to the said stock yards, that defendant did not perform that

duty; in short, it is not denied by defendant that it did not care for plaintiffs' cattle after they were delivered into the stock yards, if defendant owed said cattle any duty while they were therein. The issue tendered by defendant on this branch of the case is, that having delivered the cattle into the stock yards, the defendant no longer owed any duty in respect thereto. The defendant does not deny that it did not perform its duty, if it owed a duty. As we have seen, the cattle as a matter of fact, as between plaintiffs and defendant, were still in defendant's possession, notwithstanding the delivery of the cattle into the stock yards, because their delivery by defendant in the stock yards was without plaintiffs' consent, and because there was no connecting carrier at Kansas City in the case, and because all the uncontradicted evidence in the case shows that the defendant treated itself as being in possession of said cattle while in the stock yards and during and after the flood and until their delivery to the connecting carrier at Atchison in their final transit after the flood.

What was true as we have seen of Roberts and Combs, with respect to their neglect of plaintiffs' cattle, after they were deposited in the stock yards, is also true of the witness, Sharp (Record, 593), who, as we have seen, was the general superintendent of defendant of terminals at Kansas City, and also of General Superintendent Hurley. As the foregoing statement shows, Messrs. Sharp and Hurley, although giving close attention on Saturday, May 30th, to the removal of freight cars and dead freight therein, and to the removal thereof from Argentine to Kansas City, gave no attention whatever to plaintiffs' cattle after they were deposited that Saturday morning in stock yards. The telegrams in evidence show that Mr. Hurley had been giving the closest attention to plaintiffs' cattle up to that Saturday, but the

evidence of Mr. Sharp and the other evidence shows that neither Mr. Sharp nor Mr. Hurley gave any attention to plaintiffs' cattle after they were shipped from Emporia to Kansas City. The cattle of plaintiffs in this action and the 2,200 head of cattle involved in the other case of the Minnesota & Dakota Cattle company, which were mixed together and taken up at the same time on the viaducts, were worth in the aggregate from seventy-five to one hundred thousand dollars, and yet the uncontradicted evidence and facts in the case show that neither Mr. Hurley nor Mr. Sharp gave the slightest attention to those cattle from the time they were deposited in the stock yards Saturday morning. There was considerable evidence at the trial offered and introduced by the defendant to show that the houses and stocks of goods, packing houses and other buildings and properties in the Kaw valley at Kansas City, were not removed before the climax of the flood. The testimony given for the defendant by the witness, William Fletcher (Record, 552), and H. S. Swingley (Record, 564), was introduced by the defendant on this point. Of course, it was not shown and could not be shown, that either the houses or stocks of goods at Kansas City in the valley of the Kaw, were placed at their locations therein after the rise of the flood of May, 1903. Those houses and stocks of goods had been at the places where they were submerged by the flood for months and years prior to that flood. It was not shown, and could not be shown, that the houses or stocks of goods could have been removed after the flood had reached the height it had reached when the cattle in controversy were brought to the Kaw valley and were deposited in the stock yards. In this connection we call attention to the fact that the defendant's evidence shows that there was practically no live stock in the Kaw valley at Kansas City, Saturday, May 30th, 1903, or there-

after, aside from the cattle involved in these two cases. The evidence shows that all of the cattle that were in the Kansas City Stock Yards at the time the cattle in these two cases were driven on to the viaducts, aside from these cattle, were about 300 head. The cattle which were driven up on the viaducts was the 800 head in this case, the 2,300 head in the case of the Minnesota & Dakota Cattle company, and about 300 head of other cattle, making 3,400 head altogether. Although the daily receipts in the Kansas City Stock Yards of cattle are well known to run up into the thousands and tens of thousands, there is no evidence to show that there were any other cattle in those stock yards at the time these cattle were driven up on the viaducts except the two bunches in these two cases and the said other 300 head. All of the cattle that were in the stock yards were driven up in the viaducts, and the evidence shows that all the cattle that were driven up on the viaducts were these two bunches in these cases and the other 300 head. So far as the evidence shows there was not a single head of cattle in the packing houses in Kansas City when the climax of the flood came. The Sparks Brothers, as we have seen, got out all of their mules, and everything that had legs with which to walk was gotten out of the Kaw valley, at Kansas City, except the cattle in these two cases and said other 300 head. A large amount of testimony introduced by the defendant and covering very many pages of this record, showing that the houses and stocks of goods in the Kaw valley at Kansas City were not removed, is mere lumber in the case, and has no tendency to show what was the defendant's duty respecting the live stock in this case, which, as we have seen, was worth from seventy-five to one hundred thousand dollars, and which the defendant, with its eyes wide open, brought to the very mouth of the Kaw river at the most dangerous point in the flood,

and on the eve of its greatest height, and at the very time of its climax.

The averments in the pleadings in this action of the giving of notices by the plaintiffs to defendant of the loss and damage, were amply proven by evidence (Record, 111 to 116), and all of the averments of the petition and reply of the plaintiffs were amply proven at the trial by uncontradicted evidence contained in the bill of exceptions.

We assume that the statement, brief and argument which will be filed by counsel for the Railway company in this court will be the same as the statement, brief and argument filed by them in the Court of Appeals, and inasmuch as reply briefs, as we understand, are not favored in this court, we have thought it proper at this point of our statement to answer some of the suggestions made by counsel in their brief for the defendant Railway company.

We realize that it is of the utmost importance in arriving at a just conclusion in these cases, that the court should be made aware of the facts of the particular cases. A perusal of defendant's brief would give rise to the supposition that the plaintiffs are here contending that a common carrier is liable at all events for loss or injury of goods in transportation. Much of defendant's brief is consumed in quoting authorities and making arguments to the effect that a common carrier cannot be held liable unless it fails in the discharge of some duty imposed upon it by its undertaking of shipment; that if it acts carefully and diligently in the discharge of its duties, it is not liable; that it cannot be expected, and will not be held, to anticipate dangers which a reasonably prudent person would not, under the circumstances, apprehend; that conditions appearing after a calamity which no human foresight could anticipate, cannot be

fairly chargeable to the knowledge of the carrier, but it can only be held to know, or anticipate, what, under all the circumstances, a reasonably prudent person, similarly situated, should know, or anticipate.

Plaintiffs, in the briefs of defendant, are sought to be placed in the position of denying these generalities. We do not. We wish the court to understand the exact facts of the cases, maintaining, as we do, the proposition that those facts prove the wrongful and unlawful deviation and the propositions of negligence heretofore specified.

In defendant's brief it is argued by counsel that because Mr. Frost, one of the plaintiffs in this case and who accompanied the cattle, asked the station agent at Strong City while the cattle were there, whether the cattle could not be run around the flooded district and shipped by way of Superior, Nebraska, over the Elkhorn route, therefore the plaintiffs are to be taken as giving their consent to the deviation of the cattle to Kansas City.

It seems from the testimony of Mr. Frost (74-75, Record), that in some conversation between Mr. Frost and the agent at Strong City, Mr. Frost suggested whether the cattle could not be taken to their destination by way of Superior, Nebraska. Defendant had a railway running from the next station west of Strong City, north, or northwesterly, to Superior, Nebraska. At the time of that suggestion, which occurred in a conversation incidentally, the Kaw valley had not been flooded so that it could not be crossed, either at Topeka or on its road going to Superior, Nebraska. The other train load of the cattle of these plaintiffs had gone across the Kaw valley at Topeka and was reaching its destination in South Dakota. That was the situation when Mr. Frost made that suggestion to the Strong City agent of the defendant. It is said that Mr. Frost was anxious to have the

cattle shipped to their destination. That is undoubtedly true, but the anxiety of Mr. Frost in that respect was no justification for any of the wrongful or negligent acts of the defendant. Even if Mr. Frost had been negotiating directly with an officer of defendant, empowered by it to act upon the subject of deviating the shipment, and it had been agreed by them that the cattle might be deviated to Superior, Nebraska, still that would not be a justification for the subsequent deviation at the very climax of the flood, to Kansas City, at the mouth of the Kaw river.

The station agent at Strong City had nothing to do with the control and movements of these trains, or either of them. The evidence of Mr. Hurley and the evidence of the telegrams in the record all demonstrate that Superintendent Hurley and the general officers of the defendant railway company at Topeka controlled the movements of the train. The suggestion of Mr. Frost that the cattle might be shipped by way of Superior, Nebraska, cannot be turned into consent by the plaintiffs to bring the cattle to Kansas City (75, Record). It appears, however, that at the time of the suggestion, the Superior, Nebraska, line from Strong City, of defendant, was also flooded, but this was unknown to Mr. Frost. Strong City, where this suggestion was made, was some distance south of the valley of the Kaw river, and neither Mr. Frost nor any of his employees with this train knew anything about the flood conditions in the Kaw valley, except as those conditions were revealed to him by the station agent at Strong City. The evidence of Mr. Frost abundantly shows that in the various movements of the train carrying the cattle in controversy, he was not at any time consulted. He was not consulted while the cattle were at Strong City, by defendant's agents or servants, as to the movements of the train.

Mr. Frost in his testimony says (39-40, Record):

"Q. State whether you were consulted at any of these times when the cattle were unloaded or reloaded and unloaded again? A. No, sir, I was not.

"Q. What time were they unloaded that time? A. They were unloaded about seven o'clock, six or seven o'clock, somewhere along there.

"Q. The same evening? A. The same evening.

"Q. Where were they put when they were unloaded that time? A. Put back into the yards.

"Q. State whether Mr. Cloyd was there with his train while you were there? A. No, sir, he was not.

"Q. Were you there while his train was loaded out? A. Yes, sir.

"Q. How long did the cattle remain in the pens there, your train, after they were unloaded the second time? A. They were reloaded again the second day, I forget what time.

"Q. Was it in the forenoon or afternoon? A. It was in the forenoon, I think.

"Q. Was the entire train loaded up? A. No, sir.

"Q. What portion of it? A. About that I don't know just how many; I think about half.

"Q. How long were they in loading up this half? A. Perhaps they consumed half an hour.

"Q. After they were loaded up, what was done with them then? A. They began to unload again, and I asked them what the trouble was, and they said——

"Q. What was the response? A. They said they had orders to unload.

"Q. Where were the cattle put when they were unloaded that time? A. Put back in the yards.

"Q. Who did that loading, or unloading, I should say? A. The crew which was there.

"Q. The same crew which had been engaged—— A. I suppose it was the same crew, I was not acquainted with any of them.

"Q. Were you consulted in that unloading and loading up again, by anybody? A. No, sir.

"Q. Was this man Newton under you there? A. Yes, sir.

"Q. Was he employed by you to accompany the train through? A. Yes, sir.

"Q. When were the cattle again loaded, if they were afterwards loaded out? A. They were then loaded on the morning of the 29th.

"Q. That would be Friday morning? A. That would be Friday morning.

"Q. What time in the morning were they loaded up that time? A. They commenced loading about half past seven, I should think; seven or eight o'clock.

"Q. What was done with the cattle at that time when they were loaded? A. They were loaded and run down on the sidetrack.

"Q. How long did they remain on the sidetrack? A. About three hours.

"Q. What was done with them then? A. They were pulled out.

"Q. What time Friday were they pulled out? A. About one or half past.

"Q. What was the next place you reached on the line? A. The next stopping place was Emporia.

"Q. What time did you get to Emporia? A. I don't know just exactly, it must have been three o'clock, somewhere about that time.

"Q. In the afternoon? A. In the afternoon.

"Q. You may state where you came to after leaving Emporia? A. The next place, the next stop was Kansas City.

"Q. When did you reach Kansas City? A. Kansas City the morning of the 30th, Saturday, about somewhere about seven o'clock, I should think.

"Q. Had you been consulted up to that time as to these cattle on the train by the crew or any officer of the company? A. No, sir.

"Q. When did you first know you were going to Kansas City? A. When we got to Kansas City; I will correct that; the first station, I think the other side, I remember the station was Argentine, going through there that I knew then where I was, but up to that time I had no knowledge where I was or which way we were going."

See also pages 78 and 79, Record.

This testimony is not contradicted. It shows that Mr. Frost was not consulted, either at Strong City or while the train was moving from Strong City, and was being deviated from Emporia to Kansas City. Mr. Frost did not know of the deviation to Kansas City until about the time of the arrival of the train at Argentine, which is a suburb of Kansas City. (Record, 41-78-79.)

On these points Mr. Frost is fully corroborated by Mr. Newton, who accompanied him on this train with the cattle. (133-134-137, Record.)

The talk at Strong City between Mr. Frost and the company's agent arose incidentally between them. It was mere loose talk, the station agent having no authority in the premises. On the point of that suggestion, Mr. Frost testifies further:

"Q. What did the agent say? A. I asked him if he could not send us by way of Superior, and then over the Elkhorn, Missouri Valley or Northwestern to Council Bluffs.

"Q. What did he say? A. He says we can't do it, because you are routed by Atchison." (Record, 95.)

This answer of the agent is one of the many conclusive evidences in the case that the cattle were routed to go by way of Atchison.

On cross-examination of Mr. Frost, defendant's counsel attempted to prove that nobody but defendant's general officers at Topeka could order the deviation of the shipment, and that consequently the company's agent at Strong City had no authority to negotiate or contract on the subject with Mr. Frost. (80, Record.)

A shipment of Mr. Frost the year before had been sent by way of Superior, Nebraska; but in the second question at the top of page 80 of the Record, the words

"night before" instead of "year before," as the words should be, are inserted.

On cross-examination Mr. Frost explicitly testified that he had no communication with any of defendant's general officers who ordered and participated in the movement of these trains. (Record, 95.) In his testimony at that point, the examiner went over, one by one, the names of the different general officers of the defendant company, who appeared from the telegrams read in evidence to have ordered the movements of these trains; and Mr. Frost shows the he never saw any of these gentlemen or had any conversation or correspondence with them in any way in regard to the movements of these trains.

Superintendent Hurley, who ordered all the movements of these trains and who was a witness in the case, testified explicitly that he did not know, and had never met, either Mr. Frost or Mr. Mullin, of the Minnesota company, and that the orders moving and deviating the trains of the above company were made without consulting them, or any other person representing plaintiffs, and were each and all on his own motion. (Record, 195.)

On this point Mr. Hurley's testimony is as follows:

"Q. Do you know Mr. Frost? A. I do not.

"Q. Never met him? A. No, sir.

"Q. Do you know Mr. Mullin, president of the Minnesota & Dakota Cattle company? A. I do not.

"Q. You had no communication with him in making these orders and sending these telegrams, did you? A. No, sir, I did not.

"Q. Or with anybody representing the plaintiffs in either of these cases? A. No, sir.

"Q. These orders you made on your own motion, didn't you? A. Yes, sir, that is right.

"Q. All of which was done by you or any of your subordinates, in respect to the movement of these trains or done of your own motion? A. That is right."

The only time plaintiffs were consulted or gave any consent respecting the movements of these trains was when defendant, after the flood, removed the cattle from the Kansas City Stock Yards to defendant's pastures at Emporia, and those consents were in writing and fully preserved plaintiffs rights. (Record, 112-325.)

The trial court, in its able and exhaustive opinion, although considering every possible defense, paid no attention to the idea of consent to the deviation, and the record must be taken as showing a case of deviation without the plaintiffs being consulted and without their consent.

The contract route by way of Atchison and Topeka is shown by the testimony of Superintendent Hurely to have been the usual and customary route. (174-175-176, Record.) The uncontradicted claim of plaintiffs is that the defendant deviated these shipments of its own motion, as Superintendent Hurely testified, and without the consent of the shippers, and it follows, therefore, that when defendant ordered them off the main line at Emporia, it abandoned the shipping contracts, and with them whatever protecting provisions those contracts contained. It was argued in defendant's brief that the detention of the cattle at Strong City was justified, because the railway company received information from the Burlington, which was to take the cattle from the defendant company at Atchison, that its tracks were flooded between Atchison and Council Bluffs, between which last points the Burlington was to take the cattle, according to the original routing. Defendant claims in the brief of its counsel, that this information from the Burlington justified the detention of the cattle at Strong City; but even if this claim were, for the sake of the argument, allowed, still that claim does not support the claim that the railway company had a right, on its own motion, to deviate the cattle to Kansas City.

In the first place, defendant had and has no railway running from Kansas City to Atchison. Again, Atchison is on the Missouri river between Council Bluffs and Kansas City; and if the Burlington line was flooded from Atchison to Council Bluffs, what right did the defendant company have to suppose that it could get to Council Bluffs by way of Kansas City, instead of by Atchison? Two railways run between Kansas City and Council Bluffs and Omaha. Council Bluffs is on the east side and Omaha on the west side of the Missouri river. The Burlington runs from Kansas City by Atchison to Council Bluffs on the east side of the Missouri river and up the Missouri river valley, while the Missouri Pacific runs on the west side of the Missouri river. The Missouri Pacific railway runs up the same Missouri valley from Kansas City to Atchison. If the defendant could not get to Council Bluffs over the Burlington from Atchison, how, might it be asked, could it get to Council Bluffs over either the Missouri Pacific or the Burlington from Kansas City? This consideration must be taken in connection with the fact that all of the lines of the defendant railway company in Kansas, from Emporia north to Atchison, from Strong City to Superior, from Topeka to Kansas City, and over the cut-off from Emporia to Ottawa, were all flooded when the deviation occurred Friday, May 29th.

And since the lines up the Missouri valley were flooded, what possible excuse can be given for bringing the cattle away from Strong City, where they were perfectly safe and were being well taken care of?

In the brief of defendant, counsel says, in speaking of Sparks' mules, that were moved out of the Kansas City bottoms Sunday morning: "A few mules were taken out of the bottoms on Sunday." The testimony of Mr. Sparks shows that the number of those mules that

were taken out was between 600 and 700, and that they were all taken out between eight and eleven o'clock that morning. (Record, 345-346.) They were in the block adjoining the pens which contained these cattle.

Defendant's counsel seriously argued that, because the cattle involved in these cases were Texas cattle, therefore, they could not have been driven with the same facility that mules were driven, and counsel says that those cattle would have to be driven through the streets of Kansas City.

Anybody who is at all familiar with the Kansas City Stock Yards knows that it is in the West Bottoms of Kansas City, and that the cattle in controversy could have been driven from those stock yards out to the pastures south of the city without going through any of the streets of either the business or residence portion of Kansas City. The Kansas City Stock Yards are practically contiguous to the country districts surrounding Kansas City.

There were other facts shown in the evidence in this case, but we will refer to them in our brief and argument. All of the facts stated in plaintiffs' petition are practically undisputed, and are recapitulated as proven, in the opinion of the learned trial judge.

SPECIFICATION OF ERRORS.

1. The trial court erred in refusing to give at the conclusion of all of the testimony the instruction and charge tendered and requested on behalf of plaintiffs, that under all of the evidence the jury should find that the defendant was liable, and to find for plaintiffs (Record, 637).

The court should have given this instruction on the ground of the wrongful deviation of the cattle without plaintiffs' consent, and for the reason that such deviation as a matter of law, made the defendant liable for the consequence which ensued therefrom.

2. The court erred after the refusal of said peremptory instruction, in refusing to give and charge the jury, at plaintiffs' request, instructions numbered from 1 to 13, inclusive (Record, 638-644). These instructions asked by the plaintiffs and refused by the trial court presented the issue of this case to the jury upon the question of negligence, and the court erred by their refusal. The court should have submitted the case on that issue to the jury either on those or on other instructions.

3. The court erred in sustaining the motion and request of the defendant railway company to direct, and in directing the jury to render a verdict for the defendant and against the plaintiffs. (P. 644.)

4. The court erred in its opinion shown in the record, in saying:

> "It, therefore, follows on the main case, the re-
> "quest for instructions to the jury to render a ver-

"dict for the defendant must be sustained and the "like request of the plaintiff must be denied; this "will be done." (P. 655.)

5. The opinion of the Circuit Court of Appeals holding that plaintiffs waived and lost the right to have the negligence issues submitted to the jury, or considered by the Court of Appeals, because plaintiffs prayed for a peremptory instruction, although they at the same time submitted thirteen instructions to the jury, is erroneous. See appendix.

POINTS AND AUTHORITIES.

I.

In this case, as the record shows, there were some exceptions by the plaintiffs to the rulings of the trial court in the exclusion of evidence offered by them and objected to by the defendant. We do not desire at this point in the brief to discuss those rulings. The trial court having ruled that upon all the evidence the plaintiffs had no case, we submit at this time that the evidence which was excluded should be considered by this court with the evidence which was received. The plaintiffs in these cases are entitled to have all of the evidence in the record considered, the evidence offered by plaintiffs and excluded by the court, as well as the evidence that was received. *Ry. Co.* v. *Harris*, 12 C. C. A., 598, l. c. 602. In that case it was adjudged that the rule is well settled that when a plaintiff offers and is ready to produce competent evidence to prove a material fact in issue, and the court rejects the evidence on the objection of the defendant, the defendant will not aftrwards be permitted to allege that the plaintiff failed to prove the facts alleged in the offer of evidence.

II.

The consideration of this cause involves in general two questions: (1) Whether the railway company is liable on account of the deviation of the shipment from Strong City to Kansas City; and (2) whether the railway company is liable on account of the several negligences charged and proven. The question of deviation raises a question of law pure and simple upon conceded facts. The question of negligences involves mixed ques-

tions of law and fact for determination by a jury under proper instructions from the court. To meet these two phases of the case, arising on the points of deviation and negligence, plaintiffs asked two sets of instructions, one a peremptory instruction asking the court to instruct the jury to return a verdict for the plaintiffs, based upon the proposition of deviation, and at the same time plaintiffs submitted to the court a series of instructions submitting the issues to the jury on the propositions of negligence. It is the undoubted rule that where each party in a trial by a jury ask, on the whole case, the court to give a peremptory instruction to the jury, they are both precluded thereby, and both parties in such cases stand in the same predicament as if they had asked the court to decide the case as a matter of law. A different rule, however, arises in this case, because the plaintiffs submitted, as they had the right to do, two sets of instructions at the same time, one asking the court to peremptorily rule the case in favor of plaintiffs on the proposition of deviation, and the other instructions asking the court in effect that if the peremptory instruction should be denied, to then submit the case to the jury on the propositions of negligence, for their determination. Of course, it will not be denied that plaintiffs had the right to insist upon the liability of the defendant on each of both propositions of deviation and negligence, and the plaintiffs, therefore, cannot be held to have waived its right by asking a peremptory instruction to a submission to the jury of the question of negligence, in the event that the court should deny that peremptory instruction. The decision of the Circuit Court of Appeals which was solely devoted to a denial of that proposition, should be reversed for the reasons set forth in our petition for the *certiorari* to this court, to which petition we refer and make a part of this statement and brief. See appendix.

III.

Unless the court felt required to give our peremptory instruction on the basis of deviation, it should have submitted the questions of negligence to the jury by proper instructions, such as we asked (page 638, Record), or other proper instructions. That the court should have submitted the question of negligence to the jury and that that question was a proper question for the jury is the settled law of the Federal appellate courts. *R. R. Co.* v. *Stout*, 17 Wallace, 657, l. c. 663. In that case this court, in its opinion, used the following language: "It is true, in many cases, that where the facts are undisputed the effect of them is for the judgment of the court, and not for the decision of the jury. This is true in that class of cases where the existence of such facts come in question rather than where deductions or inferences are to be made from the facts. If a deed be given in evidence, a contract proven, or its breach testified to, the existence of such deed, contract, or breach, there being nothing in derogation of the evidence, is no doubt to be ruled as a question of law. In some cases, too, the necessary inference from the proof is so certain that it may be ruled as a question of law. If a sane man voluntarily throws himself in contact with a passing engine, there being nothing to counteract the effect of this action, it may be ruled as a matter of law that the injury to him resulted from his own fault, and that no action can be sustained by him or his representatives. So, if a coach-driver intentionally drives within a few inches of a precipice, and an accident happens, negligence may be ruled as a question of law. On the other hand, if he had placed a suitable distance between his coach and the precipice, but by the breaking of a rein or an axle, which could not have been anticipated, an injury occurred, it might be ruled as a question of law that there

was no negligence and no liability. But these are extreme cases. The range between them is almost infinite in variety and extent. It is in relation to these intermediate cases that the opposite rule prevails. Upon the facts proven in such cases, it is a mater of judgment and discretion, of sound inference, what is the deduction to be drawn from the undisputed facts. Certain facts we may suppose to be clearly established from which one sensible, impartial man would infer that proper care had not been used and that negligence existed; another man equally sensible and equally impartial would infer that proper care had been used, and that there was no negligence. It is this class of cases and those akin to it that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge."

In the case of *Union Pacific Ry. Co.* v. *McDonald*, 152 U. S., 262, l. c., 275, decided as late as 1893, this Court, in its opinion, said: "The principles announced in *R. R. Co.* v. *Stout* have been approved in many adjudged cases." And at page 279, in the same opinion, this Court says: "We adhere to the principles announced in *R. R. Co.* v. *Stout, supra.*" See also *Marande* v. *R. R. Co.*, 184 U. S.,173, which is precisely in point and the latest utterance of this Court. In these cases, as appears

from the written opinion of the learned trial court, there were four specifications of negligence relied upon by the plaintiffs in their petition:

(1) That the railway company was negligent in the detention of plaintiffs' cattle at Wellington and Strong City, Kansas, and that the company could have carried said cattle to Atchison, Kansas, by way of Topeka and delivered the same to a connecting carrier at that point.

(2) That defendant company was negligent after thus detaining the cattle at Wellington and Strong City, in not further detaining and holding them in those places until the flood, which had been on in the Kaw river, had subsided.

(3) That the company was negligent in diverging and deviating the shipments to Kansas City, and in taking the cattle into the lowlands at the mouth of the river in front of the approaching flood. And

(4) That the company was negligent in failing to move or cause to be moved the cattle from their position of peril in the stock yards at Kansas City before the arrival of the climax of the flood.

All of these acts of negligence were continuous and connected, constituting one uninterrupted and continuous negligence, and all arising after the inception of the flood and not anterior to it.

In cases of negligence, where the negligence consists of the failure to perform some positive duty created by law, the question of negligence is a question of law where the facts are undisputed, but in cases like this, where the negligences are violations of duties to be ascertained and found as facts by the jury under instructions of the court, it cannot be said that the question of negligence to perform the duty so found is ever a question of law.

In this case the question of negligence on the part of the defendant company with respect to all of the assignments of negligence, was a question to be determined as a mixed question of law and fact by the jury. It was the duty and province of the jury to determine what the duty of the defendant company was with respect to each and all of the four assignments named, and having determined the duty under the instructions and guidance of the court, then it was the province of the jury to determine whether the company was guilty of negligence in the discharge of the duty so found. See Vol. 8, Rose's Notes on U. S. Rep., where the cases following and citing the case of *R. R. Co.* v. *Stout, supra,* are collected.

If it was the duty of the court in this case to pronounce judgment on the issue of negligence, on the ground that the facts on that issue were undisputed, then that judgment should have been for plaintiffs and not for defendant.

IV.

The question of proximate cause was also a question for the jury, and not for the court, and the court erred in not submitting the question of proximate cause to the jury. This was the distinct proposition ruled in the case of *Milwoukee & St. Paul Ry. Co.* v. *Kellogg,* 94 U. S., 469. In that case it was adjudged by this court that "the question as to what is the proximate cause of an injury is ordinarily not one of science or of legal knowledge, but a fact for the jury to determine in view of the accompanynig circumstances." In the opinion in that case the Court said: "The assignment presents the oft-embarrassing question, what is and what is not the proximate cause of an injury. The point propounded to the court assumed that it was a question of law in this case; and in its support the two cases of *Ryan* v. *The New York*

Central Railroad Co., 35 N. Y., 210, and *Kerr* v. *Pennsylvania Railroad Co.*, 62 Penn. St., 353, are relied upon. Those cases have been the subject of much criticism since they were decided; and it may, perhaps, be doubted whether they have always been quite understood. If they were intended to assert the doctrine that when a building has been set on fire through the negligence of a party, and a second building has been fired from the first, it is a conclusion of law that the owner of the second has no recourse to the negligent wrongdoer, they have not been accepted as authority for such a doctrine, even in the States where the decisions were made. *Webb* v. *The Rome, Watertown & Ogdensburg Railroad Co.*, 49 N. Y., 420, and *Pennsylvania Railroad Co.* v. *Hope*, 80 Penn. St., 373. And certainly they are in conflict with numerous other decided cases. *Kellogg* v. *The Chicago & Northwestern Railroad Co.*, 26 Wis., 224; *Perley* v. *The Eastern Railroad Co.*, 98 Mass., 414; *Higgins* v. *Dewey*, 107 Id., 404; *Tent* v. *The Toledo, Peoria & Warsaw Railroad Co.*, 49 Ill., 349. The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market-place." We are not aware that that explicit ruling by this court has ever been reversed or modified, and it would not be helpful to cite other cases affirming the same proposition. The cases following and reaffirming the above proposition in the Kellogg case, that the question of proximate cause is one

for the jury, may be found collected in Vol. 9 of Rose's Notes on the U. S. Rep., p. 125.

V.

The errors of the trial court in this case, we think, will be abundantly manifest from the opinion of the trial court itself. That opinion is reported in full in Vol. 135, Fed. Rep., 135, and also is reported in the printed record in this case (page 645, Record). We will quote herein from the opinion by the pages thereof as it appears in the Federal Reporter. At the bottom of page 140, the learned trial judge says: "It is not enough in this case that plaintiffs show that some act of negligence of the defendant furnished the occasion for the loss, or that some act of negligence of the defendant contributed to the injury." We submit that this statement of the law is erroneous. The trial judge decided that, even though the negligence of the defendant contributed to the injury, still the defendant was not liable. This, we submit, is not the law. We do not believe that any authority can be found anywhere which affirms non-liability where the negligence of the defendant contributed with the act of God to produce the injury. Even the case of *R. R. Co.* v. *Reeves,* 10 Wallace, 176, which is relied upon as the leading case on the other side, distinctly and throughout recognizes liability on the part of the carrier if its negligence contribute, with the act of God, to produce the injury, and we do not believe any decision can be found anywhere, save and except alone the decision of the trial pudge in this case, which affirms non-liability where the company's negligence contributed to produce the damage and injury.

Again, at page 143, the trial court, in its opinion in this case, used the following language: "It may be con-

ceded that the cattle need not have been brought into Kansas City in the first instance, or, being in, that they could have been removed in the cars in which they arrived, or in others or on foot. Guided by events that followed as now seen by us today, the cattle no doubt should and unquestionably would have been removed from their place of peril." The duty of the defendant company was no different after the flood was over than it was before. If, as the learned judge says, the cattle "could have been removed in the cars in which they arrived, or in others or on foot," then it was a question for the jury to say whether, as was done by other owners of live stock, it was the duty of the defendant company to have removed the cattle in the cars in which they arrived, or in others, or on foot, and whether the company was guilty of neglect of that duty. The court says that the defendant company could have removed the cattle, either in the cars or in others or on foot, and then the court says that, as matters seem to us now, "the cattle undoubtedly should and unquestionably would have been removed from their place of peril." As the flood had been on for a week in advance of the bringing of the cattle to Kansas City, what reason was there for the court saying, as a matter of law, that the duty of the company was any different during that entire week than what that duty seems now to have been? If the flood at Kansas City on that fatal Sunday had come suddenly and without warning, like a thief in the night, or a cyclone in a breath, there might be some reason for distinguishing between what the duty of the company as it seems now and what it was before the coming of that cyclone, and if the cattle "undoubtedly should and unquestionably would have been removed from their place of peril," how can the court say, as a matter of law, that the company was not negligent, and that that negligence

did not contribute to produce the injury? Then the court follows the above language by the following: "That these circumstances and acts of the defendant company furnished an occasion for the loss is unquestionable, but that the direct and proximate cause of the loss and damage was the unprecedented and unexpected flood and attendant destruction that came wholly without anticipation on the part of the defendant company." These last quoted remarks are subject, as it seems to us, to several criticisms. In the first place, the flood was not unexpected. The flood had been on over a week. The rains causing the flood had been falling a month. The flood in the Kaw valley was on when the cattle arrived at Strong City. The cattle were delayed two days and over at Strong City, in consequence of the flood. The deviation which took place at Strong City and Emporia was in consequence of the flood. All of the acts of negligence charged against the defendant company took place after the flood was on. The defendant lines, from Emporia to Topeka and from there to Atchison and from Topeka to Kansas City were all flooded before the deviation, and defendant came to Kansas City with these cattle over another road. In view of all these facts, the remark of the court that the flood was "unexpected" is rather remarkable. If, after the plaintiffs' cattle had been put in the stock yards, they had been injured and damaged by a cyclone or fire, there would be some reason for saying that such cyclone or fire, being wholly unexpected, was the proximate cause of the injury. But it is not correct in this case to say that the flood was at any time unexpected after the arrival of the cattle at Strong City. Nor was it correct for the learned trial judge to say in his opinion that the flood was without anticipation at the time it reached its climax on Sunday, for the reason that on Saturday, the day before, under

the direction of the general superintendent of the company, the defendant moved 1,300 of 1,400 cars from its yards in Argentine to the highest place where the cars could be placed at Kansas City. There were 1,400 cars altogether, and the very best that the company could do with those cars was done. They could not have been taken out of the Kaw valley at Kansas City, but they were placed upon the highest ground possible in Kansas City. But while those cars were left, as they were forced to be left, in the bottoms at Kansas City, the company not having sufficient means to take them away or out of the bottom, still, the plaintiffs' cattle could have been taken out by being driven out as other people drove out their live stock. And in view of this action of the defendant company with respect to said 1,400 cars on Saturday, it will not do to say in this case that the flood which had been on for a week was, on Sunday following that Saturday, "without anticipation on the part of the defendant company." It may not have anticipated that the flood would reach the heights it reached, but for more than two days before it reached its climax on Sunday, it knew full well that a flood so large and dangerous as to flood all its Kansas lines of railway over which these cattle could be shipped, was on, and that that flood was rising higher hourly from the increasing and unprecedented rains which had continued with slight intervals nearly a month. The learned trial judge in his opinion, at pages 138 and 139, summarizes the fact in words as follows: "It appears from the evidence that "during the greater part of May, 1903, unusual and "unprecedented rains fell in the watershed of the Kansas "river, which empties into the Missouri river at Kansas "City. To such an extent was this true that a vast "amount of property located in the valley was inundated "and destroyed by high water in the Kaw river following

"in consequence of such rain. The railways running "along and across this valley were overflowed and the "property destroyed. * * * At the time the cattle "were carried to Kansas City by the defendant company, "its lines of road from Topeka to Atchison and from "Topeka to Kansas City were submerged by the flood, "and could not be operated." In addition to the fact thus stated by the trial judge the evidence showed that Friday night, which was before the arrival of the cattle at Kansas City, a sudden rise, something like a tidal wave, reached Topeka in its onward flow down the valley of the Kaw river.

In view of these conceded facts, the conclusion of the learned trial judge that the flood was unexpected as expressed in his words cited above: "That these circum- "stances and acts of the defendant company furnished "an occasion for the loss is unquestionable, but that the "direct and proximate cause of the loss and damage was "the unprecedented and *unexpected* flood and attendant "destruction that came wholly *without anticipation* on "the part of the defendant company," is absolutely without support or foundation.

In support of the proposition that contributory negligence of the carrier renders it liable, notwithstanding the act of God relied on by it as the cause, see the following authorities from which citations are made in our argument following these points, viz.:

Sweezey v. *Philadelphia*, 64 Pa. St., 106; *Helbling* v. *Cemetery Co.*, 201 Pa. St., 171; *Morrison* v. *Davis*, 20 Pa. St., l. c., 176-177; *Williams* v. *Grant*, 1 Conn., 487; *Wallace* v. *Clayton*, 42 Ga., 443; *R. R. Co.* v. *White*, 88 Ga., 805; *Merritt* v. *Earle*, 29 N. Y., 115., l. c., 116f; *Michaels* v. *R. R. Co.*, 30 N. Y., 564, l. c., 570; *Bibb Broom Corn Co.* v. *A. T. & S. F. Ry. Co.*, 102 N. W. Rep. (Minn. Sup. Ct.), p. 709; *R. R. Co.* v. *Curtiss*, 80

Ill., 324; *Wald* v. *R. R. Co.*, 162 Ill., 545; *Blodgett* v. *Abbott*, 72 Wis., 516; *Nelson* v. *Ry. Co.*, 72 Pac. Rep. (Mont. Sup. Ct.), p. 643, l. c., 651; *Steamboat Co.* v. *Tiers*, 24 N. J. Law Rep., 697; *R. R. Co.* v. *David*, 6 Heisk, 261; *McGraw* v. *R. R. Co.*, 18 W.Va., 361; *Smith* v. *Ry. Co.*, 91 Ala., 455, l. c., 456; *Coosa Steamboat Co.* v. *Barclay*, 30 Ala., 12, l. c., 127; *Nugent* v. *Smith*, 1 C. P. Div., 19 and 423; Vol. 1, Am. & Eng. Enc. of Law (2nd Ed.), 595; Vol. 5, Am. & Eng. Enc. of Law (2nd Ed.), 234; Hutchinson on Carriers, Secs. 181, 187, 188; Vol. 6, Enc. of L. & P., 377-384; *Strauss* v. *Ry. Co.*, 17 Fed. Rep., 209, l. c., 212; *Caldwell* v. *Sou. Ex. Co.*, 4 Fed. Cas., No. 2303, p. 1036; *Thompkins* v. *Duchess of Ulster*, 24 Fed. Cas., No. 14087a, p. 32; *Southern Pac. Co.* v. *Schoer*, 52 C. C. A., 269, l. c., 274; *Newport News Co.* v. *U. S.*, 9 C. C. A., 579; *Clark* v. *Barnwell*, 12 How., 272, l. c., 280; *Holladay* v. *Kennard*, 12 Wall., 254; *Gleason* v. *R. R. Co.*, 140 U. S., 433; The Majestic, 166 U. S., 376, l. c., 386; *Gratiot W. H. Co.* v. *R. W. Co.*, St. Louis Ct. of App., April 30, 1907; 102 S. W., 11.

VI.

At page 142 the learned trial judge in his opinion upon the branch of the case relating to deviation, frankly admits as follows: "The route originally contemplated by the parties was to Atchison and thence by the Burlington," and the remark following shows clearly that the learned trial judge recognized the line of railway of the defendant from Strong City to Topeka and from there to Atchison as the line over which the cattle were routed. The learned trial judge on the same page, 142, on this branch of the case further says: "By this time it was impossible for the defendant to carry the cattle over its line to Atchison, or to carry them to Kansas City other-

wise than the way they were carried; that the contract of shipment and the circumstances, common business prudence and the law, as well, authorized a departure *from the originally intended route of shipment*, I have no doubt, unless the defendant knew or should have known that by such departure the safety of the shipment would be endangered." This is all that is said by the learned trial judge on the subject of deviation. The above remarks, as it seems to us, are subject to several criticisms. In the first place according to all of the authorities, as will hereafter be shown in this brief, the defendant company was not authorized to deviate or take the cattle away from Strong City if they were in a safe place at Strong City. If, as the learned judge says, it was impossible for the defendant to carry the cattle over its line to Atchison, or even to Kansas City, otherwise than by another road, namely, the San Francisco Railroad, what reason was there for the defendant to suppose that it could get the cattle out by a roundabout transit through Kansas City, and thence up through the Missouri valley over practically the same route the cattle would have to go from Atchison northward? The flood was coming down the Kaw river. If the flood was so bad at Topeka that the cattle could not be crossed there, what reason was there for supposing that the cattle could be gotten across at Kansas City? The cattle were in a safe place at Strong City and should have been left there. By the deviation of the cattle from Strong City they were taken from a safe place into what was then known to be a hazardous place. If the cattle, as the defendant company well knew, could not be taken across the Kaw river at Topeka, then the Kaw river at Topeka was certainly a hazardous place, and if the Kaw river at Topeka was a hazardous place, most certainly the Kaw river at Kansas City would be a hazardous place by the

time the shipment arrived there. In all the cases of deviation where the court has sustained the deviation, it was because the cattle were in an unsafe place at the time of deviation. The cattle were in a safe place at Strong City. They were there in the feed lots of the defendant company, far removed from the Kaw valley. In all of the cases where deviations have been sustained, the line to which the deviation was made was not beset with any of the troubles which made the deviation necessary. In this case the line to which the cattle were deviated was a more dangerous line than the line of railway on which the cattle were originally routed. Again, on this subject of deviation, all the authorities agree that even when the deviation is made necessary the carrier should consult the owner of the cargo shipped. At page 137 the trial court, in its opinion, said: "The cattle were accompanied at all times by the owners of the stock or their representatives in charge, signing the contracts." The deviation in this case was absolutely wrongful for the reason that the company never consulted the owners or parties in charge of the stock. The deviation of the cattle to Kansas City was both wrongful and negligent. If it was negligent, which was a question for the jury, the company was liable on that ground. If the cattle were safe at Strong City, then it was unnecessary, and therefore wrongful, and if wrongful, the defendant is liable. If the deviation from Strong City to Kansas City was made without the consent of the shippers, then, according to all the authorities, it was wrongful and the company is liable on that ground alone. The learned judge, at page 142, in the language we have cited above, says that the deviation was justifiable "unless the defendant knew or should have known that by such departure the safety of the shipment would be endangered." These words bear upon the question of negligence, but,

as we have seen, the deviation was wrongful, for there was no necessity for taking the cattle from Strong City, and because, of the conceded fact in the case, that they were taken without the consent of the shippers.

At the bottom of page 142 and top of page 143 of his opinion, the learned trial judge couples the bringing of the cattle to Kansas City and putting them in the Kansas City stock yards as one act. This is erroneous. When the cattle were deviated at Strong City and Emporia it was with the purpose on the part of defendant company to deliver them to the Missouri Pacific Railway Company at Kansas City, and that that company would carry the cattle from Kansas City to Omaha, up the same Missouri river valley up which the cattle were originally routed to go over the Burlington from Atchison to Council Bluffs. The defendant company did not intend to deposit and leave the cattle in the Kansas City stock yards until after their arrival in Kansas City. At the top of page 143 the learned trial judge speaks somewhat eloquently of the safety in ordinary times of the Kansas City stock yards. The defendant company was, from the arrival of the cattle at Strong City, not acting in ordinary times. One of three great floods of 1844, 1881 and 1903 was already on when the cattle reached and left Strong City. An ordinary safe warehouse in Chicago was not a proper place in which to deposit goods during the great Chicago fire, much less was it a proper place to which to deviate a shipment not destined to that city. (*Mer. Dis. Tr. Co.* v. *Kahn*, 76 Ill., 529.) The Kansas City stock yards on May 30th and 31st, 1903, was as unsafe a place in which to deposit these $100,000 worth of cattle as was a Chicago warehouse during the great fire in that city. This being so, it is immaterial whether the purpose to put the cattle in the Kansas City stock yards originated at Strong City and Emporia, or after

the arrival of the cattle at Kansas City. The learned trial judge, at the top of page 143, in speaking of the Kansas City stock yards, eloquently says, "that in all the "history of these yards they had not been overflowed or "endangered by overflow." One would think from this remark that those yards were a very ancient institution. The facts are that neither those yards or Kansas City itself were even dreamed of until sometime after the flood of 1844, and that those yards did not have anything more than an embryo existence until after the flood of 1881. The foregoing propositions, as to the effect of the admitted deviation in this case and the consequent liability of defendant, are abundantly sustained by the authorities: *Crosby* v. *Fitch*, 12 Conn., 410, l. c., 410, 420, 423; *R. R. Co.* v. *Beck*, 125 Pa. St., 620; *Phillips* v. *Bingham*, 26 Ga., 617; *R. R. Co.* v. *Cole*, 68 Ga., 623; *Cassilay* v. *Young*, 4 B. Mon., 265; *Sager* v. *R. R. Co.*, 31 Me., 228, l. c., 238; *R. R. Co.* v. *Washburn*, 22 O. St., 324; *Ex. Co.* v. *Smith*, 33 O. St., 511; *Brown Co.* v. *R. R. Co.*, 63 Minn., 546; *Hendricks* v. *Steamship Co.*, 18 La. Ann., 353; *Hastings* v. *Pepper*, 11 Pick., 41; *Proctor* v. *R. R. Co.*, 105 Mass., 512; *Ry. Co.* v. *Allison*, 59 Tex., 193; *Johnson* v. *Ry. Co.*, 33 N. Y., 610, l. c., 611; *Goodrich* v. *Thompson*, 44 N. Y., 324; *Maghee* v. *R. R. Co.*, 45 N. Y., 514; *Keeney* v. *Ry. Co.*, 47 N. Y., 525; *Robertson* v. *Nat. S. S. Co.*, 14 N. Y. Sup., 313; *Seavey Co.* v. *Union Trans. Co.*, 106 Wis., 394; *Ry. Co.* v. *Brichetto*, 72 Miss., 891; *R. R. Co.* v. *Odil*, 96 Tenn., 61; *Mer. Dis. Tr. Co.* v. *Kahn*, 76 Ill., 520; Vol. 1, Am. & Eng. Enc. of Law (2d Ed.), 594; Vol. 5, Am. & Eng. Enc. of Law (2d Ed.), 422, 426; Hutchinson on Carriers, Secs. 190, 191; Lawson on Bailments, Sec. 127; Vol. 6, Cyc. of Law & Procedure, 383, 384; *Marsh* v. *Un. Pac. R. R. Co.*, 9 Fed. Rep., 873; *Ins. Co.* v. *LeRoy*, 7 Cranch., 26; *Hostetter* v. *Park*, 137 U. S., 30, l. c., 40;

Constable v. *Steamship Co.*, 154 U. S., 51, l. c., 61; *Texas & P. Ry. Co. et al.*, v. *Eastin* (Sup. Ct. of Texas, May 15, 1907), 102 S. W., 105, l. c., 106.

VII.

We submit that the opinion of the trial judge is not supported by the authorities cited therein.

In the case of *R. R. Co.* v. *Wentworth*, 27 S. W., 680, cited by the trial court in its written opinion in this case, it appears that the sheep which were being transported by the railway company from Texas to Chicago were overtaken while *en route* by a flood, which prevented the further transportation of the sheep on the line on which they were routed, and under those circumstances the railway company deviated the shipment of the sheep over another line on which there was no flood, which involved of necessity a delay, requiring, as it did, more time on the deviated line to get to Chicago than it required over the line on which they were routed. But in that case the sheep could not have been taken to Chicago by reason of the flood over the line over which they were routed, and since the action there was damage to the sheep by delay, the court held that there was no right of action since the sheep were gotten to Chicago in much less time than was necessary to take them by waiting until the flood subsided. There was no flood in that case along the line to which the sheep were deviated, and since the line on which they were routed was wholly obstructed by a flood the court held that the deviation was proper and necessary. The court, in passing on this point, says: "In this case the deviation from the usual or stipulated route was caused by unprecedented floods which rendered it absolutely necessary for the sheep to be carried over the Cotton Belt instead of the St. Louis,

Iron Mountain & Southern Railroad, to prevent their loss or at least a much greater delay than actually occurred."

It seems to us that Sec. 311, Hutchinson on Carriers, which is cited by the trial judge in his opinion in connection with the above Texas decision, is an authority against the learned trial judge rather than in favor of his conclusion.

In the case of *Snow* v. *Ry. Co.*, 9 N. E., 702, which in this connection is also cited by the learned trial judge in his opinion, the court held that where the contract was silent as to what line of road the initial carrier should deliver the shipment, that the carrier might select any customary and reasonably safe and direct road of railway to which the initial carrier should deliver the shipment at the terminus of its line, and that since the contract was in writing it was not competent for the parties to prove by parol evidence a prior verbal agreement specifying a certain route. However, we suggest that this decision does not bear upon the question of deviation. This decision with the two authorities above cited was cited by the trial judge in his opinion to sustain the proposition in this case that the defendant railway company was authorized and justified in its deviation of the plaintiffs' cattle from Strong City to Kansas City, but the above decision in the Snow case does not bear upon the question of deviation at all. That decision in the Snow case only bears upon the question of what would be the railway company's right in this case in the selection of a carrier at Atchison if it had carried the cattle by way of Topeka to Atchison. It does not throw any light upon the question of deviation from Strong City and Emporia to Kansas City.

Another decision cited by the learned trial judge in his opinion was *Ry. Co.* v. *Elliott*, 55 Fed. Rep., 949, 5

C. C. A., 347. An extract from the opinion of Judge Sanborn in that case is contained in the opinion of the trial judge in this case, but the facts in the Elliott case do not serve to throw any light upon the case at bar, as a brief reference thereto will show. In the Elliott case the plaintiff was in charge of certain stock shipped by rail and was riding in the caboose. Before reaching a certain station where he knew it was usual to change cabooses, he asked the conductor if a change would be made there and was answered in the negative and told that the train would only stop a few moments and he would have no time to examine his stock. On reaching the station, however, he got off, walked forward and examined several cars of the stock, and then turned back, but the train having already started he feared he would be unable to board the caboose and therefore climbed upon a stock car and walked backward along the top of the train. Before he reached the caboose the train had stopped and was backing for the purpose of changing the caboose, and it was kicked off from the train just as he was stepping upon it, causing him to fall to the track, where his foot was crushed by a wheel. And it was held that the statement of the conductor that the caboose would not be changed was not the proximate cause of the injury. The remarks of the court in its opinion in that case, while applicable and proper in disposing of that case on those facts, we submit throw no light upon this case and have no application to it.

The case of *Ry. Co.* v. *Kellogg*, 94 U. S., 469, is one of the authorities cited by the trial judge in his opinion. In that case there was a verdict and judgment in the trial court against the railway company, based upon the act of the railway company burning the saw mill of the plaintiff on the banks of the Mississippi river. The charge against the railway company was that the fire was

negligently communicated from the defendant railway's steamboat "Jenny Brown" to an elevator built of pine lumber owned by the defendant and standing on the bank of the river, and that the fire was communicated to the plaintiff's saw mill and lumber piles while an unusually strong wind was blowing from the elevator towards the mill and lumber. This court affirmed the verdict and judgment against the railway company. The court in its opinion in that case held that the question as to what is the proximate cause of an injury is ordinarily not one of science or of legal knowledge, but a fact for the jury to determine in view of the accompanying circumstances. It seems to us that the trial judge in this case not only did not follow the opinion of this court in that case, but plainly disregarded it. It has been the recognized rule of this court, ever since its decision in said Kellogg case, that it is for the jury to determine the question of proximate cause in this class of cases. This court in that case adjudged that the finding of the jury in that case that the burning of plaintiff's mill and lumber was the unavoidable consequence of the burning of the defendant's elevator, which had been caused by their negligence, was in effect a finding that there was no intervening and independent cause between the negligent conduct of the defendants and the injury to the plaintiff. The opinion of the court in the Kellogg case proceeds throughout upon the idea that the question in this class of cases of proximate cause is one of fact for the jury, and we repeat that it is difficult to understand just how the learned trial judge in his opinion in this case felt justified in citing the opinion in the Kellogg case in support of his action directing a verdict for the defendant.

In the case of *Insurance C. v. Taweed*, 7 Wallace, 44, which is another authority cited by the learned trial

judge in his opinion, it was held that the defendant was not liable because in that case there was a new, intervening cause of the injury, which relieved the defendant from liability. In that case the plaintiff's cotton in a warehouse was insured against fire. The insurance company's policy contained an exception against fire which might happen by means of an explosion. An explosion took place in another warehouse across the street, resulting in an extensive conflagration embracing several squares of buildings, and among them the warehouse where the cotton in question was stored, which was wholly consumed. The fire was not communicated from the warehouse where the explosion took place directly to the warehouse where the cotton was, but first consumed several intermediate buildings, but the whole fire was a continuous affair from the first explosion and in full headway in about half an hour. The court held under those facts that by reason of the exception in the policy the company was not liable. We submit that it is not indicated in the learned opinion of the trial judge in this case how the said decision in the Tweed case was in any way applicable to the case at bar.

The case of *Ry.* v. *Reeves*, 10 Wallace, 176, which is also cited by the learned trial judge in his opinion, is one of the principal cases, if not the principal case, relied upon by the defendant in error. In the Reeves case there is to be found in the opinion no intimation that the question of proximate cause was not one for determination by the jury. The case was tried in the trial court by a jury and a verdict given against the railway company. The judgment on that verdict was reversed by this court and a new trial ordered. The reversal is based upon misdirection by the trial court of the jury, but there is no intimation anywhere in the short opinion delivered by Mr. Justice Miller that the question of

proximate cause was a question to be determined by the court and not by the jury. The opinion throughout proceeds upon the theory that the question of proximate cause was one for the jury, to be determined by that tribunal under proper instructions of the court, and that the trial court in that case had not given proper instructions. In the opinion in that case it was also adjudged that the carrier, notwithstanding the fact of the existence of an act of God in the form of a storm or flood, is required nevertheless to exercise ordinary diligence to avoid or remedy the effects of the overpowering cause. The injury to the shipment in the Reeves case occurred at Chattanooga, where Mr. Justice Miller says: "There was a most sudden, violent and extraordinary flood." There was, however, nothing in the Reeves case to show that the carrier for four or five days prior to the damage at Chattanooga had held up the shipment for several days 150 or 200 miles distant from Chattanooga, and there was nothing in the Reeves case to show that the carrier had several days' time within which it knew of the existence of the flood, and the facts of that case render it entirely different from the case at bar. There was no deviation in the Reeves case. The court in its opinion in the Reeves case says: "If after he has excused himself by showing the presence of an overpowering cause, it is charged that his negligence contributed to the loss, the proof of this must come from those who assert or rely on it." This language is a clear recognition of the proposition that contributory negligence on the part of the carrier, co-operating with the act of God to produce a loss, renders the carrier liable. Indeed, this proposition could not be denied, being sustained by all of the authorities. However, the learned trial judge in his opinion in this case says: "It is not enough in this case that plaintiffs show that some act

of negligence of the defendant furnished the occasion for the loss or that some act of negligence of the defendant contributed to the injury." We think that the opinion of the trial judge in this case is the only one that will probably be found in the books, where it is asserted that the contributory negligence of the carrier, co-operating with the act of God, does not render the carrier liable. In the Reeves case the trial court by its 5th instruction told the jury that if the damage could have been prevented by any means within the power of the defendant or his agents, and such means were not resorted to, then the jury must find for the plaintiff. The court in the opinion of Justice Miller adjudged that the rule of this instruction was too stringent and reversed the judgment and remanded the case for a new trial.

The case of *Scheffer* v. *R. R.*, 105 U. S., 249, is also cited by the learned trial judge in his opinion. In that case by reason of a collision of railway trains in Virginia a passenger was injured and, becoming thereby disordered in mind and body, he, eight months after his injury, committed suicide, and it was held in that case, which was a suit by his personal representatives against the railway, that his own act of suicide was the proximate cause of his death.

In the case of *Ry. Co.* v. *Ins. Co.*, 139 U. S., 223 which is also cited by the learned trial judge in his opinion, it appears that the railway company had contracted with a compress company to receive and transport all cotton brought by its owners to the warehouse of the company. The railway company neglected to do this, a large mass of cotton was piled and kept by the compress company in the adjoining street, where the cotton thus collected was destroyed by fire from an unknown cause. It was held that the railway company was not responsible for the loss to the owners of the cotton destroyed, for

the reason that the railway company had given no bills of lading for the cotton in the street and the railway company had in fact assumed no custody or control of any of the cotton in the street or of the place where it was kept.

In the case of *The R. D. Bibber*, 50 Fed. Rep., 841, which is also cited by the learned trial judge in his opinion, it appears that a schooner loaded with a cargo of rails to be transported under a bill of lading which excepted liability from dangers of the seas, arrived off the bar at Galveston Harbor. While crossing the bar the vessel from some unknown cause went fast aground. The following night a storm arose which lasted two days and drove the vessel half a mile from the channel and on some shoals. The owner of the cargo brought suit against the vessel to recover the damages, alleging that the stranding was caused by the negligence of the master in not properly lightening the schooner before attempting the bar. The court there held that the grounding of the schooner was not due to the negligence of the master, and that the subsequent storm which arose the following night was the proximate cause of the injury. The case there might have some application to the case at bar if, after the cattle in controversy in this case had nearly reached Emporia while in transit, they had been overtaken by a sudden cyclone, throwing the train off the track and killing the cattle. On those facts the decision in the Bibber case and the decision in the Reeves case might apply; but in the case at bar the negligence of the defendant company commenced and continued after the flood was on and until the climax of the flood was reached. Indeed the negligence of the defendant company seems to have increased from the time of the arrival of the cattle at Strong City until the climax of the flood, in about the same proportion as the increase of the flood.

In the case of *Thomas* v. *Lancaster Mills*, 71 Fed. Rep., 481, which is another authority cited by the learned trial judge in his opinion, it was held that the fact that the destruction of a shipment by fire, occurring during a negligent delay on the part of a carrier in forwarding it, does not render such delay the proximate cause of the loss. That decision would have some application to the case at bar if the cattle of these plaintiffs had been destroyed by a sudden and unexpected fire at Emporia after the two days' negligent delay at Strong City; but in the case at bar, as we have seen, the negligence of the railway company from its commencement at Strong City until the climax of the flood, existed throughout from beginning to end after the flood was on. This flood was not a sudden affair like a fire, a cyclone or a thunder storm. It had continued for several days. In the above cases cited by the learned trial judge, if the carrier had been negligent during or after the fire or the storms, or while the fire or storms were on, as in the case at bar, the court would, we think, not have said that the carrier was exempt from liability for its contributory negligence. In the cases cited by the learned trial judge the negligence in each case existed some time anterior to the fire or flood, which in each case came on suddenly and unaware, and did not in any of the cases exist previously to the negligence of the carrier.

The case of *Hoag* v. *R. R. Co.*, 85 Pa., 293, which is also cited by the learned trial judge in his opinion, does not have any application in its facts to the case at bar.

VIII.

We submit that the error of the trial judge is further shown by the following clause of his opinion at page 140: "That it was wholly unanticipated in height and "destructive force is manifest by the undisputed fact

"that millions of dollars worth of property was placed "and left in the valley here at Kansas City by the own- "ers thereof, which was inundated and destroyed." But that "millions of dollars worth of property consisting "as it did of inanimate houses, stocks of goods and fur- "niture therein was placed and left in the valley here "at Kansas City by the owners thereof" long before the commencement of this flood, and it was not possible to move either those inanimate buildings or the immense stores therein at any time during the last week of the flood. There is another fact in this connection not mentioned in the learned opinion of the trial judge: There was not a single head of cattle in any of the Kansas City packing houses when the flood reached its climax, and only a comparatively small number of cattle, in addition to the large bunches of these plaintiffs', was in the Kansas City stock yards, although its daily receipts were up into the thousands and tens of thousands of cattle. Sparks Bros. had driven their large herd of mules out of the valley and nearly all the animals which have legs to walk upon were shipped or driven out in time to be saved, and the evidence does not show any live stock loss worthy of mention, except the loss of these plaintiffs.

IX.

At the bottom of page 138 the learned trial judge in his opinion seems to assume that it was necessary to drive the cattle up into the viaducts. The judge says: "To save the cattle in question from drowning they were "driven up into overhead viaducts." It was unnecessary to drive the cattle up into the viaducts, where they died for want of food and water, if as the trial judge found they could and should have been driven up out of the valley or shipped out on cars as was done with other live stock. The flood was not the cause of the death of

the cattle that died in the viaducts. The cattle were not any of them drowned. They died for want of food and water in the viaducts where they were placed by a human agency, namely the defendant company. If the damage must be ascribed to the last, in the train and succession of events, as was the opinion of the learned trial judge, then the want of food and water in the viaducts where the cattle were driven by men, and not the flood considered as an act of God, was the direct, immediate and proximate cause of the loss. And if the driving of the cattle up into the viaducts was made necessary by the neglect of defendant to drive or ship the cattle up out of the valley, then such negligence and the act of driving the cattle up into the viaducts were the last, efficient, immediate and direct cause of the loss and damage. Some of the authorities agree that where human agency containing no element of negligence contributes to produce the loss, the carrier is not excused by the act of God.

Steamboat Co. v. *Tiers*, 24 N. J. Law, 697; The Majestic, 166 U. S. 376, l. c., 386; *Merritt* v. *Earle*, 29 N. Y., 115, l. c., 116; *Michaels* v. *R. R. Co.*, 30 N. Y., 564, l. c., 570, cited in 154 U. S., 66.

X.

• The several acts of negligence charged in plaintiffs' petition constitute in their entirety one continuous negligence on the part of the defendant. Each negligence followed the preceding negligence. All those negligences had relation to the flood which preceded them. The case ought not to be decided upon the narrow theory or basis that either one of the first negligences in the train, considered by itself, was not the proximate cause of the injury. If the question of those negligences was a ques-

tion of fact for the jury, then the trial court erred in not submitting that question to the jury. If the question of the liability of the defendant upon the train of successive negligences was a question for the court, because of the fact that the evidence is undisputed, then the trial court erred in not ruling that question in favor of the plaintiffs. If the evidence upon the question of the train of negligences is undisputed, then we submit that the undisputed fact shows a case of very gross and almost criminal negligence on the part of the defendant company from first to last, and continuing through all the train and continuation of negligences.

The case therefore on the branch of negligence upon either theory of fact or law, must, as it seems to us, be ruled in favor of plaintiffs and against defendant. Either the plaintiffs were entitled to a submission to and a verdict of the jury upon the issue of negligence on all the specifications, or plaintiffs were entitled to the judgment of the court thereon.

ARGUMENT.

I.

In the case of *Rwy. Co.* v. *Harris*, 12 C. C. A., 598, l. c., 602, it was held that where a plaintiff offers and is ready to produce competent evidence to prove a material fact in issue, and the court rejects it on defendant's objection, defendant will not afterwards be permitted to allege that plaintiff failed to prove the facts alleged in the offer of evidence. We submit that the very many items of evidence offered by plaintiffs and wrongly and erroneously excluded by the learned trial court, should be considered by this court on these appeals with the other testimony of plaintiffs which, in some instances, was so reluctantly admitted.

II.

Upon the issue of negligence we refer to the following authorities:

In the case of *Livezey* v. *Philadelphia*, 64 Pa. St., 106, l. c., 108, the court in an opinion delivered by Sharswood, J., recognized the principle that where negligence concurs with the act of Providence in causing the injury the defendant is liable, and an opinion of Chief Justice Gibson is cited, recognizing that where the act of Providence was relied upon the happening of the injury must have resulted exclusively from such act of Providence. This does not harmonize with the opinion of the learned trial court in this case that contributory negligence does not render the carrier liable.

So in the case of *Helbling* v. *Cemetery Co.*, 201 Pa. St., 171, the court recognized that where the negligence of the defendant concurs with the act of God in produc-

ing an injury the defendant is liable. In that case there was a judgment for the plaintiff against the cemetery company for $3,500, which was affirmed by the Pennsylvania Supreme Court. The suit by the plaintiff was brought because of injury by water during rain storms to plaintiff's house. The water accumulated at the opening of a city sewer which was on the land of the defendant cemetery company, which sewer received the surface drainage. The negligence of the cemetery company charged was that it had allowed large quantities of brush, weeds and grass to lie along the water courses near the opening of the sewer, and that this so clogged the water it did not have a free passage to the sewer. The defense was that the rainfalls were so extraordinary that their consequences could not be forseen, and that the injury was therefore attributable solely to an act of God. The appeal presented the question of instructions to the jury in the trial court. The trial court instructed the jury that if the loss resulted wholly from extraordinary floods and not from any act of the defendant, the defendant was not liable. The trial court gave an instruction to the jury in words as follows: "If, however, the weight of the evidence satisfies you that the loss was the result of two concurrent acts, an extraordinary flood and some negligence of the cemetery company assisting in producing the loss, then the cemetery company would be liable." Under this instruction the jury found a verdict for the plaintiffs, which was sanctioned both by the trial court and the Supreme Court.

In the case of *Morrison* v. *Davis*, 20 Pa. St., l. c., 176-177, the court used the following language: "We may here say a word as to the care required of carriers when they discover themselves in peril by inevitable accident. In such a case the law requires of them ordinary care, skill and foresight. This is different in different

cases, depending upon the degree of civilization, and in different circumstances depending upon the degree of peril. It is commonly defined as the common prudence which men of business and heads of families usually exhibit in matters that are interesting to them. It increases as difficulties increase. In great danger great care is the ordinary care of prudent men."

In the case at bar the learned trial court was of opinion that no matter how negligent the carrier may have been, still if there was a flood, or act of God as it is called, there is and can be no liability. The trial court seems also to be of opinion that the carrier must have known all the facts before the crisis of the flood that are known now in order to be liable. In the view of the trial court there is nothing left of the law of negligence and there can be no liability in this class of cases.

In the case of *Williams* v. *Grant*, 1 Conn., 487, the court adjudged that the striking of a vessel upon a rock not generally known, and not actually known to the master of the vessel, is *prima facie* an act of God, for which the carrier is not responsible. The court further adjudged that though the situation of the rock was not generally known and was not actually known to the master of the vessel, yet if he exposed the vessel to such accident by any culpable act or omission of his own the defendant was not excused. The verdict in the trial court was in favor of defendants, but the Supreme Court granted a new trial. In one of the opinions of the court in that case it is said, in speaking of dangers of the sea and unavoidable accidents, as follows: "In either case, however, it is a condition precedent to their exoneration that they should have been in no default, or, in other words, that the goods of the bailors should not have been exposed to the peril or accident which occasioned the loss by their own misconduct, negligence or ignorance.

For though the immediate or proximate cause of a loss in any given instance may have been what is termed the act of God or unavoidable accident, yet if the carrier unnecessarily exposed the property to such accident by any culpable act or omission of his own, he is not excused. I recollect a case put in some book to this effect: That if a common hoyman unnecessarily puts to sea under circumstances which render a loss of the goods on board probable, as in very tempestuous weather, he is liable in the event of loss, though it were immediately occasioned by the elements, over which he had no control. This I take to be the law."

This case is approvingly cited by this court in *Constable* v. *Steamship Co.*, 154 U. S., l. c., 66.

In the case of *Wallace* v. *Clayton*, 42 Ga., 443, the court adjudged that an unusual or extraordinary flood in a river is such an act of God as excuses a common carrier from his liability, at all events for goods he has undertaken to transport, but even in such case the carrier is bound to exercise the care of a very prudent man to preserve the freight entrusted to him for carriage. It was also held in that case that diligence and the want of it are questions of fact to be determined by the jury under the charge of the court. In its opinion in that case the court said: "It cannot for a moment be denied that a flood such as the evidence in this case discloses is an act of God in the sense of the books, which make such an act an exception to the influences against which a common carrier insures. Indeed the irresistible march of a mighty and unexpected flood is of all others the most terrible exhibition of the powers of nature and the helplessness of man. It is only the Ruler of the Universe who can say with authority to the rushing tide, 'Thus far shalt thou come and no farther.' When such an event occurs, that rule which makes a common carrier

liable at all events gives way. Angel on Carriers, 153-160. But it does not, therefore, follow that the carrier may fold his hands or that he is to be excused if he is negligent or fails in exercising the diligence of a very prudent man. That duty is always upon him. Even amid the fury of the storm or the rush of the flood he must use that prudence, discretion and energy which experience teaches very prudent men to use under such circumstances. If the loss be by reason of the want of extraordinary diligence in the carrier, then, though the agent of the loss be flood or storm, the carrier is liable. Angel on Carriers, 153-160."

The case of *Richmond R. R. Co.* v. *White*, 88 Ga., 805, is directly in point. In the state of Georgia, where that case arose, there was a statute which provided as follows:

> "Sec. 2066.—One who pursues the business, constantly or continuously for any period of time or any distance, of transportation is a common carrier, and as such is bound to use extraordinary judgment. In cases of loss the presumption of law is against him, and no excuse avails him unless it was occasioned by the act of God or the public enemies of the state."

This last clause of the statute it will at once be recognized is simply in affirmance of the common law. In the above case the Georgia Supreme Court adjudged the following: "The rule of extraordinary diligence imposed upon common carriers by Sec. 2066 of the Code required the exercise of that degree of diligence to avoid unduly exposing goods to injury or destruction by an unforeseen act of God, such as an extraordinary flood or freshet, and also to protect and preserve the goods after the peril has become apparent. And generally, in order for the carrier to avail himself of the act of God as an excuse, the burden of proof is upon

him to establish not only the act of God ultimately occasioned the loss, but that his own negligence did not contribute thereto. For in cases of loss the presumption of law is against him." It was also adjudged in that case that: "After it is shown by dates of shipment that the goods had time to arrive and be delivered to the consignee before the flood occurred, the burden of showing what part of the goods, if any, did not arrive within that time is upon the carrier, and then the burden is upon the consignee to show the damage done to those which did arrive and the amount thereof, in order to recover on the ground of negligence in not giving notice of arrival or in not delivering on application."

It was also adjudged in that case that "As to goods which arrive too late to admit of giving the usual notice to consignees before the flood occurred, the carrier was bound to the exercise of extraordinary diligence in protecting them from damage by the flood whilst they were in his cars or his warehouse." It was also adjudged as applicable to such cases, where goods are overtaken by a flood, that "The measure of extraordinary diligence is that extreme care and caution which very prudent and thoughtful persons use in securing and preserving their own property, and that the acts and efforts constituting that diligence under all the circumstances of the case were for determination by the jury." It was also adjudged in that case that "*Precautions for the protection of property which would have been available as against any previous flood of which the carrier, a railroad company, had knowledge, would not necessarily fill the measure of extraordinary diligence, inasmuch as history or tradition might make it incumbent on the carrier to have more knowledge than that actually possessed, and that in such matters it might be just to treat the means of knowledge as equivalent to actual*

notice." The court in its opinion in that case recognized the difference between the extraordinary diligence required by the above statute in Georgia and the ordinary diligence required by the common law. However, what the court says in its opinion in that case about a liability where there is concurring negligence on the part of the carrier, applies as well to cases arising where the common law rule obtains as to cases arising under statutes like that of Georgia under consideration in that case. In its opinion commencing at page 812, the court there says: "We think, moreover, that this is where the burden ought to rest, for in its nature the defence of loss by the act of God involves a due accounting by the carrier of his own diligence so as to make it appear that the loss was occasioned by the act of God solely, unmixed with contributory negligence on the part of the carrier. *Doubtless where the carrier is in no previous default and the Providential act is so sudden and of such a nature as to leave no interval of time within which preventive measures against its effects could be taken, the mere proof of the act alone and of the consequent loss would establish the defense. This would be reasonable. But where the circumstances make a plain case for the exercise of some diligence and time for its exercise intervenes after the peril has become apparent, the burden of showing that the requisite diligence was exercised ought to rest upon the carrier.* The inquiry relates to his conduct, and he, his servants and agents, must know what that conduct was, and they of all persons have the best means, and not infrequently the only means, of proving it." Again, at page 814, in its opinion in that case the court said: "It came out in evidence that a part of the goods embraced in this action and which were injured by the flood, arrived at the company's warehouse in time to have been received by the

consignee and removed before the freshet occurred, and that there was not only an omission to give the notice of arrival customary in the business, but probably that these goods, or some of them, were detained by the carrier after they had been applied for by a drayman in behalf of the consignee. So far as these packages of goods were concerned the carrier failed in diligence and thus unduly exposed the goods to loss, before it was known, or could be known, that they had been put in peril by the particular act of God which subsequently affected them to the owner's damage." In that case the court, as is thus seen, affirmed a liability against the carrier because of the want of proper care on the part of the carrier in advance of the flood, and even in advance of the knowledge of the carrier that a flood was about to come. In that case as to some of the goods, they were not unduly delayed on the way and did not arrive until it was too late to give notice to the consignee before the freshet occurred, and as to these goods the court held that the carrier was bound to exercise diligence in protecting those goods from damage by the flood whilst they were in his cars or in his warehouse. Upon the branch of the case as to the existence of the danger, the question whether in that case the carrier exercised proper care to save the goods after the flood was on, the Supreme Court said: "The question for the jury was whether the company did as much as it could or ought to have done under the rule of diligence to which it was subject and under all the circumstances which surrounded it." The court in its opinion in that case clearly recognized that it was the duty of the carrier to exercise either ordinary diligence under the common law or extraordinary diligence under the statute, to save the goods after the flood was on, and the court also regarded the question whether the carrier did exercise

diligence as a question for the jury. At the conclusion of the opinion the court made the following observation, namely: *"We agree with the trial court that the precautions for the protection of the property which would have been available against any previous flood of which the company had knowledge would not necessarily fill the measure of extraordinary diligence. This flood was in the year* 1888, *and there had been a higher one in the year* 1840. *History or tradition might have made it incumbent on the company to have some knowledge or information as to that instance of high water. Many persons still living would be likely to know of it and it might or might not be just to treat as against the railroad company its means of knowledge as actual notice. The jury would be apt to deal rightly with such a question."*

In the case of *Merritt* v. *Earle*, 29 N. Y., l. c., 116 F, in which an elaborate opinion was delivered on this subject, the court said: "The force of inevitable accident goes a step further and applies to occurrences which no foresight or precaution of the carrier could prevent, but even this is not identical in meaning with the 'act of God.' That is an expression which excludes all human agency. It signifies the direct act of a Providential cause, for in a wider sense everything is an act of God, since nothing happens but by His permission." The learned judge proceeds to review the authorities, English and American, and concludes as follows: "It is a corrollary from these principles and the cases in which they are found that if the act of God is to excuse the carrier, it must be not only the sole, but the immediate, and not the remote cause of the loss." And in that case it was adjudged that if either the negligence of the carrier, or the intervening act emanating from any human source, contributed with the act of God to cause the in-

jury complained of, the defendant is not excused by the act of God, but is liable by reason and force of its general liability as a carrier. In the case at bar the defendant as a carrier is undoubtedly liable to plaintiffs for the loss and injury of these cattle, if the defendant is not excused by the act of God as the sole cause of the injury complained of; and if either the negligence of the defendant or any other action emanating from a human source contributed with the act of God to cause the loss and injury to plaintiffs, the defendant is still liable.

The same principle was recognized by the court in the case of *Michaels* v. *R. R. Co.*, 30 N. Y., 564, l. c., 570. In that case the court said: "This was in substance the case disclosed and the question recurs, whether the judge erred in holding the defendants liable. In other words, whether the defendants as carriers brought themselves within one of the two exceptions to their legal liability. What is precisely meant by the expression, act of God, as used in the case of carriers, has undergone discussion, but it is agreed that the notion of that exception is, those losses and injuries occasioned exclusively by natural causes such as could not be prevented by human care, skill and foresight. All the cases agree in requiring the entire exclusion of human agency from the cause of injury or loss. If the loss or injury happened in any way through the agency of man, it cannot be considered the act of God. Nor even if the act or negligence of man contributes to bring or leave the goods of the carrier under the operation of natural causes that work their injury, is he excused. In short, to excuse the carrier the 'act of God' or *vis divina* must be the sole and immediate cause of the injury. If there be any co-operation of man or any admixture of human means, the injury is not in a legal sense the act of God."

And after using this language the court cites, in support of the above propositions, many authorities.

See also the learned remarks of Cowan, J., in *McArthur* v. *Sears*, 21 Wendell, 190, l. c., 197.

The above case of *Michaels* v. *R. R. Co.* is approvingly cited by this court in *Constable* v. *Steamship Co.*, 154 U. S., 66.

In the case of *Bibb Broom Corn Co.* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 102 N. W. Rep., 709, which was decided by the Supreme Court of Minnesota on Feb. 24, 1905, the identical flood of May, 1903, which is involved in the cases at bar was there considered by the court. On the same facts which were brought out in that case, so far as the flood was concerned, which are involved in the cases at bar, the Minnesota Supreme Court adjudged the following propositions: "(1) It is the duty of a common carrier to whom goods are delivered for transportation to forward them promptly and without unreasonable delay to their destination; (2) if he fails so to do and negligently and carelessly delays the shipment and the goods are overtaken in transit and damaged by an act of God which would not have caused the damage had there been no delay, he is liable, even though the act of God could not reasonably have been anticipated. The negligent and unreasonable delay is such proximate or concurring cause as renders the carrier liable." The opinion is exhaustive and contains the citation of many authorities, English and American. In that case the trial court instructed the jury in part that if the corn was destroyed by an act of God unaccompanied by the concurrent negligence of the defendant, plaintiff could not recover, but in effect left the jury to say whether the delay in forwarding the car was negligence and whether such negligence concurred in causing the damage. This instruction was approved by the

Minnesota Supreme Court and the judgment of the trial court was affirmed. The rule applicable to this class of cases is thus stated by the court in its opinion in that case: "As a general rule applicable to all cases of negligence, if damage is caused by the concurrent force of defendant's negligence and some other cause for which he is not responsible, including an act of God, he is nevertheless liable, if his negligence is one of the proximate causes of the injury complained of, even though, under the particular circumstances, he was not bound to anticipate the interference of the intervening force which concurred with his own. * * * The authorities are at variance insofar as negligent delay is concerned, only in cases involving property not perishable. The principle in the case at bar was of that character. The property would not have been damaged but for the flood that submerged the car while in the yards at Kansas City. Neither would it have been damaged had defendant forwarded the car to Minneapolis promptly and without unreasonable delay, as it was required by law to do. So the question is, was the negligent delay of defendant in forwarding the car one of the proximate causes of the damage to the corn, or did such delay concur with the flood in causing the damage?" The court then proceeds to an examination and consideration of the authorities bearing on the question and then proceeds in its opinion as follows: "We have examined the authorities holding the opposite of this doctrine and while the courts adhering to the same are of eminent standing, we have no difficulty in adopting the view in the cases above cited. The rule which permits a carrier to excuse his negligence by an act of God overtaking him while thus in fault, seems to us unsound or as based on too strict an application of the rule of proximate cause. It is the duty of a common carrier, to whom goods are delivered for transportation, promptly and

without unreasonable delay to forward them to their destination, and such was defendant's duty in the case at bar. This it failed to do, and its negligence in this respect is not seriously controverted. The car arrived at defendant's yards in Kansas City on the 23rd of May and was permitted to remain there without proper effort to forward it until it was overtaken by the flood. It could have been moved from defendant's yards on any day after its arrival, prior to the 29th of May, and had this been done the corn would not have been damaged. If defendant had acted as required by the terms of its contract and as enjoined by law, the car would have been forwarded and would have arrived at its destination prior to the flood. That defendant's neglect concurred and mingled with the act of Good seems the only reasonable conclusion the facts will warrant, and we feel safe in applying the general rule that an act of God is not in such cases a defense. Every reason in equity and justice relieves a carrier from the performance of his contract and from liability to injuries to property in his custody for transportation, resulting exclusively from the act of God or other inevitable accident or cause over which he has no control and could not reasonably anticipate or guard against. But reasons of that nature lose their force and persuasive powers when applied to a carrier who violates his contract and by his unreasonable delay and procrastination is overtaken by an overpowering cause, even though of a nature not reasonably to be anticipated or foreseen. If but for his negligence the loss would not have occurred, no sound reason will excuse him, and he should not be relieved by an application of the abstract principles of the law of proximate cause. No wrongdoer should be allowed to apportion or qualify his own wrong, and if a loss occurs while his wrongful act is in operation and force and which is

attributable thereto, he should be held liable. *Davis* v. *Garrett*, 6 Bing., 716."

In the case of *Cobb* v. *Ry.*, 149 Mo. Rep., 609, l. c., 628, the court said: "And the fact, if it was one, that the storm had been unprecedented, affords defendant no excuse, because if a hard rain storm would sweep bents *a fortiori*, would one more severe? And the evidence unmistakably shows that had stone piers been used, defendant would have given no cause for the present litigation. *The unusual severity of the storm in this instance, instead of furnishing an excuse to defendant, should rather have struck the spur of vigilance into the flank of its apprehension.*"

In the case of *Davis* v. *R. R. Co.*, 66 Vt., 297, l. c., 298, 29 Atl. Rep., 313, l. c., 315, the Supreme Court of Vermont in 1894 delivered an opinion in which the following language is used: "But it is contended that the delay or negligence of the defendant in not removing the grain as speedily as the county court has found that it ought to have done, renders the defendant liable. It is evident that the fire was the immediate, proximate cause of the destruction and loss of the grain. If the fire had not occurred, or if that cause is eliminated, the grain would not have been lost. The *causa causans* was the fire. The concomitant incident was the delay by the defendant in removing it from the elevator. But that delay would not have destroyed the grain, and caused its loss, if the fire had not intervened. It is generally held that a common carrier is liable on the ground of negligence only when that negligence is the proximate cause of the loss. On this subject, and on what is the proximate and what the remote cause, these authorities are helpful: *Bohen* v. *City of Wasecа*, 32 Minn., 176, 19 N. W., 730, 50 Am. Rep., 564, and note; *West* v. *Ward*, 77 Iowa, 323, 42 N. W., 309, 14 Am. St. Rep.,

284, and note; *White* v. *Conly*, 14 Lea., 51, 52 Am. Rep., 154, and note; *Haverly* v. *Railroad Co.*, 135 Pa. St., 50, 19 Atl., 1013, 20 Am. St. Rep., 848, and note; *Perley* v. *Railroad Co.*, 98 Mass., 414, 96 Am. Dec., 645, and note. But courts differ in holding the carrier liable when his delay is the remote cause of the loss, and a proximate cause exists therefor, for which he is not liable. Courts of last resort, holding the carrier liable in such cases, are those of New York, followed by those of Missouri and Illinois. Holding that the carrier is not liable for such remote cause, are the courts of the United States, Massachusetts, Pennsylvania, Ohio, Michigan, West Virginia and Iowa. The cases of these states, pro and con, can be found collected in a note to *Norris* v. *Railway Co.*, 23 Fla., 182, 1 South, 475, 11 Am. St. Rep., 355. To the last named class, apparently, should be added the courts of Nebraska and of Maine. *McClary* v. *Railroad Co.*, 3 Neb., 44; *O'Brien* v. *McGlinchy*, 68 Me., 557. *In some of the cases cited, holding the carrier liable, another element existed, in addition to the delay of the carrier in moving the goods to their destination, to-wit, the exposure of the property to the action of the elements, which was observable to the carrier, like freezing, or the want of food and care when the property consisted of live animals. When the property is of a kind liable to injury or destruction by such exposure, whether moving the property with due dispatch, or delaying so to move it, the carrier is under a duty to use common prudence to protect the property from dangers which are known to him to exist, and which have come expectedly or unexpectedly; and, if the danger came without his fault, he may charge for the extra care. Beckwith* v. *Frisbie*, 32 Vt., 559. *Some of the cases holding the carrier for delay might have been properly decided against him because, knowing the danger to*

which the property was exposed, he did not exercise the diligence and care of a prudent bailee to protect it."

In this case Messrs. Hurley and Sharp, who were the general superintendents of defendant, seemed to have thought they owed a duty to remove the 1,400 cars of dead freight from Argentine on May 30th, but that they owed no duty to care for plaintiffs' live stock.

In the case of *R. R. Co.* v. *Curtiss*, 80 Ill., 324, the Illinois Supreme Court held the following: "If fruit trees and shrubbery are destroyed by the cold in the hands of an intermediate carrier by reason of negligence or unreasonable delay, or if by such delay in transportation or in delivering to the next carrier in the line the latter cannot by reasonable efforts transport and deliver before they are destroyed by cold weather, the former carrier will be liable for the loss." It was also held in that case that: "Where fruit and ornamental trees shipped were destroyed by frost before reaching their destination, and this was caused by delay of transportation to Chicago, where they were to pass into the hands of another line, the fact that the company's buildings in Chicago were desroyed by fire will not furnish a sufficient excuse for the delay *where it appears that other shipments made afterwards went through in time and were delivered to the other line.*" In speaking of the duty of the carrier in that case the court in its opinion delivered by Judge Walker, said: "The cold weather was approaching and the hazard of delay was increasing, and it required, considering the nature of the freight and its liability to injury from frost, that all reasonable efforts should have been made to get them in the hands of the next carrier in the line before winter should set in or the weather become severely cold. Failing to do so, appellants were liable for the neglect."

In the case at bar the first train load of cattle of

the Empire State Cattle company was hauled through from Strong City to South Dakota on time, and if the same care had been used by defendant as to the second train load in moving it homeward without delay from Strong City the loss would have been prevented. See on this point the well considered case decided April 30th, 1907, by the St. Louis Court of Appeals of *Gratiot W. H. Co.* v. *R. W. Co.*, 102 S. W. Reporter, p. 11, l. c. 16.

In the case of *Wald* v. *R. R. Co.*, 162 Ill., 545, the Supreme Court of Illinois held the following: "A loss or injury is due to the act of God where it is occasioned exclusively by natural causes, such as could not be prevented by human care, skill and foresight. A common carrier is not exempt from liability for a loss occasioned by an act of God if the carrier has been guilty of any previous negligence which brings the property in contact with a destructive force or unnecessarily exposes it thereto. A carrier is responsible where property committed to it is by its negligence brought under the operation of natural causes that work its destruction or is exposed to such cause of loss. Unnecessary delay of a carrier which subjects the goods in its possession to a loss by an act of God, which they would not otherwise have met with, is of itself such negligence as will make the carrier liable for the loss. A carrier which without sufficient reason fails to ship the trunk of the passenger upon the limited train taken by such passenger, is liable for its destruction by a flood which comes upon the later train upon which it is shipped, though such flood is in itself an act of God." It was further held in that case that "it is a question of fact for the jury whether or not a railroad company is guilty of negligence in not sending a passenger's baggage by the train on which he travels and having it so carried throughout the jour-

ney." In that case the plaintiff took passage from Cincinnati over the defendant railway company to New York City on a limited express train. The plaintiff had his trunk checked from Cincinnati to New York. The railway company neglected to ship plaintiff's trunk by the train on which he took passage, as the company could and should have done, but the trunk went forward on a later train, which later train was caught in the Johnstown, Pa., flood, where appellant's baggage was lost. In the opinion in that case, which is exhaustive and contains the citation of many authorities, there is a full consideration of the subject of proximate cause in these cases, and the rule which has been generally recognized by the courts (except possibly the trial court in the case at bar), that if there is concurring negligence on the part of the carrier, the fact that the injury was caused by an act of God is not a defense.

In the case of *Blodgett* v. *Abbott*, 72 Wis., 516, 7 Am. St. Rep., 873, the court adjudged that the defendant carrier was not excusable because it thought the next connecting carrier might have trouble in the continued transit of the goods.

According to that authority the fact that defendant thought while plainiffs' cattle were at Strong City that they might not be carried by the connecting carrier beyond Atchison was no excuse for the delay. Indeed the evidence in this case is undisputed that if defendant had moved forward this train load of cattle the same as plaintiffs' other train load, it would have gone through the same to the destination of both.

In the case of *Nelson* v. *Ry. Co.*, 72 Pac. Rep., 643, l. c., 651, decided by the Supreme Court of Montana in 1903, it was held that a common carrier receiving property for transportation, with knowledge of the existence of an obstruction on its route, and without informing

the shipper, cannot offer the obstruction as an excuse for not making a prompt delivery thereof, though the obstruction is the act of God, and it is bound to take notice of the signs of approaching danger liable to create obstructions, if any are known to it. In the opinion of the court in that case the court said: "Another instruction given is as follows: 'The court further instructs you that if you find from the evidence that an obstruction of the defendant's road by a snow blockade or otherwise existed at any point at the time these sheep were loaded, which would interfere with the prompt and safe carrying and delivery of these sheep, and which was known to the defendant, and the sheep were accepted by the defendant for shipment without informing the plaintiff of the state of affairs, the defendant cannot offer the obstruction as an excuse for failure to deliver promptly, even though the obstruction was the act of God. Having undertaken to take the shipment with full knowledge of the facts, its liability as a common carrier attached. *It was bound to take notice of the signs of approaching danger if any were known to it, and, if the danger was of such a character as reasonably to awaken apprehension at a time when the facilities and means of escape from danger were within their control, they were bound to use such means for the safety of the property intrusted to their care.*' The appellant complains of this instruction for the reasons (1) there is no evidence to base it upon; (2) that it is an erroneous statement of the law. The record contains evidence as to the prevalence of a storm at the time this shipment was made; that the probability of obstruction was discussed, defendant's witnesses testifying that they informed plaintiff at the time of shipment that the worst blizzard ever known was prevailing in North Dakota along the line of defendant's road. The receipt of this information was denied by plaintiff, and the question as to the exist-

ence and severity of the storm and the dangers attendant upon the shipment became and was one of the issues in the case. As to the second objection made by defendant to this instruction, we can only say that we find no error, but believe the same to state correctly the law as applicable to this case. The general rule governing this matter is expressed in *Lamont* v. *Nashville R. R. Co.*, 9 Heisk. (Tenn.) 58, in which the court says: *"The company were bound to take notice of the signs of approaching danger, and, if of such character as reasonably to awaken apprehension at a time when the facilities and means of escape from the danger were within their control, they were bound to use such means for the safety of the property intrusted to their care.'* Further sustaining this general proposition of law, we cite the following authorities: *Fox* v. *B. & M. R. R. Co.*, 148 Mass., 220, 19 N. E. 222, 1 L. R. A., 702; *Corbett* v. *St. Paul, M. & O. R. R. Co.*, 63 Wis., 82, 56 N. W., 327; *Hewitt* v. *Chicago Ry. Co.*, 63 Iowa, 611, 19 N. W., 790, 5 Am. & Eng. Enc. Law (2d Ed.), 255; *Express Co.* v. *Jackson*, 92 Tenn., 326, 21 S. W., 666."

In this case we submit that General Superintendents Hurley and Sharp had no right on May 30 to speculate as to how high the then existing and unprecedented and continually rising flood might reach, or guess or take chances as to the exact number of feet up to which it might go. This is also true as to conditions Friday, when the cattle were deviated from Emporia.

In the case of *Steamboat Co.* v. *Tiers*, 24 N. J. Law Rep., 697, the court held: A common carrier is not excused from his liability when the loss is occasioned by the act of God, unless the act of God is the proximate cause of the injury, nor where the negligence of himself or any other person concurs with the act of God in producing the loss. That a severe storm produced

an unusually low tide and thereby caused the carrier's barge to strike against a timber projecting from a wharf, so low as in ordinary tides to be no cause of injury, will not excuse the carrier from the loss of the goods occasioned by the timber piercing the vessel. It was further held in that case that the doctrine that where both parties are guilty of negligence there can be no recovery, does not apply to the owner of goods delivering them to a carrier during a storm in which it may be difficult for the carrier to protect them. If the carrier consents to receive them he is liable for all injury after delivery. The opinions in this case contain the citation of many authorities. In the opinion at page 700, the court says: "Admitting that the loss in this case was occasioned, not by negligence in leaving the barge in a situation where she was liable to strike against the bulkhead, instead of securing her better, but that in point of fact the loss was occasionad by the low tide bringing her in contact with a timber projecting a foot or more in the bulkhead, and that that concurrence of a low tide produced by a violent storm, itself strictly an act of God, and the projecting timber which was left to project by the agency of man, was it a loss by the act of God, for which the carrier is not responsible? I am clearly of the opinion it was not. The immediate or proximate cause of the loss was the projecting timber, and defendant strenuously insists that it was not the mere influence of the storm casting the barge against the bulkhead which produced the injury, and this they are driven to do in the hope thus to escape the consequences of their negligence in allowing her to remain unnecessarily in a position where this might have happened. Admitting this negligence, they say it did not occasion the injury. Had the bulkhead been free from defect, as they supposed, no injury would have occurred. The remote cause of the loss was undoubtedly the storm, but had there been

no projecting timber their argument in that case would have been inefficient as that the real producing and proximate cause was the projecting timber. It is the duty of carriers to provide good and sufficient docks, boats and other implements necessary and proper for their business, and although these instruments need not be absolutely perfect, they must be free from defects, seen or unseen. If defects do in point of fact exist, the carriers are not excused, even if it be shown that they have exercised extraordinary diligence to prevent them. In the case of *Backhouse* v. *Snead*, 1 Murphy N. C. R., 173, it was held that where the carrier hired his vessel to be repaired by a skillful workman, who made a rudder apparently sound, but internally rotten, and the loss happened by reason of its breaking, he was responsible, though he was ignorant of the defects. This decision was in accordance with the general principle which holds the carrier responsible for every loss produced by an accident not coming within the definition of an act of God, as for a loss occasioned by a fire which happened without any negligence on his part or by robbers or by the misconduct or negligence of third parties; the question in such cases is not whether there has been any degree of negligence on the part of the carrier, but whether he has shown that the proximate cause of the loss was an act of God or of public enemies. Against all other causes of loss he undertakes to insure, and if the accident which occasioned it was not an act of God or of enemies, but was wholly without his fault, it was at all events his misfortune and not the misfortune of the owner. The argument for the defendants in this case is that inasmuch as if there had not been an unusually low tide, produced by a violent storm of wind, the barge would not have struck the timber; therefore, the loss must be attributed to the storm. But if that argument was sound, it would follow that if an unsea-

worthy vessel should founder in a storm, the fact that she might have gone safe if the weather had remained fair would excuse the carrier. This is not pretended to be the law. If a vessel be in fact unfit for her business, a loss arising from a storm is presumed to have been occasioned by the defect of the vessel, because it is impossible to say how far the defect contributed to the loss. Upon the like principle if the carrier's dock be imperfect, a loss arising by the influence of a storm acting upon the imperfection and which would not have happened in the absence of either cause, must be attributed to the imperfection. The loss is not by an act of God alone. It is produced partly by an act for which the carrier is responsible. Had there been no storm, but had the dock itself given way and sunk the vessel, or had a projecting timber before unnoticed, or believed not to be dangerous occasioned the injury, since no act that could be called the act of God had intervened, it is undeniable that the carriers would be liable. In this case an act of God did intervene and was instrumental in producing the loss, but it was not the sole or proximate cause of the loss. And defendants themselves insist and assume in the charge they desire that the storm itself did not do the injury. Had not another instrument concurred which proceeded from the active or passive agency of man and for which man is responsible, there would have been no loss.'

In the case of *R. R. Co.* v. *David*, 6 Heisk. 261, it was held that "when goods in the hands of a common carrier are placed in jeopardy by some *vis major* he is bound to use actively and energetically such means to save them as prudent and skillful men engaged in that business might fairly be expected to use under like circumstances. It is error, therefore, to charge the jury that in such case the carrier is bound to use all the dili-

gence which human sagacity can suggest." The court in that case, in speaking of the case of *R. R. Co.* v. *Reeves,* says: "The sounder rule is thus given by the Supreme Court of the United States, citing from 20 Pa. Rep., 171, in the case of *R. R. Co.* v. *Reeves,* 10 Wallace, 191, that when carriers discover themselves in peril by inevitable accident the law requires of them ordinary care, skill and foresight which is the common prudence which men of business and heads of families usually exhibit in matters that are interesting to them. While the rule is not very clearly expressed or defined by the above statement of it, nor very distinctly illustrated so far as shown by the reference of the course of heads of families in matters interesting to them, yet the principle intended to be stated is the true one,—that is that in case of accident or an emergency such as is presented in this case, a railroad company is bound to use such means as would suggest themselves to and be within the knowledge and capacity of well-informed and competent business men in such positions and such diligence as prudent, skillful men engaged in that kind of business might fairly be expected to use under like circumstances, and that this diligence and these means should be actively used to protect and secure the property confided to their care. In other words, there should be no failure to use actively and energetically all the known and usual means which may fairly be expected to be found within the knowledge of men of average qualifications engaged in a responsible business of this kind where large amounts of property of the citizens are passing through their hands and are entrusted to their care."

In the case of *McGraw* v. *R. R. Co.*, 18 W. Va., 361, it was held that if the goods transported were frozen, it exempted the carrier from liability, provided

he had been guilty of no previous negligence and misconduct by which such loss or damage may have been occasioned. In the opinion in that case at page 365 the court says: "But whenever the common carrier is exempt from liability, either because of an act of God *or because of the nature and inherent character of the property and its liability to loss or damage, he must be free from any previous negligence and misconduct by which that damage may have been occasioned, for though the immediate or proximate cause of a loss in any given instance may have been what is termed an act of God, or from the nature and inherent character of the property, yet if the carrier unnecessarily exposed the property to such accident by any culpable act or omission of his own, he is not excused.*"

In the case of *Smith* v. *Ry. Co.*, 91 Ala., 455, l. c., 456, the court, in its opinion, said: "An act of God is "a cause which no human prudence or power could pre-"vent or avert. While it is true that no human agency "can prevent or stay an act of God, the act itself being "that of Omnipotence and irresistible, it is frequently "the case that the results or natural consequences of an "act of God, by the exercise of reasonable foresight and "prudence, may be foreseen and guarded against. When "this can be done by the exercise of reasonable diligence "and prudence, a failure to do so would be negligence "and subject the party on whom this duty devolved to "damages, although the original cause was an act of "God. *Notice of an extraordinary rise at the head of "a river might be sufficient to parties engaged in busi-"ness lower down to expect a proportionate rise and to "prepare for it, dependent more or less on the sudden-"ness of the rise and the time after notice and before the "rising water reached the place where the injury oc-"curred.*"

See also *Coosa River Steamboat Co.* v. *Barclay*, 30 Ala., 120, l. c., 127.

In this case defendant was bound to take notice from flood conditions in the Kaw river at Topeka, where defendant had its chief offices, as those conditions existed on Friday, May 30, when these cattle were forwarded from Strong City, that it was positively and unqualifiedly dangerous to attempt to take them across the Kaw river at Kansas City.

In the case of *Nugent* v. *Smith*, 1 C. P. Div., 19 and 423, l. c., 436, the court in an exhaustive opinion delivered by Cockburn, C. J., said: "The carrier is bound to do his utmost to protect goods committed to his charge from loss or damage, and if he fails herein he becomes liable from the nature of his contract. In the one case he can protect the goods by proper care. In the other it is beyond his power to do so. If, by his default in omitting to take the necessary care, loss or damage ensues, he remains responsible, though the so-called act of God may have been the immediate cause of the mischief. If the ship is unseaworthy and hence perishes from the storm which it otherwise would have weathered, if the carrier by undue deviation or delay exposes himself to the danger which he otherwise would have avoided, or if by his rashness he unnecessarily encounters it, as by putting to sea in a raging storm, the loss cannot be said to be due to the act of God alone, and the carrier cannot have the benefit of the exception."

In Vol. 1, Am. & Eng. Enc. Law (2d Ed.), 595, the author uses the following language: "Where the negligence of the carrier concurs with an act of God in producing a loss, the carrier is not exempted from liability by showing that the immediate cause of the damage was the act of God; or, as it has been expressed, where the loss is caused by the act of God, if the negli-

gence of the carrier mingles with it as an active and co-operative cause, he is still responsible."

In Vol. 5, Am. & Eng. Law (2d Ed.), 234, the author uses the following language: "No accident or casualty which might have been prevented by the exercise of ordinary care and forethought on the part of the carrier and by the use of known means not requiring any extraordinary diligence, can be attributed to inevitable accident or act of God as a cause, and the carrier cannot escape liability therefor."

In Hutchison on Carriers, Sec. 181, the rule is stated thus: "And whenever the carrier is placed in a situation in which it becomes necessary for him to exercise his skill or judgment, no matter what may be the circumstances of danger or difficulty, he takes the risk of the proper exercise, and if there be a way or means of escape, *a carrier by losing his presence of mind* or by mistaking one object for another is thereby misled or shows a want of the necessary skill and judgment whereby a loss occurs, he is responsible." See also Hutchinson on Carriers, Secs. 185 to 192. In Hutchinson on Carriers, Sec. 186, it is said: *"And it may be stated generally that whenever he goes to meet danger in spite of the warning of the elements or with a blind confidence that he will be able to encounter it in safety, whether it be upon sea or on the land, he brings the loss upon himself and it will not avail him that the immediate cause of it was the act of God."*

In this case the telegrams read in evidence taken in connection with the evidence of Mr. Douthitt show that defendant's officers and agents wholly lost their presence of mind when they commenced the repeated acts of loading and unloading of the cattle at Strong City, and that they did not regain their presence of mind until the flood subsided.

In Hutchinson on Carriers, Secs. 187 an 188, the cases of the *Charleston S. B. Co.* v. *Bason*, 1 Harper, 262, and *Campbell* v. *Morse*, 2 Harper, 468, are cited by that author with approval. In the first case, where goods were laden upon a steamboat which grounded from the reflux of the tide, in consequence of which she fell over and the water rose into her cabin and injured goods belonging to the plaintiff, the owners of the vessel were held liable for the loss, because it was held that the master of the vessel was guilty of negligence in not selecting a proper place for the grounding of the vessel or in not removing the goods when he saw that the coming of the water into the cabin was inevitable under the circumstances in which the vessel was placed. He was, therefore, liable for two reasons: (1) because of his negligence in bringing the vessel into the improper place where the danger should have been seen, and (2) because when the grounding had occurred he did not use the proper diligence to save the goods. And in the other case, of *Campbell* v. *Morse*, the carrier undertook to cross a stream between sundown and dark, immediately after a rain, and the wheels of his wagon stuck fast and he was unable to extricate it before the stream rose so as to submerge the body of his wagon and damage the goods. He relied for his defense upon the nature and circumstances of the misfortune as an excuse, although it was proven that the rise was more sudden and higher *than any that had been known to take place in the stream for forty years.* The court held that it was manifest that had he gone through the ford without being stopped the accident would not have occurred. In attempting to cross the stream under the circumstances, he took upon himself the risk of its sudden rise and the consequences.

In this case defendant's officers and agents had no

right to estimate or guess that this flood would be of the same exact height as the flood of 1881, and that it would not go higher.

In Vol. 6, Cyc. Law & Proc., 377, it is said: "The term act of God used to express a cause of loss or damage, for the consequences of which the carrier will not be liable, means some casualty not due to human agency. The terms inevitable accident and unavoidable accident are sometimes used as synonymous with the act of God, but they lack the suggestion that the loss is due to other than human agency and therefore their use is not satisfactory. Indeed, it has been said that act of God is distinguishable from inevitable accident. In the civil law the carrier is said to be excused by *vis major* and also by *casus fortuitus*, but the rule of carriers' liability by the civil law is the same as by the common law, and these terms are not equivalent to act of God. To constitute act of God the casualty must be not only the direct result of natural causes, but one which is in no way contributed to by human agency."

Again, at page 384, the same author says: "It is clear from what has been already said that if the carrier might, by reasonable care or foresight, have avoided loss by act of God or other excepted cause, he will be liable. The duty also rests upon him as far as possible to avoid or lessen the damage resulting from such cause, and negligence in not doing so will render him liable."

In the case of *Strouss* v. *Ry. Co.*, 17 Fed. Rep., 209, l. c., 212, the court in its charge to the jury said: "You will see, then, from the statements of these general principles, that the important question for you to settle from the evidence is whether, after these trunks were received by the baggage master and checked, the flood came so suddenly that under the circumstances the injury could not have reasonably been prevented by the defendant, or its

agents in charge of the trunks, by the use of all possible means. If it could have been done with the exercise of reasonable and proper and all possible means that could be exercised and used by these officers, then the defendant was bound to place the trunks in a place of safety and prevent damage to the goods in the trunks. If, under the circumstances, it could not have been so reasonably and possibly done—with the surroundings of the parties at that time, from the impending flood— the sudden character of the flood—if they could not take care of the goods under these circumstances, then you will be justifiable in saying that they were injured by the act of God; but the theory of that is that the company must use every possible means to prevent the flood from damaging the goods. The general rule is that if goods in the hands of a common carrier are damaged by the public enemy—as in case of the army destroying goods at a depot in the late war—then the law says the common carrier is not to be held responsible for the loss of the goods. And so of sudden floods and cyclones, that render it beyond the power of the company to take care of the goods and protect them. And this question narrows itself down to the fact as to what care this defendant gave, under the circumstances, to these goods that night, in order to save them from injury, and what it did do. If, by the exercise of the means within its control, with all the surrounding as the depot was fixed (the plaintiffs put their trunks there in the depot as it was constructed), and you could not expect the railroad company to make any extraordinary provisions such as were only required on extraordinary occasions, but it would be required to use all the machinery it had around it to make this baggage secure—its officers did all that was possible to be done under the circumstances, then it is not liable; if they did not do that, then it is liable

to this plaintiff for the damages resulting from its failcre to carry these goods safely to Napoleon, and is only to be excused from the performance of this contract by the happening of an act of Providence that they could not avoid."

In the case of *Caldwell* v. *Southern Exp. Co.*, 4 Fed. Cas. No. 2303, p. 1083, decided by the Circuit Court of the U. S. for the Western District of Tennessee, it was held that the carrier is liable if he negligently expose property to capture by a public enemy, in consequence of which it is captured and destroyed. In that case it was held that if the negligence of the carrier concurred with the act of the public enemy the defendant was liable.

In the case of *Tompkins* v. *The Duchess of Ulster*, 24 Fed. Cas. No. 14078a, p. 32, the District Court of the U. S. for the Southern District of New York, in an opinion delivered by Judge Betts, held "that the act of God which excuses a common carrier from liability must be the immediate and distinct result of Providential events, *sudden or overwhelming in their character, which human sagacity of force could not foresee or prevent.*" In that case it appeared that a steamboat loaded in New York for Peekskill sunk in a storm in the North river. The case was one in admiralty. The libelant owners of the cargo proved by the pilot that there was fault and negligence in the management and equipment of the boat and it appeared that the boilers leaked and extinguished the fires, thus disabling the engines from working; also that an ash hole was left open below the deck. The claimants contended that the vessel and cargo were lost on account of the violence of the storm, and denied the allegations of negligence and improper equipment. The vessel was held liable by the court for the loss of the cargo. In the opinion in that case the court said: "In the aspect of the controversy it might be important to

examine particularly this branch of the case, because the rule of law seems explicitly settled that when the loss is produced wholly by natural causes, still if there be the least degree of negligence conducing to it or it arises in any way from human actions or neglect or in combination with such action or neglect, the carrier is not excused. *McArthur* v. *Sears*, 21 Wendell, 190. *Williams* v. *Grant*, 1 Conn., 487. * * * Yet usually the qualification attends that the accident or necessity which excuses a carrier must be the immediate and distinct result of Providential events, *sudden or overwhelming in their character, which human sagacity or force could not foresee or prevent. Forward* v. *Pittard*, v. *Durn.*, and E. 33, 3 Kent Comm., 217." The illustrations Chancellor Kent gives as the summary of the doctrine on this subject are that the carrier is responsible unless the loss has happened by means of lightning, earthquake or tempest.

In this case, as we have seen, the flood was no sudden affair coming like a fire or cyclone, but had been coming on for nearly a month before its climax was reached.

In the case of the *Southern Pacific Co.* v. *Schoer*, 52 C. C. A., 269, l. c. 274, 114 Fed. Rep., 466, the court adjudged that nothing less than such a fortuitous gathering of circumstances as prevents the performance of a duty and such as could not have been foreseen by the exercise of reasonable prudence or overcome by the exercise of reasonable care and diligence constitutes an act of God which will excuse the discharge of a duty." That was a case where the recovery was based upon damage sustained by the plaintiff in consequence of a collision of a train of the defendant. The railway company contended that the collision was due to an act of God. In the opinion of the court in that case by Judge Sanborn is the following language: "But there was nothing in

all this or in any of the evidence of the case to warrant an instruction to the jury that they might find that this collision was caused by an act of God, and nothing less than an act of God would relieve the defendant from the duty of exercising reasonable care in the operation of its trains. The foundation of the rule that the act of God excuses the faiulre to discharge a duty is the maxim *Lex neminem cogit ad impossibilia. If by the use of reasonable care, prudence and diligence under the circumstances of a particular case it is possible to discharge the duty, then those circumstances do not constitute a valid excuse for the failure to perform it. Nothing less than such a fortuitous gathering of circumstances, preventing the performance of a duty, as could not have been foreseen or overcome by the exercise of reasonable prudence, care and diligence, constitutes an act of God which will excuse the discharge of the duty.*"

In the case of *Newport News Co. v. U. S.*, 9 C. C. A., 579, 61 Fed. Rep., 488, the court adjudged that under the Revised Statutes of the U. S., Secs. 4386, 4388, forbidding interstate carriers of animals to confine them more than twenty-eight consecutive hours without unloading for rest, water and feed, unless prevented by storm or other accidental causes, such unloading is excused by unavoidable causes only and therefore not by an accident to a train due to negligence. The language of the Act of Congress considered in that case, "unless prevented from so unloading by storm or other accidental causes," is the same, word for word, as the concluding words of the second paragraph of the contract in this case, which is recited in the opinion of the trial judge in his opinion in this case. In the opinion in that case of the Circuit Court of Appeals for the Sixth Circuit the following language is used: "Congress did not mean that simply because the carrier had encountered

the storm, therefore he must be excused. It must appear that the storm prevented obedience. The storm could not be prevented. Its consequences may be avoided or mitigated by the exercise of diligence. If with all reasonable exertion a carrier is unable, by reason of a storm, to comply with the law, then he has been unavoidably prevented from obeying the law. If, notwithstanding the storm he could, by due care, have complied with the law, then he is at fault because his own negligence is the last link in the chain of cause and effect, and in law the proximate cause of the failure to comply with the law. Therefore, to avail himself of the excuse of storm the carrier must show, not only the fact of a storm, but that with due care he was prevented as an unavoidable result of the storm from complying with the law. We may reach but one conclusion as to the meaning of Congress by the expression, "other accidental causes." If the storm is no excuse unless its unavoidable effect was to prevent compliance, then it follows that no other accidental causes would be an excuse unless that cause and its effect are likewise unavoidable. The meaning of the words "other accidental causes" must be ascertained by referring to the preceding special words.

The rule *noscitur a sociis* is clearly applicable. A storm is unavoidable in the sense that it cannot be prevented. Other accidental causes must be taken to mean other unavoidable accidental causes. An effect attributable to the negligence of the appellant is not an unavoidable cause. The negligence of the carrier was the cause; the unlawful confinement and unreasonable detention but an effect of that negligence."

In the case of *Clark* v. *Barnwell*, 12 Howard, 272, l. c., 280, this court in its opinion said: "And the main question in the case is whether or not the damage in question was occasioned by one of the perils and acci-

dents within this clause of the bill of lading, for the masters and owners, like other common carriers, may be answerable for their acts although no actual blame is imputable to them, and unless they bring the case within the exception, in considering whether they are chargeable for a particular loss, the question is not whether the loss happened by reason of negligence of the persons employed in the conveyance of the goods, but whether it was occasioned by any of those causes which, either according to the general rules of law or the particular stipulations of the parties, affords an excuse for the non-performance of the contract. After the damage to the goods, therefore, has been been established, the burden lies upon the respondents to show that it was occasioned by one of the perils from which they were exempted by the bill of lading; but even where evidence has been thus given, bringing the particular loss or damage within one of the dangers or accidents of the navigation, it is still competent for the shippers to show that it might have been avoided by the exercise of reasonable skill and attention on the part of the persons employed in the conveyance of the goods. For then it is not deemed to be, in the sense of the law, such a loss as will exempt the carrier from liability, but rather a loss occasioned by his negligence and inattention to his duty. Hence it is that although the loss occurs by a peril of the sea, yet if it might have been avoided by skill and diligence at the time, the carrier is liable."

In the case of *Holliday* v. *Kennard*, 12 Wallace, 254, this court, in an opinion delivered by Mr. Justice Bradley, affirmed the rule that when goods in the hands of a carrier are threatened to be destroyed or seized by a public enemy, he is bound to use due diligence to prevent such destruction or seizure. It is not necessary that he should be guilty of fraud or collusion with the

enemy or willful negligence to make him liable. Ordinary negligence is sufficient. In the opinion in that case Mr. Justice Bradley said: "The effect of the charge as delivered was that although a common carrier is not responsible for the destruction or loss of the goods by the act of God or a public enemy, he is, nevertheless, bound to use due diligence to prevent such destruction or loss. *If his negligence or want of proper attention contributed thereto, he would be liable therefor.* * * * Surely the law requires this degree of diligence and would make the defendant liable for the want of it—that is, for ordinary negligence. Whether such negligence was or was not proved, was fairly left to the jury."

In the case of *Gleason* v. *Virginia Midland R. R. Co.*, 140 U. S., 435, l. c., 439, this court, in its opinion, used the following language: "Extraordinary floods, storms of unusual violence, sudden tempests, severe frosts, great droughts, lightnings, earthquakes, sudden deaths and illnesses have been held to be acts of God, but we know of no instance in which a rain of not unusual violence and the probable results thereof in softening the superficial earth have been so considered. In *Dorman* v. *Ames*, 12 Minn., 451, *it was held that a man is negligent if he fail to take precautions against such rises of high waters as are usual and ordinary and reasonably to be anticipated at certain seasons of the year, and we think the same principle applies to this case.*" The recurrence of floods in May and June annually are to be anticipated in both the Missouri and Kaw rivers. But the flood of 1903 in the Kaw river, according to the testimony of both Messrs. Connor and Jennings, was far above the average annual floods from an early time in May, 1903, and its growth was continuous and unprecedented from the start.

In the case of *The Majestic*, 166 U. S., 376, l. c., 386, this court unanimously adjudged that the act of

God which would exempt from liability a common carrier is limited to causes in which no man has any agency whatever. In the opinion in that case the following language is used: "'The act of God,' said Chancellor Kent (Vol. 2, p. 597), 'means inevitable accident without the intervention of man and public enemies,' and again (Vol. 3, p. 216) that 'perils of the sea denote natural accidents peculiar to that element which do not happen by the intervention of man nor are to be prevented by human prudence.'" And *casus fortuitus* was defined in the civil law to be *quod damno fatali contuigit cuivis diligentissimo possit contingere.* It is a loss happening in spite of all human effort and sagacity. The words "perils of the sea" may, indeed, have grown to have a broader signification than the act of God, but that is unimportant here. Shipmen, in the Court of Appeals, quotes from 1 Parsons on Shipping, 255, the definition there given of the act of God, and the reason for it, as follows: "The act of God is limited, as we conceive, *to causes in which no man has any agency whatever, because it was intended never to raise in the case of the common carrier the dangerous and difficult question whether he actually had any agency in causing the loss, for if this were possible he should be held.*"

III.

Upon that branch of the case relating to the question of deviation we submit the following authorities:

In the case of *Crosby* v. *Fitch*, 12 Conn., 410, l. c., 419, 420-423, this question of deviation was discussed and decided. In that case the goods were consigned for shipment in defendant's vessel from New York City to Norwich, Conn., and the usual course of navigation vessels in such cases was by Long Island Sound. The navi-

gation of the sound being interrupted by ice, the vessel made the voyage south of Long Island, where a loss occurred by the goods being thrown overboard in a storm to save the vessel. The court held that the vessel should not have commenced its voyage until the ice had disappeared from the sound; that there was no sufficient necessity for the deviation, and that the owners of the vessel were liable for the loss of the goods. The court, at page 422, places the liability on the ground of contract, holding that the usual and customary route is within the contemplation of the parties when the contract of shipment is made.

On the subject of deviation, see also *Powers* v. *Davenport*, 7 Blackford, 497; *Philips* v. *Bingham*, 26 Ga., 617.

The above case of *Crosby* v. *Fitch*, 12 Conn., 410, and the cases of *Davis* v. *Garrett*, 6 Bing., 716; *Williams* v. *Grant*, 1 Conn., 487, and *Michaels* v. *R. R.*, 30 N. Y., 564, are approvingly cited by this court in the case of *Constable* v. *Natl. Steamship Co.*, 154 U. S., 66.

In the case of *R. R. Co.* v. *Beck*, 125 Pa. St., 620, the court adjudged that when a railroad company, in disregard of a shipper's instructions and of its undertaking, forwards merchandise by steamer instead of by rail, and the merchandise is lost by fire on the steamer, the carrier is responsible for the loss in an action on the cintract, the question of proximate cause as in an action for negligence being immaterial. In that case the court in its opinion says: "If the defendant company, for reasons of its own, saw fit to disregard instructions and forward the cigars by steamer instead of by rail, and a loss resulted, it is too plain for argument the defendant would be responsible for such loss. It is begging the question to say that if the cigars had been shipped by rail as directed a loss might have occurred. In such

case the defendant would have incurred no responsibility."

So in *Phillips* v. *Brigham*, 26 Ga., 617, it was held that "if a common carrier deviates from the regular route and the goods are lost, it is a conversion." In the opinion in that case the court said: *"If the boat took the cotton by agreement, to carry the cotton to Savannah, and instead of going the ordinary route to Savannah went an extraordinary route, and while out of the ordinary route the cotton was lost, that was a conversion."*

In this case the ordinary and usual route, according to all the evidence, for a shipment over defendant's road from Amarillo, Texas, to Atchison, Kansas, was by way of Wellington, Strong City, Emporia, Topeka and Valley Falls to Atchison, and the taking of the cattle from Emporia to Kansas City was a deviation by an extraordinary route not within the contemplation of the parties in making the shipment.

In the case of *R. R. Co.* v. *Cole*, 68 Ga., 623, it was held that "Where goods are delivered to the first of a connecting line of railroads to be shipped to a given destination by a specified route, a delivery by the first railroad to another railroad which forms a part of a different route *is a breach of the contract and a conversion* which renders the first road liable for the value of the goods, and if the goods be delayed by such delivery, or damage result, the first road may be held responsible therefor."

In this case the route within the contemplation of the parties, as evidenced by the endorsements on the back of the contracts of shipment and also on the way bills, was from Amarillo to Atchison over defendant's road, from Atchison to Council Bluffs over the Burlington route, and thence to Evarts, S. D., over the C., M. & St. P. Ry., and the attempt to transport the cattle over

Missouri Pacific railway by way of Kansas City was a conversion.

In the case of *Cassilay* v. *Young*, 4 B. Monroe, 265, the Appellate Court of Kentucky held that the undertaking of a carrier to deliver goods, the dangers of the river excepted, with privileges of reshipment at a particular point, will not authorize a stoppage short of the point designated for reshipment, and if the carrier stops short of that point and the cargo be lost in a storm, the carrier will be held responsible. The vessel of the defendants which carried the plaintiff's goods in that case was sunk in a storm at Paducah. The shipment was destined to Vicksburg, Miss. The court in its opinion in that case says: *"The storm at Paducah was undoubtedly a peril of the river or an act of God for the effects of which the carriers would not have been liable if they had encountered it in the ordinary course of their voyage and of their duty, but as it comes upon them when out of the course of their voyage and of their duty and might probably have been avoided or at least its effects greatly mitigated but for their disregard of their duty and of their contract, we are of opinion that they are liable for the loss."*

In the case of *Sager* v. *R. R. Co.*, 31 Me., 228, l. c., 238, the court held that "a common carrier will be liable for damage to goods resulting from disobedience of the directions given by the owner and assented to by the carrier respecting the mode of conveyance."

In the case of *R. R. Co.* v. *Washburn*, 22 O. St., 324, it was held that a common carrier who undertakes to transport goods over the whole or a part of its own route and then to forward them to a designated destination beyond is bound to transmit, with their delivery to the carrier next on the route, all special instructions received by him from the consignor, and in default there-

of in any material or substantive particular to stand responsible or to make good the loss to which such negligence shall have contributed. In that case a shipment was made from Cleveland, O., destined to Martinsburg, Mo. The shipment was delivered to the Cleveland, Columbus & Cincinnati R. R. Co., which was to carry the goods to St. Louis and deliver them to the North Missouri R. R. Co., on whose line said point of destination, Martinsburg, was situated. The receiving company carried the goods to Columbus, and there delivered the goods to the defendant, Miami R. R. Co. The line of the defendant railroad company composed a part of the line of the initial railroad company. The goods were carried to Cincinnati and were there diverted by being delivered to the Ohio & Mississippi R. R. Co., which did not constitute any part of the line of shipment originally designated, and the goods were consigned to C. A. Scott, a commission merchant at St. Louis. On the arrival of the goods at St. Louis Scott refused to pay the freight charges, and the goods were lost in St. Louis. In its opinion in that case the Ohio Supreme Court said: "A common carrier who receives goods under an agreement to transport them over the whole or a part of its own route, and then to forward them to a destination beyond acts in the two-fold capacity of carrier and forwarder. In the latter capacity alleged negligence in which is the sole ground of controversy presented by this record, he acts as agent of the consignor and as such is bound to transmit with reasonable exactness to the next succeeding carrier the instructions of his principal. If these instructions be without restriction as to the subsequent route, intermediate consignment or mode of transit of the goods, but are in general terms to forward them to a designated destination, he will have discharged his duty as forwarding agent by accompanying their delivery in good order to the carrier of the next usual route of tran-

sit, with the like general instructions in terms sufficiently explicit and unambiguous to inform him of their ultimate destination."

In the case of *Express Co.* v. *Smith*, 33 O. St., 511, the Court there held as follows: "The carrier who undertakes to carry goods over his own road is not responsible for unavoidable delays such as might be occasioned by the destruction of a railroad bridge by a flood, and if such delays occur while the goods are in transit it is thereupon the duty of the carrier to exercise his sound discretion and reasonable diligence in forwarding the goods to their destination. He is not bound to divert the goods from his own to another road over which he has no control, unless in the exercise of such discretion and diligence it appears that a change in route would have prevented the loss attendant upon delay." In that case it was contended by the plaintiff that the injury to the goods while in transit near Utica, N. Y., by reason of heavy rains, could have been avoided if the goods had been transshipped and the shipment deviated either by way of Syracuse of Buffalo, and it was contended that, therefore, it was the duty of the carrier to make such deviation. The Court, at p. 520, respecting this contention, said: "Had the plan suggested been in fact pursued and the peaches transshipped either by way of Syracuse or Buffalo, the delay which would have ensued, together with the rough jolting attendant upon the necessary cartage, would, as it seems to us, have insured their entire destruction. Thereupon the shippers might, with much force of argument, have said: *'We shipped by your route and you had no right to make a deviation. By so doing you subjected our property to unusual delays and risks not contemplated, and loss having ensued, you are responsible. You should have gotten it around the break with all speed, but if that were impossible you*

should have sold it to the best advantage instead of taking a course which must have necessarily led to its entire loss.' "

In the case of *Brown and Haywood Co.* v. *The Pacific R. R. Co.*, 63 Minn., 546, it appeared that the defendent carrier had received the shipment of goods from the plaintiffs to be carried to a point beyond defendant's line, with directions from plaintiffs to deliver them to certain connecting carriers, to be carried to their destination. The shipper made an agreement with the last connecting carrier to have the car containing the goods stopped at two intermediate points on its line and certain portions of the goods delivered to each point; the balance to be carried to the destination to which the goods were billed by the initial carrier. The initial carrier had no knowledge of this agreement and wrongfully sent the goods by a disconnecting carrier, whose line did not reach the place of destination but did reach one of said intermediate points, to which it brought the goods and was proceeding to forward the whole of them to the place to which they were so billed, when plaintiff disclosed to it his contract to have the goods distributed to the three points, and demanded that it be complied with. Before complying with the same, this carrier compelled him then and there to pay the whole freight for the whole route and thereupon delivered him the goods destined to that point, and undertook at his own cost to carry to each of the other points the portion of goods destined to such point. In doing so one package of goods was broken and destroyed. In a suit by the shipper against the initial carrier for the loss, the Court held in that case the initial carrier became, by its wrongful act of diverting the goods from the designated route, an insurer for their safe delivery at the three places of destination, though two of those places were never dis-

closed to it. It was further held in that case that the transaction between the shipper and the carrier to whom the goods were wrongfully delivered did not amount to a delivery then and there to the shipper so as to relieve the initial carrier from his liability. There was a judgment in the trial court against defendant carrier, and on an appeal that judgment was affirmed. In the opinion in the case the Court says: "Appellant concedes that by misconducting the goods beyond the end of its own line the defendant was liable for conversion, and was therefore liable for the safe arrival of the goods at their destination, all of which is undoubtedly good law."

In the case of *Hedricks* v. *Steamship Co.*, 18 La. Ann, 353, the Court held that "where a party selects one ship in lieu of another, whereon to ship his goods, he cannot complain if they are lost, although his bill of lading was made out for that other."

In *Hastings* v. *Pepper*, 11 Pick., 41, it was held that "if a common carrier receives goods directed to be carried in a particular manner and position, he is bound to carry them in that manner and position, and if he carries them otherwise and they are lost or damaged the burden will be upon him to prove that the loss or damage was in no degree attributable to his breach of contract, but was occasioned solely by the act of God or a public enemy or the act or fault of the owner himself. In the opinion which was delivered by Chief Justice Shaw it is said: "As the carriage is a matter of contract, as the owner has a right to judge for himself what position is best adapted to carry goods of this description with safety and to direct how they shall be carried, and as the carrier has the right to fix his own rate for the carriage or to refuse altogether to take the goods with such directions, the Courts are all of the opinion that if the carrier accepts goods thus marked, he is bound to carry the

goods in the manner and position required by the notice. Here it is in evidence and not denied that the box was stowed in such a manner that the marked side was not kept up and consequently the large bottle which was broken by some cause on the passage after it was stowed and before its arrival, bore its weight on its side and not on its bottom, but it is argued that although this fact is evidence of both negligence and breach of contract, still if the loss was not the consequence of such negligence the defendant is not the more responsible on that account. This is no doubt correct, but we are clearly of the opinion that such negligence and breach of contract being proved, the defendant is bound to stand to the loss unless he can prove clearly that the loss was in no way attributable to that cause, or rather, to prove affirmatively and beyond reasonable doubt what was the cause of the loss and that such cause was not attributable in any degree to the negligent disregard of the notice on the box."

In the case of *Proctor* v. *R. R. Co.*, 105 Mass., 512, it appeared that the defendant railway company, whose road ended in Boston, received at a way-station goods addressed to St. Louis, which the defendant company agreed to convey to Boston and forward thence by the Merchants Express, which was a line of transportation from Boston to the West; but instead of delivering the goods to said Merchants Express at Boston, the defendant company forwarded the goods to New York by other carriers, who there delivered the goods to a company styled the Merchants Express & Transportation Co., which conveyed them thence to St. Louis at a cost greater than would have been the cost of their transportation thither by said Merchants Express, and the court held that the company was liable to the consignor of the goods for the difference in cost.

In the case of *Rwy. Co.* v. *Allison*, 59 Tex., 193, the court held that *"if a common carrier deviates from his route or forwards goods by different conveyances than those contemplated by his agreement, he becomes an insurer of the goods and cannot avail himself of any exemption in his behalf in the contract."* In that case the company, in receiving the freight, stipulated against responsibility for damage beyond its own line, but agreed to forward the goods through to Chicago in the cars in which they were loaded, and it was held that by changing the cars after they left the road of the company it assumed the risk of safe transportation of the goods, notwithstanding the stipulation against liability for damage beyond its own line. At page 198 the court, in its opinion, says: *"The exemption from liability is, however, available only where the carrier forwards the goods consigned to him in the manner and by the route with reference to which the contract is made. If he deviates from his route or forwards the goods by different conveyances from those contemplated by his agreement, he becomes an insurer of the goods and cannot avail himself of any exceptions made in his behalf in the contract. Fatman* v. *Cincinnati R. R. Co.*, 2 Disney, 248; *Robinson* v. *Merchants Dispatch Co.*, 45 Iowa, 470. The contractor forwarded the melons in this case through from Galveston to Chicago on the cars in which they were loaded as an entirety. By changing the cars after they left appellant's road the risk of their safe transportation was assumed by its agent, the connecting line, when the change occurred, for the company, and it became liable notwithstanding the stipulation against damage beyond its own terminus. A case in point is that of *Stewart* v. *Merchants Dispatch Co.*, 47 Ia., 229. There goods were delivered to a transportation company at Worcester, Mass., to be taken to Muscatine, Ia., through

without transfer in cars owned and controlled by the company, and the contract contained a clause of exemption against liability for loss by fire. When the goods reached Chicago they were transferred to a warehouse and consumed by fire the same day. It was held that the company were liable for the loss, notwithstanding the exemption."

In the case of *Johnson* v. *R. R. Co.*, 33 N. Y., 610, l. c., 611, the court adjudged that a common carrier in the shipment of goods is bound to obey the instructions of the shipper, and if he disregards instructions and the goods are lost, the carrier is liable for their value; that the disregard of instructions by the carrier is at his own risk. The goods sued for in that case were lost on the passage thereof to New York in a boat that was lost. The goods had been delivered to the railway company at Littlefalls, in Herkimer County, New York, to be transported by the railroad company to Albany and thence forwarded by the People's Line of steamboats to New York City. The railway company, however, did not, in accordance with the instructions, deliver the goods to the People's Line of steamboats at Albany, but delivered them to a line of towboats of another company running between Albany and New York. The court, in its opinion, says: "The defendant undertook to transport the flax to Albany and to forward it thence to New York by the People's Line of steamboats; on the refusal of that line to receive it the defendant's obligation as a carrier ceased, and if it incurred any further liability it was in the character of agent for the owner of the property. In the absence of instructions as to the mode of transportation from Albany, defendant owed no duty to plaintiff beyond the delivery of the property in the usual course of business to safe and responsible carriers for transmission to its destination. *Brown* v. *Dennison*,

2 Wendell, 593; *Van Santvoord* v. *St. John*, 6 Hill, 157. But when the forwarding agent is instructed as to the wishes of his principal and elects to disregard them, he is guilty of a plain breach of duty and when he sends goods in a mode prohibited by the owner he does it at his own risk and incurs the liability of an insurer."

In the case of *Goodrich* v. *Thompson*, 44 N. Y., 324, the court adjudged the following proposition: If any express company contracts to forward goods by a particular steamer, but in fact sends them by a different steamer, and they are lost, the company is liable for the loss. The fact that the specified vessel is withdrawn from the route so that the goods could not be shipped by her does not authorize them to forward by any other usual, customary and proper mode of conveyance. *It is their duty to notify the owner and await instructions.* Forwarding by another vessel being unauthorized, they are responsible for the consequences.

In the case of *Maghee* v. *R. R. Co.*, 45 N. Y., 514, the court adjudged the following to be the rule in this class of cases, namely: When a carrier accepts goods to be carried, with a direction on the part of the owner to carry them in a particular way or by a particular route, he is bound to obey such directions, and if he attempts to perform his contract in a manner different from his undertaking, he becomes an insurer and cannot avail himself of any exception in the contract. In that case there was a judgment in the trial court for the railway company which, on appeal, was reversed by the Court of Appeals. There is a full consideration of the case in the opinion delivered by Judge Andrews, and also of the above proposition adjudged by the court in the case, with the citation of a number of authorities, commencing at page 522 of the opinion.

See also *Hinckley* v. *R. R. Co.*, 56 N. Y., 429.

In the case of *Keeney* v. *Rwy. Co.*, 47 N. Y., 525, the company contracted to transport a quantity of cattle from Goderich to Buffalo. The cattle were sent to Brantford, and there the cars containing them were detached and placed upon a side track, where they could neither be unloaded nor fed and watered, and were left for two or three days, and consequently some of the cattle died and others were injured. The court held that the above was not an act of negligence in the execution of the contract, but an entire and intentional abandonment of all effort to perform the contract for the time, thus constituting a breach of contract, and the defendant was liable.

In the case of *Robertson* v. *National S. S. Co.*, 14 N. Y. Sup., 313, it appeared that the defendant carrier by its bill of lading acknowledging receipt of a quantity of goat skins in good order, agreed to forward them from Havre, France, by a certain steamer to London, to be there transported upon another steamer to New York. Defendant shipped the goods from Havre to Southampton and thence by rail to London, and the court held that this was a deviation from the terms of the contract, which made defendant liable as insurer for damages to the skins from their becoming wet and slimy before their arrival at London, although the cause thereof did not appear, and that the express terms of the contract could not be varied by any usage among shipping men as to routes. The court, in its opinion in that case, used the following language: "The bill of lading expressly provides that the carrier shall not be liable for damage from sweating, inherent deterioration, rain, spray or perils of the sea. From the evidence it is clear the defendant is not liable unless it be for deviating from the terms of the contract in shipping goods to Southampton and sending them from thence by rail to London, instead of for-

warding them by the steamer Wolf direct to London, as provided by the bill of lading. If it was clear that the damage to the skins resulted from their own inherent characteristics and that deviation had nothing whatever to do with their subsequent impaired condition, the deviation might be regarded as of no consequence; but it is impossible to hold that the deviation may not have led to the wet and slimy condition of the skins which was discovered when they arrived at London. *It is not for the court to determine whether the usual and customary route or one prescribed by the consignor is best suited to obtain safety and dispatch. The consignor may select his own mode of conveyance and has a right to require that the contract be fulfilled in the manner agreed. Dunseth* v. *Wade,* 2 Scam., 285. *If it is not so fulfilled the carrier takes all the chances and assumes all the risks, and this is precisely the position in which the defendant placed itself by the deviation aforesaid. How or from what cause the skins became wet and slimy as discovered at London, does not appear. Whether they would have fared different if they had been forwarded by the Wolf direct to London, is left to conjecture. The risk of this cannot be put upon the plaintiff, for defendant took the chances and must now bear the loss.* The contract was to carry the skins to London by the Wolf. This meant direct to London by water and without changes. If that was possible—and it was—the consignor was entitled to have his goods forwarded as he directed, and the failure of the defendant to perform its contract in this regard made it an insurer and responsible for the loss. Hutchinson on Carriers, Sec. 314. The rule is that if a carrier attempts to perform his contract in a manner different from his undertaking, he becomes an insurer for the absolute delivery of the goods, and cannot avail himself of any exceptions made in his

behalf in the contract. Lawson on Contracts, p. 122. *Maghee* v. *R. R. Co.*, 45 N. Y., 514."

In the case of *Seavey Co.* v. *Union Transit Co.*, 106 Wis., 394, it appeared that a railway company received goods consigned to the plaintiff at West Superior, upon a bill of lading providing for their transportation over the company's road in care of a certain steamship company at Buffalo, from which point to West Superior the latter operated a regular line of boats. At Buffalo the railway company delivered the goods to a different steamship company, the defendant, which ran a line of boats to West Superior and Duluth, and which contracted to transport the goods to West Superior on a specified vessel. Defendant had no notice or knowledge of the original transportation contract. For its own convenience the defendant transferred the goods at Duluth to a railway company to be carried to West Superior, and while in possession of such railway the goods were damaged. It was held by the Wisconsin Supreme Court (1) that, except as it constituted the first carrier a forwarding agent, the original bill of lading has no force as between plaintiff and defendant, and its provisions as to the responsibility of an intermediate and forwarding carrier are irrelevant; (2) the delivery to another carrier at Duluth was a breach of defendant's contract, and rendered it liable as an insurer for any injury or loss that would not have occurred had it performed its duty."

In the case of *Ry. Co.* v. *Brichetto*, 72 Miss., 891, it was held that a railroad company having transported vegetables consigned to a northern market to the junction of its road with another road in the same system, and finding that because of a strike they could not be forwarded over that road, instead of sending them by another available route, *without communicating with the shipper, as could easily be done*, diverts them to a south-

ern market where they are sold at a sacrifice, is liable in damages. In that case the railway company had a contract of carriage of the plaintiff's vegetables from Edwards, Miss., to Cincinnati, O. On the freight reaching Meridian, where the goods were to be delivered to the Alabama Great Southern Railroad, called the connecting link, but really a link in the same system of which appellant was a part, it was found impossible to forward the freight over that road by reason of a strike. On these facts the court, in its opinion, says: *"It was the duty of appellant in this unforeseen emergency to communicate with the shipper, if convenient, and take his directions. It was altogether practicable to have notified the shipper in a few minutes, and to have taken his advice, but this the appellant failed to do."*

In this case Mr. Frost, who is one of the plaintiffs, accompanied the shipment on defendant's cars as the representatives of all the plaintiffs, and was never consulted with reference to defendant's movements of their cattle. (Record, pp. 37, 39, 40, 41, 195.)

In the case of *R. R.* v. *Odil*, 96 Tenn., 61, the court there held: A common carrier cannot justify a deviation *en route* upon refusal of a connecting carrier to receive freight on account of a strike, without notice to the shipper and instructions from him, where it appears that the goods could have been held and properly cared for without injuring their safety until such notice had been given and instructions received. It was also held by the court in the case that "A common carrier who unjustifiably substitutes another connecting carrier for the one named in the bill of lading, becomes insurer for the substituted carrier, and is liable for the loss of the goods while in the latter's possession, even by inevitable casualties." The facts of that case as appears from the opinion of the court were as follows: The potatoes of the

plaintiff were shipped from Nashville, Tenn., destined to Chicago. The bill of lading, as well as the proof, showed that the potatoes were routed to go by the Louisville & Nashville Railroad Co. to Evansville, Ind., and from there by the Evansville & Terre Haute Railroad and into Chicago over the Chicago & Eastern Illinois Railroad. When the potatoes reached Evansville they were tendered to the Evansville & Terre Haute Railroad immediately upon their arrival, but that road declined to take them on account of a strike then prevailing on the Chicago & Eastern Illinois Railroad. Thereupon the Louisville & Nashville Railroad Co. delivered the potatoes to the Peoria, Decatur & Evansville Railroad, which had a line into Chicago connecting with the Wabash Railroad at Sullivan, and running into the city over that road. This road at that time was open to Chicago and was as well equipped and as expeditious as the road over which plaintiff had routed the potatoes, and was in no sense inferior. After the potatoes had been delivered to that road and had started upon their transit the strike spread to the Wabash road, and that road refused to receive the potatoes on their arrival at Sullivan, the junction point. The potatoes were thereupon taken back to Peoria and placed in the hands of a warehouse man and sold for the railroad upon the idea and belief that being perishable this disposition was the best for the shipper and other persons concerned. No notice was given to the plaintiff that the Evansville & Terre Haute Railroad had refused to receive the potatoes at Evansville, or that they had been sent over the Peoria road, or that they had been diverted to and sold at Peoria. Plaintiff refused to accept the proceeds of the sale. Based on these facts the court in its opinion, says: "It is insisted in the assignment of errors that under the facts in this case an emergency had arisen which justified a deviation in route, inasmuch as

the one chosen by the shipper was closed by a strike and the other equally good was open. There is no doubt that when, in case of an unforeseen necessity, the safety of the shipment demands a deviation from the route agreed upon with the shipper, it may be made and will be justifiable, as, for instance, forwarding perishable freight by rail when a storm prevents a boat from proceeding upon its voyage; *but where the goods can be properly cared for and held until the shipper can be communicated with, the carrier will not be justified in selecting another route without notice to him and instructions from him.* Ray on Freight Carriers, Sec. 1. Hutchinson on Carriers, Sec. 14. See also *R. R.* v. *Campbell*, 7 Heisk., 261. *Unless justified by urgent circumstances a deviation by the carrier will render it responsible for losses resulting even from inevitable casualties, and the original carrier becomes in effect an insurer for the line he selects.* Ray on Freight Carriers, Sec. 79. Hutchinson on Carriers, Sec. 314. *It clearly appears in this case that the plaintiffs could have easily been consulted by letter or wire and their instructions taken, when it was found that the route selected was closed at Evansville, and the shipment safely held in the meantime; and failing to do this, the defendant road must be held to be liable for any injury resulting from the substituted route."*

The case of *Merchants' Dispatch Tr. Co.* v. *Kahn*, 76 Ill., 520, illustrates the principle of liability in cases of deviation in transit. In that case the goods were shipped from Worcester, Mass., for Matoon, Ill., as the point of destination, and the usual course of carriage and transit was by way of Indianapolis and not by way of Chicago, but in that case the carrier took the goods to Chicago and stored them in a warehouse, where they were destroyed by the great Chicago fire; the court held on those facts that the carrier was liable for the loss.

In Vol. 1, Am. & Eng. Enc. Law (2d Ed.), 594. the author uses the following language: "Thus it has been held that although a hard frost may be considered an act of God, yet damages to goods on board a steam vessel by the leaking of a pipe which was burst by the frost is a loss for which the carrier may be held liable, and if a cargo is injured by a storm at sea during a deviation from the usual course by the master of the vessel, it has been maintained that the deviation is a sufficient proximate cause of the loss to enable the freighter to recover."

In Vol. 5, Am. & Eng. Enc. Law (2d Ed.), 422, 426, the author on this subject of deviation says: "The carrier is liable for any loss occurring in the course of a deviation from its proper route or from the instructions of the shipper as to other matters, no matter from what immediate cause the loss may arise. It has been urged with much force that the very fact of a deviation ought not to affect the carrier's liability unless it be shown further that such fact contributed in a direct way to cause the loss, *but the rule has been strictly adhered to that the shipper is bound only to prove a deviation and the loss in the course of it; upon such proof the carrier is liable unless it can be clearly shown that the loss would have occurred had there been no deviation. * * * In cases of emergencies which justify a deviation and when the owner's consent might fairly be presumed, the carrier may act in contradiction or modification of the letter of his instructions, but in all such cases should give notice to the owner, as soon as practicable, of what has been done.*"

In Hutchinson on Carriers, Secs. 190, 191, the subject of the liability of the carrier in cases of deviation is fully stated. In Section 190 of that work the author says: "*So if the carrier deviate without necessity from*

the regular and usual course, he will be held responsible for any loss which may occur, whether by the act of God or from any other source, and it will not be competent for him to show that had he gone the usual and customary route he would, in all probability, have encountered the same danger with the same consequences, nor would it avail him that had he done so the same misfortune would beyond a reasonable doubt have overtaken him."

In Lawson on Bailments, Sec. 127, the rule in cases of deviation is stated thus: "Loss by act of God after deviation. Deviation is the voluntary departure from the voyage or route without necessity or reasonable cause. Necessity can alone sanction it in any case, and then it must be strictly commensurate with the *vis major* producing it. *If a master deviates from the usual course of his voyage and damage is caused by a tempest in itself the act of God, the proximate cause of the loss is the wrongful act of the master, and he is responsible for it. The same rule applies to carriers by land.* If the carrier has agreed to send goods by land and he sends them by water, or if he has agreed to carry them by canal and he takes them out to sea, and they are lost by an act of God, he is liable. So, if he agrees to send them by one line of boats and sends them by another, or if he agrees to send them by steam and he sends them by sail, the burden of showing a necessity for the deviation rests upon the carrier, and the necessity must be real and not merely apparent. If the deviation is one for the convenience of the carrier, he assumes the risk for any loss that may occur and becomes an insurer at all events."

In 6 Cyc. Law & Proc., 383, 384, the author uses the following language: "If the carrier, in transporting the goods, unnecessarily deviates from the usual and

ordinary route contemplated in the undertaking, he will be liable for any loss occurring during such deviation, although such loss is within the recognized exception to the carrier's liability. Indeed, it is said that in departing from the established route the carrier is guilty of misfeasance and is liable for the value of the goods on the theory of conversion. The carrier is equally liable where, having expressly contracted for a particular route, mode or manner of transportation, he transports goods otherwise than as stipulated and they are lost or damaged. Thus if the carrier leaves goods at a point short of their destination he becomes absolutely liable for loss or injury. It may become necessary for the carrier, by reason of some emergency not contemplated at the time of shipment, to change the route or method of transportation, and, if so, he will not be liable for subsequent loss or injury for which he is in general not responsible by law or contract, but if it is practicable in such case without risk to the goods, to notify the shipper, the carrier should do so rather than to depart from the terms of the contract, and await further directions. There is some uncertainty as to whether, when a deviation from the usual or stipulated route or method of transportation is shown, the carrier may excuse himself by proof that subsequent loss or damage, for which he would not but for the deviation have been liable, would have occurred had there been no deviation, but at any rate it is incumbent on the carrier to clearly and satisfactorily establish that fact, which usually he will be unable to do."

In the case of *Marsh* v. *Union Pacific R. R. Co.*, 9 Fed. Rep., 873, the United States Circuit Court for the District of Colorado held that when goods are sent, not according to the contract with the owner, but by some other route, there is no lien for freight money.

In the case of *Ins. Co.* v. *LeRoy*, 7 Cranch., 26, this court passed on this question of deviation in an insurance case. In the opinion in that case the court said: "The discharge of the underwritetrs from their liability in such cases depends, not upon any supposed increase of risk, but wholly on a departure of the insured from the contract of insurance. The consequences of such violation of contract are immaterial as to its legal effect as it is *per se* a discharge of the underwriters, and the law attaches no importance to the degree in cases of voluntary deviation. Necessity alone can sanction a deviation in any case, and that deviation must be strictly commensurate with the *vis major* producing it."

In the case of *Hostetter* v. *Park*, 137 U. S., 30, l. c., 40, this court, in its opinion, said: "A deviation is defined to be a voluntary departure without necessity or reasonable cause from the regular and usual course of a voyage in reference to the terms of a policy of marine insurance, but it is no deviation in respect to such a voyage to touch and stay at a port out of its course if such departure is within the usage of the trade." In the case at bar the question of usage does not arise, because there is neither evidence nor pretense of any usage that shipments of cattle from Texas to Atchison may be deviated away from the main line across the Kaw at Topeka to Kansas City.

In the case of Constable v. *Steamship Co.*, 154 U. S., l. c., 61, *this court, in its opinion, says: "In the law we may deem a deviation as defined to be a voluntary departure without necessity or any reasonable cause from the regular and usual course of the ship insured.* 1 Bouv. Law Dict., 417. *Hostetter* v. *Park*, 137 U. S., 30, 40. *Davis* v. *Garrett*, 6 Bing., 716. *Williams* v. *Grant*, 1 Conn., 487. *As for instance, where a ship bound from New York to Norwich, Conn., went outside*

of Long Island and lost her in a storm. Crosby v. *Fitch,* 12 Conn., 410. *Or where a carrier is guilty of unnecessary delay in pursuing a voyage or in the transportation of goods by rail. Michaels* v. *N. Y. Central R. R.,* 30 N. Y., 564.

In *Express Co.* v. *Kountze Bros.,* 8 Wall., 342, the express company received from defendants in error a quantity of gold dust for transportation from Omaha to Philadelphia, and in its receipt stipulated that it should not be liable "for any loss or damage by fire, the acts of God, or the enemies of the government, mobs, riots, insurrections, or pirates, or from any of the dangers incident to a time of war." There were two routes over which the property might be sent; one through the state of Iowa and the other by way of St. Joseph, and by railroad across the state of Missouri. The former was the safest by reason of the disturbed conditions of Missouri on account of the war then in progress; the latter route was the more expeditious, though the more hazardous. Plaintiffs, so one of them testified, notified the company's agent not to send the gold dust by the St. Joseph route. The company, nevertheless, did so, and the gold dust was lost by robbery while in transit through Missouri. The court said (p. 353): "If this testimony be true, it is hard to conceive a case of grosser negligence, for here were two routes—the one safe and the other hazardous—and yet the express company, in definance of the wishes of the owner of the property, rejected the safe and adopted the hazardous route. *Carriers of goods cannot escape responsibility if they behave in this manner, for they are required to follow the instructions given by the owner of property concerning its transportation whenever practicable."* Judgment against the express company was affirmed.

In *L. & N. R. R.* v. *Duncan,* 34 So., 988, s. c. 137

Ala, 446, a car of mules were delivered to the railroad company for transportation from Birmingham, Alabama, via Montgomery, and thence over the Plant system to Greenville, Florida. No one for the shippers accompanied the shipment. On arrival at Montgomery the Plant system refused to take the shipment, and the company, without communicating with the owners, forwarded the car by another and much longer route, whereby the owners claimed damages to the shipment. Judgment for the plaintiffs was reversed and the cause remanded for a new trial, not because there was no case, but because of the insufficiency of the petition, but the court said (p. 990): "On the state of facts existing with reference to this consignment, after the car had reached Montgomery, and the Plant system had refused to accept it for carriage to Greenville, * * * *it was defendant's duty to give notice of that fact to the consignors, to the end that they might give further directions as to routing the consignment, unless the property was of such perishable nature as that the time necessary to give such notice and to receive such instructions would have caused a delay in forwarding calculated to injure or destroy it.* * * * *Live stock is, of course, perishable in a general sense; but we apprehend that horses and mules released from the car and in a pen at Montgomery, as these were, were in no danger of perishing while the defendant was communicating with the consignors at Birmingham, and receiving their reply.* It seems clear to us, also, that the parol evidence as to the consignors having given direction for the consignment to go from Montgomery by the Plant system, did not tend to vary or contradict the stipulations of the bill of lading, and that the evidence received on this subject, if believed by the jury, established the fact that the consignors directed the transportation to be over the Plant system."

In *Gulf C. & S. F. Ry.* v. *Irvine,* 73 S. W., 540 (Tex. Civ. App.), the court said: "The facts in this case show that appellees demanded that their cattle be shipped over appellant's line from San Angelo, Texas, to Brownwood, Texas, and thence over the line of the Fort Worth & Rio Grande Railway. This the appellant refused to do, and routed the cattle over its line by way of Temple and Cleburne, a distance of 115 miles further than by the route desired by appellees. The shipper usually has a right to select the route over which his goods are to be shipped, *and the carrier will be held liable for all damages resulting from a deviation from the route selected by the shipper.*"

On this point, as to deviation of the shipment without the consent of the shipper, the decision of the supreme court of Texas delivered May 15th, 1907, in *Texas & Pacific R. R. Co., et al.* v. *Easton & Knox,* 102 S. W. Reporter, p. 105, is recent, and as we conceive, authoritative. In that case the shippers, Easton & Knox, sought to ship cattle from a point in Texas to Tulsa, in the Indian Territory and informed the agent of the initial carrier that he wished the shipment made via Fort Worth, Texas. The contracts were written out routing the property via Paris, Texas, to which the shipper objected; and on being informed that the shipment could not be routed otherwise than via Paris, he signed those contracts.

On the trial, it developed that the agent's statement was not true; that they could have been routed via Fort Worth and also via Sherman, Texas, and the trial court found, under the facts which are more fully stated in the appeal of the same case, reported in 92 S. W., 832, 15 Tex. Ct. Rep., 642, that those contracts were obtained by duress and deception, and held them invalid and considered the case from the standpoint of the shipper's

desire and direction to the carrier to route the shipment via Fort Worth. The question of the legal effect of the deviation of the shipment by the carrier was distinctly raised in that case as it is in this, with this difference; that in this case there was no question between the shipper and carrier as to the route and there is no question of fact here as to the admitted deviation from the route contemplated by the parties. The court says (page 106):

"It is elementary law that if a carrier deviates from the route fixed by his contract, he becomes responsible for all loss which occurs either on his own or his connecting lines. By the deviation, he becomes an insurer of the goods. It is also settled that when goods are delivered to a carrier for transportation to a designated point, it is his duty as a general rule, to transport them by the safest and most direct route. If being instructed as to the route he selects a different one, he becomes responsible for any loss that may occur in transit."

On page 107 of the opinion, and referring to other assignments of error, wherein the railroad company contended that the court below had made findings unsupported by the facts, the immateriality of those questions is disposed of as follows:

"As already intimated, we are of the opinion that by refusing to ship the cattle as directed by the plaintiff, the Texas & Pacific Railroad Company became responsible for all damages which accrued from the shipment."

It appears from the case that the most of the injury to the cattle occurred while they were in the custody of the St. Louis & San Francisco Railroad Company, the connecting carrier, to which they were delivered by the initial carrier, and that the initial carrier asked and obtained in the proceedings, a judgment over in its favor against the St. Louis & San Francisco Railroad Company of which the latter road complained. Both roads had

been sued in the case. On this point the court again says:

"The St. Louis & San Francisco Railway Company were responsible to the plaintiff for all damages which occurred to their cattle by reason of its negligence, while in its hands, notwithstanding the liability of the initial carrier for the same loss. The Texas & Pacific Railway Company having become an insurer of the cattle after they were delivered to its connecting carrier, when it was adjudged to pay for the negligence of the latter, it was subrogated to the rights of the plaintiff, and had the right to be reinbursed for what it was required to pay on account of the negligent conduct of the St. Louis & San Francisco Railway Company."

In this connection we again call the court's attention, as we have heretofore done, to the fact that neither the trial court in this case nor the court of appeals in its opinion, considered or decided the question of the legal effect of the railroad company's action in deviating the cattle to Kansas City without the consent of the shipper, from the contract route of shipment. In both courts we sought to collate and present all of the decisions on this question of law. In both courts we urged the importance and conclusiveness of this question; in both courts we emphasized and called attention repeatedly to the fact that plaintiff's asserted the liability of the railroad company, first, on the ground that it became absolutely liable for what happened to the shipments after their deviation from the regular contract route; and second, and independently, for the damage resulting from the various negligent acts of the defendant railroad company, which are assigned in the pleadings.

Neither court considered the question of deviation; the trial court in its opinion herein cited (135 Fed., p. 142), merely refers to it by saying he had no doubt of the right of the railroad company, under the circum-

stances, to make the deviation; the court of appeals, in its opinion, does not refer to the question at all.

If we are right in the position we have all along taken as to the law of the deviation of shipments by a common carrier, even the question of practice on which the court of appeals divided, and to which alone the majority and minority opinion are directed, would be entirely immaterial for the reason that it does appear from an examination of all the authorities, that under the undisputed facts in this record, the defendant railroad company is absolutely liable to these plaintiffs, by reason alone of the deviation of the shipment.

IV.

We submit, in conclusion, that the defendant should by this court be held liable to plaintiffs for their demand herein, both on the grounds of deviation and negligence and that the judgments of both courts of appeal and circuit court should be reversed, and the cause remanded to the trial court with directions to grant a new trial.

Respectfully submitted,

JAMES S. BOTSFORD,
B. F. DEATHERAGE, AND
O. G. YOUNG,
Attorneys for Petitioners,
Empire State Cattle Co. et al.

R. E. BALL,
Attorney for Minn. & Dakota Cattle Co., Petitioner.

THE MINNESOTA AND DAKOTA CATTLE COMPANY, *Petitioner*,
vs.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY.

No. 179.

STATEMENT.

As shown by the petition (Rec., 5-11) this is an action to recover the sum of $42,621.37 damages alleged to have been suffered by the plaintiff by reason of the defendant's wrongful conduct and negligence as a common carrier for hire, of freight, consisting of three train loads of live stock belonging to the plaintiff, two trains being shipped from Kenna in the Territory of New Mexico, and one from Bovina, in the State of Texas, all to be transported over the line of the defendant's railroad to Atchison, Kansas, thence by the Kansas City, St. Joseph & Council Bluffs, or Burlington route, to Council Bluffs, Iowa, thence by the Chicago, Milwaukee & St. Paul Railroad to Evarts, South Dakota. The allegations of the petition are substantially identical with those contained in the petition filed in the preceding case. The essential specifications of the respects in which the defendant was guilty of wrongful and negligent conduct and violation of its duty as a common carrier, whereby plaintiff's loss was sustained, are the same in both cases. Briefly the history of the movement of the three train loads of cattle in controversy in this case is as follows:

Stuebe (Rec., 385, *et seq.*) testifies: The cattle were bought in Texas by the plaintiff Cattle Company about

April 20, 1903. The first train load, of 21 cars, left Kenna, New Mexico, by the Pecos Valley Railroad Monday, May 25, between five and six o'clock p. m. The second train load left Kenna, Tuesday, the 26th of May, between six and seven o'clock p. m. and consisted of 22 cars, 3 cars of which train were dropped at Amarillo, Texas, and the train went on with 19 cars. The third train load, from Bovina, Texas, consisting of 17 cars, picked up the 3 cars at Amarillo, making 20 cars in that train. This train left Bovina, Texas, between nine and ten o'clock p. m., Tuesday, May 26th. The three train loads comprised 2293 head of cattle. Both Kenna trains were ahead of the third train from Bovina, which was personally accompanied by the witness Stuebe, who was personally interested in the plaintiff Company and its representative. The other two trains were also accompanied by representatives of plaintiff, the owner. The Bovina, or third train, reached Wellington, Kansas, between six and seven o'clock p. m. Wednesday, May 27th, and the cattle were there unloaded and fed. This train left Wellington between seven and eight o'clock a. m., Friday, May 29th, having been held there by the defendant about 36 hours. Its next stop was at the Kansas City Stock Yards, where it arrived between six and seven o'clock a. m. Saturday, May 30th. The first train from Kenna, which had started from that station, as stated, Monday, May 25th, between five and six o'clock p. m. and the train load of the Empire State Cattle Company, in controversy in the preceding case, arrived at Kansas City at the same time, Saturday morning, May 30th. The second Kenna train, which started from Kenna, as stated, the evening of May 26th arrived in Kansas City Friday evening, May 29th (p. 387). This train started 24 hours later from the point of shipment, and arrived at Kansas City 12 hours sooner than the first Kenna train.

Witness Welsh, plaintiff's ranch foreman (p. 348), had charge of and accompanied the first train shipped from Kenna on Monday, May 25th. His first stop was made also at Wellington on the evening of the 26th, between ten and eleven o'clock. He requested to be loaded out next morning at five o'clock, the 27th, but was not loaded out until the evening of the 27th about seven o'clock. The train ran that night to the first station beyond Strong City and then was taken back to Strong City and unloaded there about daylight on Thursday, the 28th. It also was detained at Strong City all of the 28th, and was re-loaded Friday morning, the 29th, leaving Strong City about noon on that day, and arrived at Kansas City, as stated, Saturday morning, May 30th (p. 349). This witness states that the 20 cars in his train got all necessary feed at Wellington, Kansas, but only got one bale to the car at Strong City. He saw Mr. Frost, of the Empire State Cattle Company and both the trains of that company at Strong City. In other words this train of cattle and the train of the Empire State Cattle Company, which was in charge of the witness Cloyd (Rec., preceding case, p. 31), which went on to its destination and missed the flood, and the train in charge of Frost in controversy in the companion case, were all three at Strong City at the same time. The train in charge of Cloyd was sent on and reached its destination in safety, the two trains in charge of Frost, for the Empire State Cattle Company, and Welsh for the Minnesota & Dakota Cattle Company, were not sent on from Strong City until about noon on Friday, the 29th, when they were hauled as one train to Kansas City, reaching there, as stated, Saturday morning, the 30th. The train load belonging to this plaintiff, which arrived at Kansas City Friday night, and the two train loads belonging to this plaintiff and the one train load belonging to the

Empire State Cattle Company, which arrived Saturday morning, were all unloaded in the Kansas City Stock Yards and placed in what is known as the Shipping Division of the Yards. From that time on, the history of the cattle belonging to both plaintiffs in these cases, is identical. The statement in the preceeding case, of the history of the flood of 1903 in the Kaw River, the details there given of the conduct and misconduct of the defendant in the movement of these cattle, it is unnecessary here to repeat. The acts and omissions, on the part of the defendant, complained of, are precisely the same, and everything in that regard that is there said applies with equal potency in both cases. About one fact, which we regard as of vital importance, there can be no doubt, and that is, all of these trains were originally routed from their respective stations of shipment by way of Amarillo, Texas, thence by the defendant's main line to Atchison, and thence by the Burlington north. The court in its opinion says, as to this fact (p. 647): "The way-bills upon which the cattle were shipped, and other evidence, discloses that the cattle were, by the initial carrier, routed over its line to Amarillo, Texas, thence over the defendant's line of road, by way of Wellington, Strong City and Topeka, to Atchison, Kansas, thence over the Burlington road to Council Bluffs, Iowa, and from thence to point of destination over the Milwaukee railroad."

In addition to the way-bills (p. 125) sustaining this statement of fact as to the original routing of the cattle, the shipping contracts attached to defendant's answer in both cases, although the court says that they themselves did not specify the route, show by their endorsements (p. 19) of "Kenna, N. M., to Atchison, Kan." and "Bovina, Tex., to Atchison, Ks." what the route was; and the bond attached as an exhibit to defendant's answer in this case (p. 19), on which defendant grounded a cross

action for the recovery of the expenses incurred at Kansas City and in the subsequent pasturage of the cattle, taken and accepted by the defendant July 9, 1903, recites that this plaintiff shipped the three train loads of cattle mentioned, "all of said shipments to be transported over the line of the Atchison, Topeka & Santa Fe Railway Company, or its connections, as shown by the stock contract, to Atchison, Kansas, and thence forwarded to Evarts, South Dakota, the point of destination." Whatever, therefore, the legal effect of defendant's act in bringing these cattle to Kansas City, the unquestionable fact is that it deviated the shipments from the line of transportation selected and determined between the parties at the time the shipments were made, and of their own motion and without the consent of the plaintiff, or its representatives in charge of the cattle, and without consultation with them or any of them, hauled the cattle to Kansas City and unloaded them off of the main line at a point where it was never contemplated they should be. Nearly all of the facts alleged in the petition in regard to the negligence of defendant are, as the court in its opinion says (p. 645) practically undisputed. It is practically undisputed that these cattle were detained by the defendant company at Strong City and Wellington for a length of time more than sufficient for them to have been fed and watered and safely transported to Atchison before the flood interrupted traffic on defendant's main line. The last train, according to the testimony heretofore cited, crossed the Kaw River at Topeka on Friday morning, the 29th of May, and reached Atchison safely. One train load of the Empire State Cattle Company's cattle which was, as stated, at Strong City at the same time that part of the plaintiff's cattle and the remaining train of the Empire State Cattle Company were there and ready to be shipped, went through to its destination in safety. Indeed, the court says (p. 652):

"It is true that if this delay had not occurred and the cattle had been promptly forwarded to and through Kansas City (Atchison?) they would not have been caught in the flood at Kansas City."

We, therefore, take the fact of the negligent and unnecessary delay on the part of the defendant as being established. It is an undisputed fact, also, that these cattle were in a safe place until they were brought into the Kaw valley and placed in the Kansas City Stock Yards near the mouth of that river, and at the lowest point in the valley. And again the court says (p. 652): "If they had been kept at such points until the flood had subsided they would not have been injured as they were at Kansas City."

The Court's attention has already been extensively called to the history of the flood and the situation of the defendant's railroad, and of its officers who directed and manipulated the movement of these trains. For brevity, and because the graphic delineation of that situation can not be improved, we will not attempt to go over it in detail. The fact that the flood conditions in the Kaw River and its tributaries began some time prior to the defendant's receipt of these cattle for transportation; the fact that that stream had, for weeks before the climax of the flood, been constantly rising; the fact that the defendant's General Offices were located at Topeka and its officers managing the traffic of its road were in constant and intimate touch with the situation; the fact that when Superintendent Hurley assumed the responsibility of ordering these train loads of cattle to come forward to Kansas City on Friday, May 29th, he knew at that time that defendant's line from Topeka to Kansas City, and from Topeka to Atchison, was impassable; the fact that he knew at that time that his order could not even be obeyed without hauling the trains by way of Olathe over the

Frisco tracks;—all these facts are practically undisputed.

The cattle having arrived in Kansas City, and being placed in the pens of the Shipping Division, the defendant did nothing toward getting them out to a place of safety. Kendrick, Live Stock Agent of the Burlington (p. 283), was ready to take the cattle out before any of them had arrived, and on Friday afternoon he went to the Santa Fe office to arrange to take the cattle out, but was told they were routed by the Missouri Pacific.

A rough sketch of the situation of the Stock Yards, with reference to the Kaw River, will be found on page 235 of the record. The office, at that time, of defendant's local Live Stock Agent was at Argentine. When Kendrick went to the defendant's office in the Exchange Building to arrange about taking the cattle out, the person in charge, at his request, confirmed by 'phone from the Argentine office, his statement that the cattle were routed by the Missouri Pacific. Kendrick, it seems, was even then afraid to credit the statement that his road was not to take the cattle, and satisfied himself by speaking to defendant's Argentine office over the 'phone, and in that conversation he was told the same thing. (p. 286). The Burlington had plenty of cars and equipment. Its loading chutes were in the south end of the Stock Yards just opposite the pens marked "Shipping Division," where the cattle were located, and south of the Exchange Building. These loading chutes and pens in the Shipping Division were on the highest ground in the Stock Yards. The loading chutes of the Missouri Pacific were quite a distance north of the Exchange Building and located at the lowest part of the yards. The Santa Fe office was advised by the Missouri Pacific office, as early as nine o'clock Saturday morning, that the latter road could not take these cattle. Mr.

Douthitt, General Live Stock Agent of the Missouri Pacific, whose special province and business it was to make arrangements of this kind, and who, the testimony conclusively shows, was the highest authority in the matter, of any agency of the road at Kansas City, testified (p. 267 *et seq.*) that the first he heard of the cattle being in Kansas City was about 8:30 Saturday morning, May 30th, at which time the Santa Fe agent first spoke to him about taking them out. He says (p. 272): "We told them we would not have the power to handle that many trains of cattle without notice; that the indications were we could not get them out under any circumstances. We would make an effort, if the water was not any higher by noon, to load one train that day." Yet, with this distinct and emphatic notification that the Missouri Pacific could not take the cattle, the defendant allowed the opportunity offered by the Burlington to pass, and there is no proof that they even applied to the Burlington, or made any effort to have the cattle taken out. That the Burlington could have taken them any time on Saturday is apparent from Kendrick's testimony, and from the fact that that road having its loading chutes near the Shipping Division in the highest part of the yards, as stated, shipped out a train load of 35 cars of cattle as late as six o'clock Saturday evening. (p. 289, 290).

Defendant had no arrangement with the Missouri Pacific to take these cattle at Kansas City. The statement of the trial court (p. 648) that it had is a mistake. If anything was needed to establish this fact, other than the clear and unequivocal testimony of the only official with whom that arrangement could be finally made at Kansas City, general live stock agent Douthitt, it is not lacking. The list of telegrams (pp. 179-195) is indeed a tangle of wires and they are not rendered more intelligible by their want of chronological order and

the failure to enter on many of the copies produced the hour and minute of their sending and receipt. But from these telegrams it is apparent that no arrangement was arrived at with Missouri Pacific to take the cattle at Kansas City. H. H. Clark, local superintendent at Atchison seems to have thought on Thursday, the 28th, that his road, the Missouri Pacific, would get 142 cars (including the cattle in question) from defendant at Kansas City. He wires Supt. Hurley 7:36 *a. m.*, 28th, (Thursday) (p. 188) "Will accept 42 cars stock Kansas City for Sioux City and Evarts S. D. *with distinct understanding your line will accept all responsibility and pay all claims* that may arise by reason of delays due to high water. * * * *Stock will not move unless above accepted.*" Later, same day, 7:57 *p. m.* (p. 188), he wires "Cannot accept 100 additional cars stock at Kansas City until further advised." Then still later, same day, he wires, 9:52 *p. m.* (p. 189) "Will accept the stock at Kansas City. Advise when you will deliver the 100 car lot." *These are all the wires from Clark on Thursday, 28th, between 7 a. m. and 10 p. m.* It was doubtless these dispatches which lead the Court to so confidently assert that it was arranged with the Missouri Pacific to take the stock at Kansas City. But see what Mr. Hurley was doing on the 28th. He wires General Supt. Burlington, St. Joe (188) "We have 142 cars stock for you destined Sioux City, Iowa, Evarts, S. D. and Stair, Canada. Can you not accept this at Kansas City and handle it through." Burlington answers (p. 189) same date: "Mr. Barnes of the Burlington wires at 6:10 p. m. Expects to have washout at Hamburg repaired by 3:30 p. m. today and if no further trouble can handle business over K. C. road as usual. At 7:26 p. m. he wires, yes, can handle stock for Evarts, S. D. Kansas City to Council Bluffs." *Then same day Hurley wires*

his superintendent at Topeka, McLellan: "I have told Fox to load stock held at Strong City and Wellington which amounts to 100 cars. *K. C. St. J. & C. B. now advise us they are open and can accept it.* If anything arises so they cannot accept it before it reaches Kansas City deliver to Missouri Pacific." He also wires Clark same day (28th) answering the latter's proposition of conditional acceptance: "The stock goes to you on revenue basis, is not detoured, therefore cannot accept any responsibility. We loaded it on your previous acceptance and have it in transit. Will you protect at Kansas City?" To this, as seen above, Clark replied by his wire of 9:52 p. m. that he would accept stock at Kansas City and asking when the 100 car lot would be delivered.

Now note what Mr. Hurley had accomplished on this 28th day of May. He had made a definite and distinct arrangement with Clark for the Missouri Pacific to take the 142 cars of stock at Kansas City. Clark, it affirmatively appears from Douthitt's testimony, had no authority, as superintetndent at Atchison, to make the arrangement, but he did make it and could doubtless have had it ratified. *Mr. Hurley also had made on this same day a definite arrangement with the Burlington general superintendent for that road to take these same* 142 *cars of stock at Kansas City.*

He seems strangely determined to get this hundred thousand dollars' worth of cattle over or into the swollen and constantly swelling Kaw, if it took two connecting carriers to do it. The first 42 cars of the 142, *which he had promised both roads,* were delivered to Burlington. So Clark, Friday, 29th (p. 192), in an offended sort of tone wires: "All arrangements made to handle the 142 cars cattle. Am now advised first 42 cars delivered Burlington. Advise. Also inform me in regard to other

100 cars. When will it be delivered?" This Hurley seems not to have answered and Clark wired him again, 9:14 a. m., Friday (p. 194). "We are holding crews at Kansas City to protect stock. Am now advised you turned the 43 cars over to Burlington. *Can you say if we will get the* 100 *cars? If not, wish to turn the crews back at Atchison.* Please answer quick." Let it be particularly noted what defendant's general superintendent did with this opportunity to have these cattle transported out of this perilous valley into which he was bringing them. He threw it away. Defendant had already broken faith with Clark by turning over to the Burlington nearly one-third of the cars which he had prepared to take, and it was natural and essential that he should desire to save his road the trouble and expense of having crews and equipment on hand to receive the cattle, if he was to be fooled a second time. This is Mr. Hurley's answer (p. 194): "Your wire in regard stock. 19 cars will reach Kansas City about 1:30 p. m. today. Balance of it will reach Kansas City late this evening or tonight. *Cannot give you correct figures on it now, but will do so as early as possible.*" He never did so. This is the last word of the defendant to the Missouri Pacific until it took the mattter up with Mr. Douthitt, Saturday morning the 30th, about 8:30, when they were told that Missouri Pacific was not prepared to take the cattle. Of course it was not. Hurley, in reply to Clark's pointed request, twice wired to know if he would get the 100 cars, does not even tell him he can have the 19 cars expected in Friday afternoon, but says, "Cannot give you *correct figures* on it now, but will do so as early as possible." All this fully explains why Kendrick, the Burlington agent, went to the Santa Fe office Friday afternoon to arrange for taking out the expected cattle. There had been no disturbance or violation of the agreement made Thurs-

day the 28th with the Burlington through its general superintendent at St. Joe to take out the 142 cars. All of these that had arrived, 42 cars, it had received and transported. The balance were coming and Kendrick was on hand ready to receive them. But is it not incomprehensible that defendant, after having thrown down Clark, should fail to avail itself of the chance which was at hand of having the Burlington take the cattle out? Why should the Santa Fe office tell Kendrick that Missouri Pacific was going to take the shipments when it was not, and Mr. Douthitt had distinctly so told defendant's agents as early as 8:30 that morning? The explanation is not far to seek. Mr. Hurley had wired Clark: "Cannot give you *correct figures* on it now." Were there any *figures* about it except that there were 100 cars of stock which "will be in this evening or tonight? There were. Mr. Mullen, president of plaintiff, says (p. 408) that the through freight contracted to be paid was $111.00 per car from Kenna to Evarts, and $100.00 per car from Bovina to Evarts. Mr. Brown, chief clerk live stock department of the Santa Fe, testified (483) that under the general rule a certain portion of that $111.00 per car and $100.00 per car would go to the Santa Fe for hauling to Atchison, and a certain other portion to the Burlington for hauling from Atchison to Council Bluffs, and a certain other portion to the Milwaukee for hauling from Council Bluffs to Evarts; that (486, 487) under the general rule, the haul from Atchison to Council Bluffs not being the same as from Kansas City to Council Bluffs, the same pro rata of the through rate would not apply to the two hauls; and that if a shipment were made over the Santa Fe that was to go by the Burlington to Council Bluffs from Atchison and that shipment came into Kansas City, it would be necessary to make some special arrangement with some

other carrier to make the longer haul from Kansas City to Council Bluffs. It is manifest where Mr. Hurley's "figures" come in. Neither the Burlington nor any other road would haul from Kansas City to Council Bluffs for the same proportion of the through rate as from Atchison. It is plain that by dickering with these two roads and playing one against the other the defendant frittered away the opportunity which both afforded to save these cattle. But whatever the explanation or whether there is any or not, the fact cannot be successfully denied that defendant repudiated its arrangement with Clark and refused the cattle to the Burlington, which was ready to take them. It tried to run on two tracks at once and failed to get on either, for no other perceptible reason than in order to save a few hundred dollars in freight. Therein it was grossly neglectful of its high duty to the plaintiffs. It continued its policy of neglect all day Saturday, 30th, making no effort whatever to get the cattle out of the dangerous location in which it held them—except in the case of 20 cars of this plaintiff's stock, the story of which will be told later on in this statement. Steube, for plaintiffs, haunted defendant's office during Saturday, trying to induce its officers to take some action. As soon as he arrived he went at once to see the Santa Fe agent at defendant's office in the Exchange building. This was about seven o'clock Saturday morning (388)—found the office locked—went then to office of Mr. Allen—remained there awhile, when he and Allen returned to defendant's office about 7:30 a. m. They found there Mr. Brown, chief clerk of the general live stock agent, Mr. Titus. They told Brown (389) that they wanted to get the cattle out as soon as possible. He says, "all right, we are arranging it now." He went to Burlington office and back to Santa Fe office, found Brown out and went to break-

fast. About eight o'clock he and Frost (of the Empire State Company) went to defendant's office and Brown told them he was trying to get the cattle out then (p. 390). "I says, I can't see why we can't get them out at once, at least the train that got in yesterday; *the Burlington man told he can get them out as soon as he gets orders.*" Brown's answer on receiving this information (which he or his office already had) is of importance as showing defendant's gross neglect and disregard of its duty. "He says the Missouri Pacific takes out your cattle," although Mr. Douthitt had informed him or his office that under no circumstances could the Missouri Pacific do any such thing. When asked when this would be done, Brown said, "I let you know soon." Then Steube and Frost went out and rounded up their helpers and charged them to stay around the yards as they were liable to leave at any time. Afterward, about 9 o'clock a. m., they went back to Brown and were told they would get out about noon. They returned about noon (391) and were told that the Missouri Pacific would not take the cattle. What did defendant do in the afternoon and evening of Saturday toward making any effort to forward these cattle or remove them from their place of known peril? Nothing whatever. This record does not contain any evidence that the Santa Fe officials paid any attention to the cattle or did or attempted anything for their preservation and protection from Saturday noon until after the flood. It shows on the contrary that they did not. (Combs recalled, pp. 619-622). Heavy rises were known to be coming on top of a stage of water already threatening the whole valley. Child, general supply agent of the Stock Yards Company, called by defendant, testifies (536) that the great volume of water which caused the enormous rise at Kansas City, Sunday morning, 31st, came from west of Manhattan. "Q.

How long did it take that rise to run from Manhattan to the mouth of the Kaw? A. Forty hours."

"Q. How long would it take the rise to run from Topeka down the Kaw? A. About twenty hours." Connor, of the United States wealther bureau, answers the last question (311), "not more than about thirty hours." He seems to know accurately, for he says: "The crest of the flood moved at the rate of two and six-tenths miles an hour in the Kaw." *So that, taking Connor's statement as the reliable fact, somewhere between midnight Friday the 29th and daylight Saturday the 30th, this destructive rise rolled its tide of waters past the very doors of defendant's general offices at Topeka.* Yet defendant's officers would have it appear, *and the court in effect holds as a matter of law,* that on the appearance of this great rise at Kansas City, it was as unknown and unannounced to them as if it had started at the Belt line bridge at Kansas City, and no jury should be permitted to infer that they knew of or had any reason to apprehend its coming. Not only defendant's officers at Topeka, whence emanated all orders relative to the movement of these cattle, must have known early Saturday morning of the descent of this great volume of water, but it was known and apprehended at Kansas City because communication was not interrupted between the points, and Hutchings, superintendent of the stock yards, says (545), the "general order" to put the cattle in the viaducts was issued *Saturday afternoon.* Why he should call the order "general" is not apparent, because everybody else with cattle in charge in that great market, except defendant and one other party with a small bunch, had sense enough to get them out of the valley. There was nothing comparatively to which to apply the "general" order, except the cattle of these plaintiffs. They were driven

into these narrow viaducts, Supt. Childs says (545), partly Saturday night and mostly Sunday morning, the work being finished about ten o'clock. Steube says they were driven up into the viaducts Saturday night beginning about ten o'clock, and that they were all up there when he saw them about eight o'clock Sunday morning (393). This was an act of most reprehensible folly. It was plain that they could be neither fed nor watered in such a place. The viaduct is merely an elevated chute. They spent some hours, according to Child, cramming this valuable herd of more than 3,000 cattle into these viaducts when all the while they were within twenty or thirty minutes of the highlands and absolute safety. Supplies of men and horses ample to handle and take care of them were at hand. (Allen, p. 622.) But Assistant General Live Stock Agent Combs (p. 580), had heard of loose Texas steers chasing people, and then if taken out they would *"come in contact with dogs* and everything that would frighten that kind of cattle to death." So they were saved from the certain doom which awaited them, if taken to the hills, and were condemned to the viaducts as a preferable and more "practicable" fate. After the cattle had been given this Indian burial, that is after eight o'clock Sunday morning, Sparks, who had 700 mules just across the alley from the pens of the shipping division where these cattle had been yarded, drove them out of the valley and saved them (p. 345). Mr. Moore, one of defendant's counsel at Kansas City, saw the mules being driven out by the Allen avenue viaduct about 11 a. m., Sunday the 31st (p. 422). The cattle remained in these viaducts eight days. The remnant of them were taken by defendant to Emporia, there pastured until July 10th, when they were shipped to Evarts. Those belonging to the respective plaintiffs were not separated until after their

arrival at Evarts (397). This plaintiff received 1,831 head out of 2,293, the rest were dead as a result of their being placed on the viaducts. The remnant was variously estimated to be worth at Evarts from $10.00 to $15.00 per head (399). The cattle when shipped were worth $22.00 per head at points of shipment. The freight paid by plaintiff at Evarts was $6,438.00.

Plaintiffs in its petition seeks to recover this loss and damage from defendant on the following grounds:

(1) The wrongful deviation of the shipments from their route.

(2) The negligence of the defendant in unreasonably detaining the cattle at Wellington and Strong City.

(3) Defendant's negligence in sending the cattle forward into the Kaw valley, at the time and under the conditions when it was done.

(4) Defendant's negligence in deviating the cattle and hauling them to Kansas City.

(5) Defendant's negligence in failing to remove or cause the removal of the cattle from the yards in time to escape the flood.

The answer (pp.11-14), after a general denial, sets up in the second paragraph a series of statements of fact, and we attempt a brief review of the evidence pertaining to each so far as it has not already been referred to.

(a) The answer asserts that defendant, before the arrival of said shipments at Topeka, was notified by the Burlington that it could not accept the cattle at Atchison because of washouts on its line, and that it then made arrangements with the Missouri Pacific to take the cattle at Kansas City. We have already conclusively shown that defendant made arrangements both with Clark, superintendent of Missouri Pacific at Atchison, and with

general superintendent of the Burlington at St. Joe, to take the cattle at Kansas City; that it violated and repudiated the arrangement with Clark on Friday the 29th; that when by reason thereof the Missouri Pacific made no preparation to take the cattle at Kansas City, defendant insisted on its taking them, when they knew it could not, and refused to allow the Burlington to take the cattle, when they knew it could. To this we have nothing to add, except to correct an error of the trial court on the facts in this connection. The court says (p. 653) that the Burlington notified defendant it could not take the cattle at Atchison on account of washouts, and later notified defendant it could take them, and then again notified defendant that it could not take them. All this is true. *But once more and after this,* it notified defendant that it could take them at Kansas City and agreed to do it, and did take all of them there that defendant would allow it to take, forty-two cars (p. 194).

(b) Defendant's answer states that it did transport the cattle to Kansas City "with the knowledge, consent and acquiescence of plaintiffs." No claim was made below, and doubtless none will be made here, that this is true. When the trains reached Kansas City, Steube, in charge, thought he was in Atchison (407). All of the evidence bearing on the matter shows that the cattle were brought to Kansas City solely by orders of defendant without a "by your leave" asked of plaintiffs, though ample opportunity for consultation at all times existed.

(c) The answer next alleges that defendant did deliver twenty carloads of plaintiffs' cattle, 760 head, to the Missouri Pacific railway at Kansas City and delivered the balance to the Stock Yards Company to be held by that company until the Missouri Pacific could take them out. We assert and propose to demonstrate by citation of proof, mostly by defendant's witnesses, the

entire falsity of this allegation. The point of fact of initial importance in this connection is as to the method of making delivery of cattle from one carrier to another through the medium of the Stock Yards Company so that possession and control of the stock pass from one to the other. About this fact there will, or should be, no dispute. Child says (p. 540) the Stock Yards Company paid the delivering road all charges that it had on its bills, took the cattle and bills, and turned the latter over to the receiving carrier with all charges including its own for feed and care added, loading out the cattle on the order of the receiving line. He says (539) that in effecting such delivery the Stock Yards Company acts as agent for both parties. Mr. Douthitt, of the Missouri Pacific, testifies (283):

"Q. Where they were unloaded, as they were in this instance, how would your road get them? A. The way bills would be delivered by the Santa Fe to my office; we would place an order with the Stock Yards Company to run those cattle to our loading chutes at a certain hour; the Stock Yards Company would load them at that time into our cars or cars we furnished at that particular point; the way bills then would be forwarded to the terminal office by my office, and conductor of the train take them out and take them through."

There are very many pages of testimony introduced by defendant relative to the alleged delivery of these twenty cars and the customary manner of making delivery through the stock yards to a connecting carrier. We deem it unnecessary to cite further testimony as to the method pursued, except to add that of defendant's local live stock agent, Roberts, who says (468) that the way bills from the train would be sent over to his office at Argentine by a messenger and then by him (Roberts) turned over to the office of the connecting line.

Now put all of the testimony under the glass and

see whether delivery of these 20 cars of cattle to the Missouri Pacific was ever effected, and whether the Stock Yards Company, while holding all the cattle, ever ceased to be the agent of the defendant. First, as to what was actually done with the twenty cars. Hildebrand, yardmaster of defendant, says (518) he got the train of stock about six o'clock in the morning, *immediately upon its arrival, and was ordered by the Argentine office of defendant* to take it to the Missouri Pacific yards. He "got hold of the train" on one of the main lines between the south end of the Santa Fe yards and Twelfth street, hauled it as far as Twelfth street, and then sent it on in charge of Santa Fe Switchman Cappell (519). Cappell says (pp. 520-521) that he was ordered by Hildebrand to take the train on into the Missouri Pacific yards, situated some distance north of the Exchange building and just east of the Kaw river, and this he did, leaving the train there. Ed Davis, foreman of Stock Yards Company for what is known as "the Missouri Pacific side," (508) testifies for defendant that it was his duty to see that cars were unloaded and loaded; that a switch engine and crew of the Missouri Pacific moved these cars to the Missouri Pacific chutes; that he had them unloaded and immediately drove them back south through the alleys and put them in the shipping division; that being through cattle that was where they belonged (510); that he did this of his own motion, without any orders from anybody; that at the place where they were unloaded there were no pens fit to receive them (p. 511) as there was water in the pens at that time, possibly a foot, and still coming in (512); that if the Missouri Pacific took the cattle out they would be loaded at the same point where they were unloaded (514); that there were no cars there to load the cattle into at the time they were taken from the Santa Fe cars; and that after these cattle

were unloaded the Missouri Pacific did not load any cattle at those chutes (p. 515). So that, as far as concerns *the cattle* of these 20 cars, they simply had a circuitous journey, planned and ordered by the defendant alone, around through the Missouri Pacific yards, and were escorted by the yard foreman back through the alleys to the shipping division, where the rest of plaintiff's cattle were. Now as to the way bills for the 20 cars, without the delivery of which there could be no delivery of the cattle. D. Farley, chief clerk of defendant's local freight office, produces a receipt for these cars (p. 473), purporting to be signed by R. P. Isitt, local freight agent of the Missouri Pacific; says it was made out in the handwriting of one Evans, yard clerk of the Santa Fe (476); that he did not know who signed Isitt's name to it, but knows that Isitt did not (p. 477). Sullivan, defendant's chief night clerk at Kansas City, says (p. 494), another receipt is in the handwriting of one Winthrop, an under clerk in the office; that he (Sullivan) altered the way bills of the 20 cars by scratching out the words "K. C., St. Joe & Council Bluffs" and writing "Mo. P.," and inserting in place of "Atchison" the letters "K. C." (p. 495); he directed Winthrop to deliver the bills with the receipt to the Missouri Pacific (p. 496), and never saw any of the papers after their delivery to Winthrop until the day he testified. This receipt in two sheets marked 14a and 14b, is shown in the record (pp. 497-499), and bears the stamps, Missouri Pacific freight office, *June 30th*, 1903, and A., T. & S. F. Ry. Co., July 4th, 1903, *a month after Sullivan says he gave the papers to Winthrop*, and more than two weeks after the stock represented by the receipt (or what was left of it) had been placed by defendant in the pastures at Emporia. There is not a particle of evidence even tending to show that Winthrop or any one else ever delivered

the way bills and receipt (14a and 14b) to the Missouri Pacific. As to the Isitt receipt for the cars (marked 15), though much discussed, it was not introduced in evidence. Isitt says of it (p. 633): "That is a receipt for the cars, what is called an interchange slip. * * * That is a certificate that the cars have been received and taken for the purpose of adjusting the rental on the cars between different lines, that is the purpose of that slip. That is such a slip as is signed by both lines, no matter what the circumstances are under which the car is delivered, whether it is right or wrong it makes no difference. Q. It doesn't indicate anything, then, in reference to whether your line has accepted for further transportation to another point those cars, or not? A. Not at all." It will be borne in mind that Mr. Douthitt, when he told defendant's agent about 8:30 Saturday morning that the Missouri Pacific could not under any circumstances engage to take the cattle, told him also (and it was a mere mattter of his disposition to accommodate) that he "would make an effort, if the water was not any higher by noon, to load one train that day." At exactly noon he tried with an engine to get to the Missouri Pacific loading chutes, but the water put out the fires and the attempt failed (p. 273): "Q. Now, was there in fact, any cattle delivered to your road—these cattle? A. No, sir. Q. Did you receive from the Santa Fe any order for any of these cattle? A. No, sir. Q. Did you receive from the Santa Fe any way bills? A. No, sir." Hutchings, superintendent of the stock yards, says (p. 546) that he did not know whether the bills for these four trains of cattle showed any routing by any particular line beyond Kansas City or not; that the cattle were taken out by the Santa Fe, the same road that brought them in; that the Stock Yards Company held them as agent for the Santa Fe, delivered them back to

the Santa Fe, required Santa Fe to pay its charges, and if the Santa Fe intended them to be delivered to a connecting carrier, as a matter of fact it was not done. Roberts, local live stock agent, says (p. 468) that these way bills, in ordinary course, would have gone to his Argentine office by messenger and been sent by him to the office of the connecting carrier; *that he found these identical way bills in his office after the subsidence of the flood* (p. 469).

"Q. So that these way bills were not delivered to any connecting carrier at Kansas City, were they? A. Not that I know of; no, sir."

Mr. Combs testified (590): "Q. Your railroad company hauled these (cattle) back to Emporia or Lang to these pastures? A. Yes, sir. Q. And then hauled them from there on to Atchison, and by way of these other roads to Evarts? A. Yes, sir. Q. Under the same original routing and way bills that they had been loaded under from Texas? A. Yes, sir; they were carried to their destination on their usual way bills—on the regular way bills." He admits that in all the numerous conferences held in June between the parties to these suits relative to the cattle, no intimation was ever given that any part of them had at any time been delivered to the Missouri Pacific. The testimony of Mullen (635) and of Frost (636) shows that numerous interviews were held between them and defendant's representatives, Mr. Lathrop and Mr. Combs, in which plaintiffs were urged to take the cattle off of defendant's hands at Kansas City, and at no time did they say anything indicating that one train load had been delivered to the Missouri Pacific. In the stipulation (528) introduced by defendant to support its cross action set up in the third count of the answer, it writes down and signs, "it is agreed in this case that the defendant was compelled to pay out,

and did pay out, on account of plaintiffs' cattle at the stock yards at Kansas City, $2,428.60, and at Emporia $2,820.38." Why should it be compelled to pay or pay anything, if in truth it had delivered, as alleged, twenty cars to the Missouri Pacific and the remainder to the Stock Yards Company for the Missouri Pacific?

In this same third count and counter-claim, it *pleads* the fact (p. 15) "that the said defendant company, as is the general custom, well known to plaintiff, in cases *where cattle in the possession of railway companies in the course of transportation* are fed, watered and cared for by a stock yards company, paid to the said Stock Yards Company the sum of $2,428.60;" and Assistant General Live Stock Agent Combs acknowledges (585, 586) that the expense of unloading the 20 cars at the Missouri Pacific chutes was a part of these charges which defendant paid. Defendant, in this third count, not only *admits,* but *alleges,* that all of these cattle, while in the Kansas City stock yards, *were in its possession in the course of transportation, and bottoms on that fact* its prayer for a judgment against this plaintiff for the expenditure there made on account of the cattle. Yet, in the face of all this overwhelming proof, the defendant, again acting on the principle of "any viaduct in a flood," seeks to save itself by climbing up on the tottering proposition that it had cleared itself of all responsibility by delivering 20 cars to the Missouri Pacific, and the remainder to the Stock Yards Company for the Missouri Pacific. This structure of falsework will break down, it has broken down; and the place where it was is covered by the truth.

(d) The answer next pleads that the damages sued for were caused by the act of God. Elsewhere in this combined brief is discussed the question of whether under the proof adduced defendant can, as a matter of

law, successfully charge the responsibility upon the Almighty.

(e) The answer next pleads that plaintiff gave defendant no notice, as required by paragraph eight of the shipping contracts, of its claim for damages. Plaintiffs' reply (pp. 21, 25) pleads compliance with said paragraph and waiver of its requirements. Due notice was given and claim made (216 *et seq.*) (324). Detail of the evidence, which abundantly shows waiver, is not deemed necessary in as much as no question in this regard was raised on the trial below or in the court's opinion.

(f) The third count of the answer is a counterclaim for the expenses incurred by defendant, while holding the cattle at Kansas City and Emporia, and at the conclusion of all the evidence was dismissed by the defendant (Rec., Minnesota & Dakota Cattle Co. case, p. 30).

The main questions to be determined are:

1. Did the court err on the facts disclosed in not directing a verdict for the plaintiff, by reason of the wrongful deviation of the shipments? If not,

2. Did the court err in refusing to submit the questions of negligence to the jury and in directing a verdict for the defendant?

3. Did the Court of Appeals err in holding that consideration of those questions was precluded because plaintiff requested a peremptory instruction, although it at the same time submitted to the court thirteen other instructions to the jury?

SPECIFICATION OF ERRORS.

1. The trial court erred (Rec., 637) in refusing to give, at the conclusion of all the testimony, the instruction and charge tendered and requested on behalf of the plaintiff, that under all the evidence the jury should find that the defendant was liable, and to find for the plaintiff. The court should have so instructed, because the undisputed proof shows a deviation by the defendant, without plaintiff's consent, of the shipments of cattle from the route by which they were billed, and in such case as a matter of law defendant is liable for the loss sustained.

2. The court erred, after refusal of this peremptory instruction, in refusing to give and charge the jury, at plaintiff's request, instructions from 1 to 13, inclusive (Rec., 638, 644), and in refusing to give each of said instructions.

3. The court erred in sustaining the motion and request of the defendant railway company to direct, and in directing, the jury to render a verdict for the defendant and against the plaintiff. (Rec., 30.)

4. The court erred in its opinion, shown in the record, in saying: "It, therefore, follows on the main case the request for instruction to the jury to render a verdict for the defendant must be sustained, and the like request of the plaintiff must be denied. This will be done." (Rec., 655.)

5. The opinion of the Circuit Court of Appeals holding that plaintiff waived the right to have the negligence issues submitted to the jury, or considered by the Court of Appeals, because plaintiff prayed for a peremptory instruction, although plaintiff at the same time submitted thirteen instructions to the jury, is erroneous. See copy of petition for the *certiorari* in this Minnesota & Dakota case in the appendix herein.

POINTS AND AUTHORITIES.

All propositions, and authorities cited and reviewed in support thereof, as set forth in the preceding brief, are here adopted pursuant to the stipulation and agreement between the parties that a joint brief might be filed.

In view of the fact that the errors assigned, and the propositions involved, are precisely the same in both cases, all of the authorities relied on by plaintiffs in error in both cases have been compiled and reviewed in the foregoing brief of the Empire State Cattle Company, *et al.* To avoid unnecessary repetition, we re-state briefly the points made, as follows:

1. For the purpose of determining whether the action of the trial court in peremptorily directing a verdict for the defendant was correct or erroneous, all of the testimony offered, both that which was admitted and that which was excluded, will be considered by this court.

2. The question of whether the defendant is liable as a matter of law for the wrongful deviation of the shipments, and whether, therefore, the court erred in refusing the plaintiffs' request to direct a verdict for the plaintiff, is a separate and distinct question from that of whether the court erred in holding as a mattter of law that there was no evidence sufficient to go to the jury, on the matter of the defendant's negligence. Plaintiff had and has, a right to the separate determination of these questions.

3. Even if the plaintiff was not entitled to a peremptory instruction to the jury to find for the plaintiff, by reason of the wrongful deviation of the shipments, the other and further question of defendant's negligence should have been submitted to the jury under proper instructions.

4. Under the facts proven, the question of the proximate cause of the injury was a question for the jury to determine as a matter of fact, and not for the court to decide as a mattetr of law. It should have been submitted to the jury.

5. The opinion of the trial court (135 Fed., 135) fails to consider many of the facts which are vital to a correct conclusion, and incorrectly declares the law of the case, as we have heretofore shown.

6. The trial court, in its opinion (*supra*, p. 142), recognizes that the defendant deviated these shipments on its own responsibility, as claimed by plaintiff, but incorrectly declares the law in such cases. Under the evidence the defendant is liable for the consequences of that deviation.

7. The propositions of law asserted by the trial court in its opinion are not supported by the authorities therein cited and relied upon.

8. The fact that immense quantities of household property and merchandise were lost in the flooded districts of Kansas City has no tendency to show that the defendant was not negligent in respect to the loss suffered by this plaintiff.

9. It was not necessary, as assumed by the trial court, to place these cattle in the overhead viaducts at the stock yards. It was a grossly negligent act to do so.

10. The decision of the Court of Appeals is erroneous for the reasons given in the petition for the *certiorari* in each case which is reprinted in the appendix herein.

ARGUMENT.

Supplementing the argument heretofore made, we will refrain from making the brief more voluminous, except to devote a very limited space to the principle which should govern in determining whether a trial court should or should not take a case from the jury and peremptorily direct its verdict. A most instructive and luminous decision in which the duty of the trial court is defined and the principle applied, is found in the case of *Marande* v. *R. R.*, 184 U. S., 173. That was an action to recover from the railroad the value of certain cotton which was destroyed by fire while in defendant's cars on its tracks near its terminal wharf, it being claimed by the plaintiff that defendant was negligent (a) in operating its locomotives near the cottom on the wharf; (b) in failing to properly care for the property, and (c) in providing inadequate fire apparatus, together with lack of instructions in its use and lack of competent men to handle it. The Circuit Court, at the conclusion of the evidence, had directed a verdict for defendant, and the Circuit Court of Appeals affirmed the judgment. The defendant being incorporated under an act of Congress, plaintiff took the case to the Supreme Court by writ of error. That court reversed the judgment of the Court of Appeals and of the Circuit Court, and directed a new trial. Two assignments of error were considered; one that the case should have been allowed to go to the jury on the issue of deviation, and the other that plaintiff should have been allowed "to go to the jury on the general question of the loss of the cotton by the negligence of the defendant." Mr. Justice White, delivering the opinion, said (176): "In order to pass upon the issues arising on these assignments, the evidence must be considered. In taking it into view, however, we shall do

so only to the extent necessary to enable us to decide the question of law which arises, that is, *was the evidence sufficient on the subject of negligence and deviation to go to the jury?*" After an elaborate statement of the evidence, he proceeds (186): "Such being the proof, was it sufficient to go to the jury? In answering this question, as we have said at the outset, we shall be called to pass upon, not the preponderance of the evidence, but whether it was adequate to go to the jury; and this involves not a decision as to the facts, but the determination of a proposition of law." He then quotes the governing principle from 172 U. S., l. c., 545: "If different inferences might fairly be drawn from the evidence by reasonable men, then the jury should be permitted to choose for themselves." And again, from 179 U. S., l. c. 659: "It is undoubtedly true that cases are not to be lightly taken from the jury; that jurors are the recognized triers of questions of fact, and that ordinary negligence is so far a question of fact as to be properly submitted to and determined by them." Mr. Justice White then continues (191): "We come, then, to an analysis of the evidence for the purpose of ascertaining whether it was correctly decided that it afforded no reasonable ground upon which a jury, in the exercise of its functions, could have inferred that the destruction of the cotton by fire was occasioned by the negligence of the defendant. In doing so, we shall, of course, be mindful that as both courts below have held that the evidence had not the tendency stated, their decision is entitled to great respect—*a respect, however, which cannot relieve us from the duty of securing the plaintiffs in the enjoyment of their constitutional right to trial by jury if, in our opinion, the case made by them was one proper to be decided as one of fact by the jury, and not to be concluded as a matter of law by the court.*"

In the above cited case, the bill of lading provided for the carriage of the cotton by defendant to "the port of New Orleans," and thence by steamship to Havre, France. It seems that plaintiff contended both that defendant had deviated the shipment, whereby it was liable for the loss, and that the loss was occasioned by the negligences specified. The action of the trial court in holding that there was no sufficient evidence of the fact of deviation to authorize the jury to find such fact is approved by the Supreme Court, but guarded with the remark (p. 198): "We cannot say that testimony may not be introduced at the new trial which may modify the aspect of this question as exhibited in the record now before us." In the case at bar *the fact* of deviation is not at all in question, and the issue presented to this court in that regard is, what is the legal effect of that fact on the question of defendant's liability? Does it render the defendant liable, irrespective of the negligence charged? Plaintiff contends that it does. If it is right about this, the court should have so told the jury, leaving them to find and fix the quantum of damages. Or, is the conceded fact that defendant summarily hauled these cattle away from their line of shipment, without consulting the owner, a matter by which it incurred no responsibility, and of which plaintiff has no right to complain? In other words, is it an immaterial fact not bearing on the question of liability? The lower court so held. The Supreme Court seems, in the case just cited, to have thought it of vital moment, and that liability would as surely follow its existence as would nonlitbility its non-existence. On the question of negligence involved in the cases at bar, in order to approve the action of the trial court in directing a verdict for the defendant, it is necessary to hold,

1. That the fact of deviation is an immaterial fact;

2. That there is no evidence tending substantially to show, or from which a jury would be allowed to infer, negligence in detaining these cattle at Wellington and Strong City, or that even if the detention was negligent it was immaterial as not being the proximate cause of the loss;

3. That there is no evidence from which a jury will be permitted to infer that defendant's officers knew, or had reason to apprehend, at the time of bringing the stock to Kansas City, they were bringing them to a hazardous place, or that if they did, their negligence was immaterial because, as a matter of law, it was not the proximate cause;

4. That there is no evidence from which reasonable men could conclude that during Saturday, May 30th, defendant was negligent when its officers declined to send the cattle out over the Burlington, and made no effort to send them out otherwise, except to offer them to the Missouri Pacific;

5. That there was no substantial evidence that defendant's officers, on Saturday, May 30th, knew, or ought to have known, of the enormous rise coming, although the undisputed evidence of competent witnesses is that it came from west of Topeka, and must have passed defendant's general offices from twenty to thirty hours before reaching Kansas City;

6. That no jury will be permitted to find that the act of placing these cattle in the viaducts, when they could easily have been taken out of the valley, was other than the act of a reasonably prudent and careful person.

The authorities heretofore cited demonstrate the impossibility of upholding the action of the court in taking the case from the jury on the facts shown. A com-

mon carrier cannot be guilty of doing the acts shown in this record, and of omitting to exercise that vigilance and care of property to which the shipper is entitled, and then evade responsibility by saying, "It was the act of God—the Lord hath taken away."

It is respectfully submitted that the judgments should be reversed and a new trial of the cases directed.

R. E. BALL,
Attorney for Petitioner,
Minnesota & Dakota Cattle Co.

JAMES S. BOTSFORD,
Attorney for Petitioners.
Empire State Cattle Co., et al.

APPENDIX.

—IN THE—

Supreme Court of the United States.

EMPIRE STATE CATTLE COMPANY, a Corporation, W. E. WAITE, E. F. WAITE, W. H. FROST, P. H. KELLOGG, C. L. MILLETT and J. D. CARR, *Petitioners,*

vs.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, *Respondent.*

PETITION

For the Issue of the Writ of Certiorari Herein, to the United States Circuit Court of Appeals of the Eighth Circuit.

Petitioners, for the purpose of obtaining a writ of *certiorari* herein, represent as follows, to-wit:

This suit was brought by petitioners as plaintiffs against respondent as defendant, in the Circuit Court of the United States for the District of Kansas, First Division, on November 13, 1903. It is an action at law to recover Fifteen Thousand Dollars damages, for the death of a portion, and injury to the residue, of 798 head of cattle belonging to plaintiffs, which were shipped over defendant's railway through the state of Kansas. The cattle were purchased by the plaintiffs, in Texas, and were shipped over defendant's road, destined to go to the pastures of plaintiffs in South Dakota.

The petition averred and the proof at the trial showed, that the plaintiff cattle company was a corporation created by the laws of South Dakota, and that the other plaintiffs were residents and citizens of South Dakota, and that the defendant railway company was a corporation created by the laws of the state of Kansas, having its chief office at Topeka, in the First Division of the state of Kansas, in which this suit was brought.

The case was tried by the said Circuit Court, with a jury. The trial continued for a period of nine days, from January 16, 1905, to January 25, 1905, and the trial was had on the petition of plaintiffs, the answer of defendant, and the reply thereto, of the plaintiffs.

The case of the plaintiffs, both in the Circuit Court and in the Circuit Court of Appeals of the Eighth Circuit, was prosecuted by them upon the theory of the liability of the defendant to plaintiffs, on two grounds. First, that the death of and injury to plaintiffs' cattle resulted from the deviation by defendant of the shipment, without plaintiffs' consent, from the line on which the cattle were routed to go; and, second, that the death of and loss to plaintiffs' cattle resulted also from the different negligences of the defendant specified in the petition of plaintiffs.

At the conclusion of the trial, plaintiffs asked the court to give, and presented to the court, fourteen different instructions to the jury. Those instructions may be found from pages 637 to 644 of the Record.

The first instruction (p. 637) was a peremptory instruction which the plaintiffs prayed the court to give, instructing the jury peremptorily to return a verdict in the case for the plaintiffs. This instruction was founded upon the proposition maintained by plaintiffs that defendant was absolutely liable to plaintiffs on the facts of the case, as a matter of law, for the death and loss of

plaintiffs' cattle, by reason of the deviation of the shipment from the routed line without plaintiffs' consent; and the prayer in this peremptory instruction proceeded upon the theory that that branch of the case, on the undeniable and conceded facts of the case, presented a question of law for decision by the court.

The other thirteen instructions presented at the same time with said peremptory instruction and to be found from page 638 to 644 of the Record, were instructions asking the court, in the event that the peremptory instruction should be denied, to submit to the jury the issues of negligence in the case. All of the thirteen instructions referred to, asked the court to submit the issues of negligence to the jury. It was, of course, understood by the court, as well as by counsel, that, if the peremptory instruction based on the unlawful and wrongful deviation, was given, it would not be necessary to consider those other instructions.

At the same time plaintiffs presented those several instructions, defendant asked a peremptory instruction to the jury. The court gave the defendant's peremptory instruction to the jury, to return a verdict for the defendant, and denied each and all of plaintiffs' said instructions. To those several rulings, plaintiffs excepted at the time.

The jury, under the instructions of the court, gave a verdict for the defendant (p. 644, Record), and a final judgment was given for the defendant (pp. 26-27, Record).

Afterwards plaintiffs filed a bill of exceptions in the case, which extends from page 29 to page 656 of the printed Record.

The pleadings in the case may be found from page 3 to page 21 of the Record.

A history of the trial of the case will be found from page 21 to page 28 of the Record.

The final judgment in the case, in the Circuit Court, was given January 25, 1905.

Within due time the cause was duly removed by a writ of error, citation and by filing an assignment of errors to the United States Circuit Court of Appeals of the Eighth Circuit.

The case was heard in the Circuit Court of Appeals in December, 1905, and was decided by that court July 9, 1906, by an affirmance of the verdict and judgment of the Circuit Court. (*Empire State Cattle Co.* v. *A., T. & S. F. Ry. Co.*, 147 Fed. Rep., 457.)

Afterwards, on August 9, 1906, said Circuit Court of Appeals made an order extending the time to November 1, 1906, within which plaintiffs could file their petition for a rehearing in said cause.

Afterwards, on September 20, 1906, plaintiffs filed their petition for a rehearing in said cause, after serving the same on counsel of defendant, and said petition for a rehearing having been served and filed, in accordance with the rules of said United States Circuit Court of Appeals, was considered by that court and denied, November 17, 1906; and, by the denial of said petition for a rehearing, said judgment of affirmance of said Court of Appeals of the said judgment of the said Circuit Court in said cause became final. (Record, 677-687.)

Said petitioners further show to the court, as will appear from the opinion of said Circuit Court of Appeals, (147 Fed., 457), that said judgment of affirmance by said Court of Appeals was based upon the ground adjudged in its opinion by said Circuit Court of Appeals, that, because plaintiffs, at the conclusion of the trial of said cause in said Circuit Court, presented to and requested said Circuit Court to give a peremptory instruc-

tion to the jury to return a verdict for plaintiffs, plaintiffs were precluded from the right to have considered said other thirteen instructions, although presented at the same time of and with said peremptory instruction in the event that said Circuit Court should deny said peremptory instruction asked by plaintiffs.

Petitioners say they are advised that said ruling of the Circuit Court of Appeals in its opinion affirming the judgment in this cause, is the first and only time that it has been adjudged by any American court, state or federal, that a party to a suit, who asks the giving of a peremptory instruction to a jury and at the same time asks the giving of other instructions to the jury submitting the issues to the jury in the event that the peremptory insruction thus asked shall be denied, is precluded, by the asking of such peremptory instruction under those circumstances, from having the other instructions considered, if the peremptory instruction is denied. Petitioners say they are advised that it is the general practice as understood by the members of the American bar, generally that where, as in this case, instructions are asked, one of which is a peremptory instruction to the jury and the others submitting the issues to the jury, for the court, in the event of the denial of the peremptory instruction, to consider the other instructions for the submission of the issues to the jury; and petitioners in that view, submit that the decision in this cause by said Circuit Court of Appeals is contrary to the general practice which prevails in the federal and state courts in like cases.

Petitioners show to the court, as appears from the opinion of said Circuit Court of Appeals, that said opinion is contrary to a decision of this court and to the decisions in like cases of other Circuit Courts of Appeal and is also contrary to the decisions of the Court of Appeals of the state of New York, cited in said opinion in this case.

Said petitioners, in order to enable this court to see how the issues of deviation and negligence in this case arose, submit in this, their petition for a writ of *certiorari*, the following statement of facts:

On May 25, 1903, petitioners were the owners of the 798 head of cattle in controversy at Hereford, Texas, which they shipped from said Hereford for transportation, by rail, from that point to Evarts, South Dakota; that said shipment was made from said Hereford, Texas, over three lines of railway, to-wit, from said Hereford to Amarillo, Texas, over the Pecos & North Texas Railway; from Amarillo to Atchison, Kansas, over defendant company's railway, and from Atchison, Kansas, to Evarts, South Dakota, over such connecting line of railway as should receive said cattle from said defendant railway company at said Atchison, Kansas.

Said 798 head of cattle, in the cars in which they were shipped, were delivered to defendant at said Amarillo, Texas, for shipment over defendant's railway north to Atchison, Kansas, to be there delivered by it to said connecting railway company, and said defendant, on May 25, 1903, accepted from plaintiffs said 798 head of cattle for shipment from said Amarillo, Texas, to said Atchison, Kansas.

Said 798 head of cattle were transported by defendant, as such common carrier, from Amarillo, Texas, to Strong City, Kansas, which is a station on said defendant's line of railway between said Amarillo, Texas, and Atchison, Kansas.

In said state of Kansas where said defendant's railway crosses said state, in passing from Amarillo, Texas, to Atchison, Kansas, there are three cities situate on said railway, viz: Strong City, Kansas; Emporia, Kansas, and Topeka, Kansas. The general course of defendant's railway across said state of Kansas, in passing

from Amarillo, Texas, to Atchison, Kansas, is from southwest to northeast. Strong City, Kansas, is southwest, or southwesterly, from Topeka, and Emporia, Kansas, is between Strong City, Kansas, and Topeka, Kansas.

Said cattle of petitioners were unloaded by defendant into defendant's pens at said Strong City, Kansas, on May 26, 1903, for the purpose of being fed and watered and of obtaining rest, as provided by the law of Congress in such cases. Petitioners' cattle were so unloaded on the night of May 26, 1903, and were ready to be reloaded and for the transportation to be continued and the transit resumed on the next morning of May 27, 1903.

During the entire month of May, 1903, there were continuous rains night and day, in the valley of the Kaw river, which flows from Eastern Colorado to Eastern Kansas, east, across the state of Kansas, and which empties into the Missouri river at Kansas City, Missouri. The watershed of the Kaw river extends from the southern portion of Nebraska across the northern part of Kansas, to a point about ten miles south of said Kaw river.

Said rains created in the valley of said Kaw river an unprecedented flood, which commenced to rise about May 15, 1903.

Notwithstanding said 798 head of cattle had been fed and watered and had time to rest so that they were ready to be reloaded and were ready for the transportation and carriage thereof to be resumed and continued on the morning of May 27, 1903, defendant railway company, by reason of the rise of said flood, detained said cattle on its, the defendant's own motion, at said Strong City, in the pens of defendant, from the said morning of May 27, 1903, until noon, May 29, 1903. Said May 27, 1903, was on Wednesday, and said flood,

as we will see further on, reached its climax Saturday night, May 30, 1903. After so detaining said cattle at Strong City from Wednesday morning to Friday noon, May 29, 1903, and after loading, unloading and reloading said cattle two or three times at Strong City by defendant railway company, defendant continued the transportation and transit of said cattle Friday noon, May 29th, 1903, and said cattle were by defendant then hauled from Strong City, Kansas, to Emporia, Kansas, which last city is southwest of Topeka, Kansas, and is on the uplands some considerable distance from the valley of the Kaw river at Topeka.

As already stated, said 798 head of cattle were routed to go over defendant's railway northeasterly, passing through said Strong City, Kansas, Emporia, Kansas, and across the Kaw river at Topeka, and thence northeasterly to Atchison, Kansas, which is situate on the Missouri river. (Opinion of trial court, Record, p. 645, 135 Fed. Rep., 135.)

On the arrival of the cattle at Emporia during the afternoon of Friday, May 29, 1903, it was and had been for six hours and more known by the defendant's officers and servants, that the line on which these cattle were routed to go to Atchison, crossing over the Kaw river at Topeka, was flooded and had been flooded from two o'clock that morning, so as to be impassable; that defendant's line from Topeka to Kansas City had been likewise flooded so as to be impassable and the transit and transportation of said cattle at said Emporia was by defendant, its officers, agents and servants, without plaintiff's consent, deviated from their route and transit over defendant's line northeast to Topeka and Atchison, to another line of defendant, known as the "Ottawa cut-off" and which cut-off extended from Emporia to Kansas City, by way of Ottawa, Olathe and Holliday, and from

Holliday over its line from Topeka to Kansas City, Missouri.

In this connection, it should be stated that the defendant had and has no railway running from Kansas City to Atchison, Kansas. The only railway owned or operated by defendant, either in 1903 or since, north or east from Kansas City, is its line from Kansas City to Chicago.

The transit and transportation of said cattle which were thus deviated at Emporia, Kansas, were so deviated for the purpose of transporting the same over said cut-off of defendant, to Kansas City, Missouri, which was sixty miles and more east of Topeka, Kansas, and distant that far from the line of defendant's railway on which, by the shipping contract of the parties, said cattle were routed to go in their passage to South Dakota.

After the deviation of said cattle at said Emporia, Kansas, over said other line, defendant ascertained that it could not get to Kansas City over its own line; and, on the arrival of the train containing the cars which carried petitioners' cattle, at Olathe, Kansas, during the night of Friday, May 29, 1903, defendant, finding that it could not get to Kansas City over its own line in consequence of the fact that all of its lines west of Kansas City, including said cut-off, were flooded, transported said train of cars containing petitioners' said cattle in a roundabout way to said Kansas City from said Olathe, over the tracks of the St. Louis & San Francisco Railway Company. In this way defendant succeeded in transporting said train of cars conveying petitioners' said cattle from the uplands over which said cattle had been transported up to that time, to the valley and mouth of the Kaw river at Kansas City, where said defendant, without obtaining petitioners' consent, unloaded said cattle in the shipping pens at the Kansas City Stock Yards, alongside of and

at the mouth of said Kaw river. Said cattle were unloaded in said stock yards on the morning of Saturday, May 30, 1903. On Sunday, May 31, 1903, the said flood which had so continued during a large part of said month of May, 1903, in the valley of said Kaw river, rose to such heights as to flood said stock yards, and said cattle, having been left without any further attention by defendant railway company after the deposit by it of said cattle in said stock yards, were, by the agents and employes of said stock yards company, driven out of the pens in said stock yards on said Sunday, up into the overhanging viaducts and chutes which passed through and over said stock yards. This was done by the officers and employees of the Stock Yards Company, for the purpose of preventing said cattle from being drowned in said stock yards. Said cattle remained in said overhanging chutes and said viaducts several days, during which time, in consequence of the impossibility of feeding and watering said cattle, a large number of them died and the balance were very seriously damaged.

The petition of the plaintiffs in the case, after fully stating the foregoing facts, and other facts, summed up therein the grounds of liability claimed against the defendant, as follows:

"1. Defendant did not exercise due and reasonable care, but was negligent in the detention of said cattle at Strong City, Kansas, from May 27th, 1903, to May 29th, 1903, and in not carrying and transporting on May 27th, 1903, said cattle from said Strong City, Kansas, to Atchison, Kansas, by way of Topeka, Kansas, so that said cattle might have been by defendant, at said Atchison, Kansas, delivered to a continuing and connecting carrier at that point.

2. Defendant did not exercise due and reasonable care in the transportation and carriage of said cattle, but was negligent in not detaining said cattle at Strong City, Kansas, on said May 29th, 1903, until the said unprece-

dented flood in said Kaw river had subsided, so that the transit of said cattle might be safely resumed without liability to damage or injury thereto.

3. Said defendant did not exercise due and reasonable care, but was negligent and acted wrongfully and without plaintiffs' consent in the deviation of the shipment by said defendant to Kansas City, from which last point and city, defendant had and has no connecting line extending to Atchison, Kansas.

4. Defendant did not exercise due and reasonable care in the transportation and carriage of said cattle by carelessly and negligently endeavoring to head off the flood of said Kaw river by landing and depositing said cattle in the pens on the bank of said Kaw river, at the mouth thereof several days after the rise and increase of the flood of said Kaw river, and plaintiffs say that defendant by its agents and servants in charge of the transportation of said cattle of plaintiffs had actual knowledge of said flood from said May 27th, 1903, and well knew of said flood, and of the continued rise and increase thereof on said May 30, 1903, when said defendant so deposited said cattle of plaintiffs in said pens by the side of said Kaw river at the mouth thereof.

5. That defendant having wrongfully transported said cattle to Kansas City as aforesaid, carelessly and negligently failed and neglected to move or cause to be moved the same from their position of peril aforesaid at Kansas City, Missouri, as it had reasonable time and opportunity to do, before the arrival at said Kansas City of said flood, but the same were overtaken by said flood."

At the trial of the case in the Circuit Court, Mr. Connor, who has charge of the United States Weather Bureau office at Kansas City, Missouri, testified that the rainfall which produced the Kaw river flood of May, 1903, commenced in April, 1903; that there was a slight cessation of the rain early in May and another cessation from about the 15th to the 18th of May, 1903, and with that exception the rains were continuous through May, night and day. (p. 300, Record.)

The defendant, during 1903 and ever since, has had its chief offices at Topeka, Kansas, which is about sixty miles west of Kansas City, and Mr. Connor testified that a flood in the Kaw river at Topeka would, in the regular course of the flow of water, reach Kansas City in about thirty hours.

Mr. T. E. Jennings, who had charge of the United States Weather Bureau at Topeka, Kansas, testified that the rainfall the first twenty days of May, 1903, averaged about four inches, in the western part of the Kaw water shed; that from the 21st to the 28th of May, 1903, the rainfall in that region averaged another four inches, and that on May 28, 1903, came the tremendous rainfall in that region, which was about five and one-half inches, at Salina, Kansas. He said, "We got a month's rainfall during the first twenty days of May, we got an average May rainfall, then during the next 7 days that was repeated, and on the 28th we had the tremendous downpour in the central counties, extending from Salina county northeastward into Marshall." (p. 129, Record.)

Another witness in the case (p. 223, Record) was W. E. King, Assistant City Engineer of Topeka, Kansas, who testified that he took observations of the rise of the Kaw river at Topeka, and that on the morning of May 28, 1903, at 8:30 o'clock, the Kaw river was then 16.88 feet, or eleven inches, above low water mark; that the Kaw river continued to rise after that; that he kept men stationed at that point until the crest of he flood; that he had a thirty minutes continuous report from May 28, at 8:30, to June 6, at 10:30; that the crest of the flood was reached at 9 p. m. on May 30, and that between 8:30 the morning of the 28th, and 9 p. m. of May 30, the water rose ten and one-tenth feet.

The testimony of Theron S. Cafferty (p. 225, Record), and of C. T. McLellan (p. 292, Record), who were

division officers of defendant company, shows that de-defendant's roads in Kansas, from Topeka to Atchison, from Topeka to Kansas City and from Holliday to Kansas City, were all flooded from an early hour on the morning of Friday, May 29, 1903, and that all those lines of defendant, over one of which this train of cars would have to go in going to Kansas City, or northwardly, were flooded, as already stated, from an early hour on the morning of Friday, May 29, 1903, and that those facts were well known, not only by those division officers of defendant company, but by Superintendent Hurley and all the general officers of the defendant company; that so extraordinary and perilous were the flood conditions on all of defendant's lines in the State of Kansas on said Friday morning, May 29, 1903, that attention was given to those conditions by Superintendent Hurley and the other general officers of the defendant, and that the movements of the train in question carrying petitioners' said cattle, were directed personally by Superintendent Hurley and the other general officers of the company, and the facts show that for six hours before said Friday noon, May 29, 1903, when said transit was resumed from said Strong City, said lines were and had been so flooded as to make it impossible for the defendant to reach the valley of the Kaw river or to cross the same, or to reach said Kansas City over any of the said lines of defendant. The evidence at the trial, which fully sustains all the averments of the petition and shows the foregoing facts, proves that the defendant company in starting said shipment from Strong City and in deviating the same from said Emporia, knowingly and wilfully went into the mouth of the flood, at its climax.

In support of the first specification above named, that defendant was negligent in detaining petitioners' said cattle at said Strong City from Wednesday morning

May 27, 1903, to Friday noon, May 29, 1903, reliance at the trial was placed on the testimony of the witnesses W. H. Frost (p. 37, Record), G. W. Cloyd (p. 31, Record), and J. D. Carr (p. 116, Record). By the testimony of those gentlemen it was shown that at the same time of the purchase and shipment of those 798 cattle out of Texas, another train load of cattle was bought by plaintiffs and shipped, in like manner. The shipping contracts and the billing and routing of that other train load of cattle, which contained 763 head of cattle of the same class and character of cattle as the 798 head of cattle in controversy, were in all respects the same as the shipping contracts and the billing of the 798 head of cattle in controversy. The only difference between the other train load, which was in charge of Cloyd, was that it was about four or five hours ahead of the train load containing the cattle in controversy. Said other train load of 763 head of cattle was likewise stopped at Strong City, for feed and water and rest, but the transit and transportation of said other train load of cattle was resumed and continued by defendant, Wednesday evening, May 27, 1903, from said Strong City, and said other train load of cattle was hauled by defendant over its said line through Emporia and Topeka, to Atchison, Kansas, and there delivered by defendant to the connecting carrier, and by the connecting carrier continued north, so that said other train load reached its destination in South Dakota on Monday, June 1, 1903.

The evidence shows that both those train loads of plaintiffs' were in the stock yards at Strong City, from Tuesday night until Wednesday evening, when, as already stated, said other train load was hauled out and its transit and transportation continued by defendant to its destination. The history of said other train load of cars, as given above, shows that defendant was negligent

in not continuing from said Strong City, on said Wednesday, May 27, 1903, the transit and transportation of the train load of cattle in controversy.

Defendant was likewise negligent respecting the second of the above specifications, in leaving said Strong City on said Friday noon. As already stated, all of defendant's lines in Kansas were flooded early that Friday morning, and the testimony of Assistant Engineer King, of Topeka, shows that on Friday there was a tidal wave of water passing down the Kaw, which had accumulated from the rains described by said Jennings and had reached at that time the City of Topeka and which, according to the testimony of Weather Bureau Superintendent Connor, was certain to reach Kansas City within thirty hours after its passage by Topeka on said Friday. It was therefore reckless, if not madness, for defendant, having detained petitioners' cattle at said Strong City over two days, to attempt to reach or get across the Kaw river after awaiting the arrival of the very climax of the flood, especially by such attempt at the mouth of that river.

The third specification, that defendant was negligent in endeavoring to get across the Kaw river by taking the cattle over its cut-off from Emporia, was sustained by the evidence.

The fourth specification of negligence was also sustained by the evidence.

The fifth specification of negligence, that defendant carelessly and negligently failed and neglected to move, or cause to be moved, said cattle from their position of peril in said stock yards, was sustained by the evidence.

One of the witnesses in the case was William M. Kendrick (Record, p. 283), who was the live stock agent at Kansas City of the C., B. & Q. R. R. Co., and who

testified that his company could have taken petitioners' cattle out of Kansas City, north across the Kaw River, on the afternoon of Saturday, May 30, 1903; that he offered to defendant to take and transport the cattle in controversy, but that the defendant company refused and neglected to deliver the cattle to the said "Burlington" Company for that purpose; that as evidence of the fact that said Burlington Company could have taken petitioners' cattle out of and across said Kaw River, northerly, out of Kansas City on said Saturday afternoon, Mr. Kendrick testified that on said Saturday evening, May 30, 1903, 35 cars of cattle were shipped out of Kansas City north across said Kaw River by said Burlington Railroad Company (Record, pp. 227-228).

Another witness in the case was W. C. Sparks (Record, p. 345), who testified that he was a member of the firm of Sparks Brothers, who were engaged in the mule business at Kansas City and had a mule yard a block south of the Kansas City Stock Yards, where petitioners' cattle were penned, and that on Sunday morning, May 31, 1903, Mr. Sparks' company drove out of their said mule yards, between six hundred and seven hundred head of mules, up out of the Kaw valley south, up to and on the uplands immediately south of Kansas City, and that in this way their mules were saved from the flood; and the testimony of Mr. Sparks shows that the same could have been done on that Sunday morning by defendant company, with respect to petitioners' said cattle in said stock yards, and that that was the wise and prudent course to have taken concerning petitioners' cattle instead of driving them up into said overhanging viaducts and chutes where petitioners' cattle were certain to and did suffer and die from starvation and want of water.

Another witness in the case was L. A. Allen (Record, p. 226), who testified that there were plenty of men

and instrumentalities in and around the stock yards in Kansas City on that Sunday morning, by whom the cattle of petitioners could have been driven out of said stock yards.

The testimony in the case shows that said cattle of petitioners in the stock yards and the cattle of the plaintiff, Minnesota & Dakota Cattle Company, in the other companion case, presented also to this court for the writ of *certiorari*, constituted about all the cattle that were in the stock yards at said Kansas City on said Sunday, May 31, 1903.

Another witness in the case was one G. A. Roberts (Record, pp. 522-523), who was the live stock agent of the defendant company at Kansas City, whose testimony shows that defendant and its agents and officers gave no attention to the cattle of the petitioners after they were thus deposited Saturday morning, May 30, 1903, in said stock yards, by the defendant railway company.

Another witness in the case was one A. W. Coombs (Record, p. 580), who was the Assistant General Live Stock Agent of defendant company at Kansas City, and who testified also that the officers of defendant company gave no attention to these cattle after they were deposited Saturday morning in said stock yards.

Another witness in the case was one Sharp, who was the superintendent of defendant's terminals at Kansas City, and whose testimony shows that he and General Superintendent Hurley were engaged Saturday and Saturday afternoon in moving from the defendant's yards at Argentine a large number of cars and engines out of danger from the rising flood, but that neither of those officers, nor any of the other officers of defendant, paid any attention to petitioners' cattle which had been by defendant thus deposited in said stock yards.

Petitioners submit that the opinion of the Circuit Court of Appeals in this case is opposed to the decisions of the New York Court of Appeals, cited in said opinion of said U. S. Court of Appeals. Thus, in *Kurtz* v. *Peck*, 113 N. Y., 222, it was adjudged that:

"Where, upon a jury trial, each party asks that a verdict be directed in his favor and neither asks to go to the jury on the questions of fact, the court is authorized to find upon the facts."

The above language clearly indicates that the court, in that case, held that if a party asks for a peremptory instruction and at the same time asks, in the event of the denial of that instruction, to go to the jury upon questions of fact, the party is not precluded by his peremptory instruction.

The same ruling was made by the same court, in *Sutter* v. *Vanderveer*, 122 N. Y., 652.

In the case of *Koehler* v. *Adler*, 78 N. Y., 287, the New York Court of Appeals, in an opinion delivered by Chief Justice Church and concurred in by the full bench of that court, used the following language:

"The action was for money loaned, and the verdict was directed by the court. The defendant alleges error in not submitting the case to the jury. At the close of the evidence the plaintiff asked the court to direct a verdict in his favor, and the defendant then requested a like direction in his favor. The court stated that he thought the plaintiff entitled to the direction. The counsel for defendant then asked to go to the jury upon the question whether the debt in suit was ever contracted at all. This was denied, and an exception taken. Upon these facts we think that the defendant was entitled to go to the jury if the case warranted it. If nothing furher had been done after both parties asked a direction of a verdict, it would be assumed that they intended to waive the right of submission to the jury, and consented that the court should decide the question of law and fact in-

volved. But after a request, and a refusal to direct a verdict, there is no absolute inconsistency in asking to submit questions of fact to the jury. It is not proper, ordinarily, to direct a verdict if there is any material question of fact which ought to be submitted, and it is error to make the direction in such a case. Parties may consent, however, that the court may pass upon all questions both of fact and of law, and if they do they will be bound, and when both parties ask a direction this court will presume such consent. In this case the presumption is repelled by an express request to go to the jury upon a question of fact."

Said opinions of the New York Court of Appeals are in harmony with the understanding of the profession and the practice which everywhere prevails, both in the state and federal courts, by which practice a party may submit a series of instructions to the court, one of which is peremptory in its character and the others of which are asked by the party submitting the instructions, in the event that the peremptory instruction is denied.

Petitioners are advised that great surprise will be experienced on the part of the bar, if this rule contended for by them in this case is permitted to be overturned by an affirmance of the decision of the Court of Appeals in this case. The opinion of the Court of Appeals in this case is also opposed to the express decision of the Circuit Court of Appeals of the Second Circuit, in the case of *Tigua Iron Co.* v. *Greene*, 88 Fed., 207; 31 C. C. A., 477. The decision of the Circuit Court of Appeals in that case, as will be seen from the opening paragraphs of Circuit Judge Lacombe's opinion, is squarely in favor of the proposition we contend for and is decisive against the decision of the Court of Appeals in this case. Between the Circuit Court of Appeals in the Second Circuit, in that case, and the Circuit Court of Appeals in this case, there is a direct and irreconcilable conflict

213

In the case of *Merwin* v. *Magone*, 70 Fed., 776; 17 C. C. A., 361, the court in its opinion by Judge Shipman, said:

"It will be observed that neither party raised a question of fact, and each asked for a direction in his favor. In such a case, the finding is conclusive if there is any evidence to sustain it."

To the same effect is *Magone* v. *Origet*, 70 Fed., 778; 17 C. C. A., 363.

So in the decision of the Circuit Court of Appeals of the Second Circuit, in the case of *Chrystie* v. *Foster*, 61 Fed., 551; 9 C. C. A., 606, that court, in its opinion by Judge Wallace, said:

"Where the defendant excepts to the direction of a verdict for the plaintiff, but makes no request to go to the jury, he cannot be heard to assail the judgment upon the ground that there were questions of fact for the jury. *Provost* v. *McEncroe*, 102 N. Y., 650, 5 N. E., 795. Where both parties move for the direction of a verdict, and neither requests any question of fact to be submitted to the jury, they concede that there is no question of fact, and that the case turns wholly upon the questions of law, which are to be determined as though the facts were undisputed."

The opinion of the court is also opposed to the opinion and decision of the Circuit Court of Appeals of the Sixth Circuit, in the case of *Monahan* v. *Grand Trunk Western Ry. Co.*, 138 Fed., 37.

In the opinion in that case, which was delivered by Circuit Judge Severens, the court said:

"The second question propounded by counsel is based upon the following facts: At the close of the production of evidence the counsel for the defendant preferred a request to the court that the jury be directed to return a verdict for that party. This request having been discussed by the counsel for the respective parties, the

court was proceeding to give its opinion and instructions to the jury, and seemed to indicate, as plaintiff's counsel thought, a purpose to sustain the defendant's request for a positive direction in its favor. Thereupon the court permitted an interruption to allow the plaintiff's counsel to put on file certain requests to instruct the jury, and assured the counsel that he should have the benefit of them, and then, after giving its views at length, directed a verdict for defendant. The requests filed by plaintiff were eighteen in number, the first being as follows:

'(1) Under the pleadings and proofs, you are instructed that your verdict must be for the plaintiff, and the only question for you is as to the amount of damages.'

"The others related to particular matters of law and fact involved in the issue. The court did not comply with any of these requests. The plaintiff excepted to the ruling of the court upon defendant's motion for directing the verdict in its favor, and to the refusal of the court to give the instructions requested in his behalf. Counsel for defendant now urge that the request of each of the parties for a peremptory instruction by the court had the effect of a joint withdrawal of the issues of fact from the jury and a submission of them to the court for its determination, and that, the court having decided them in favor of the defendant, both parties are concluded by the finding, citing *Beuttel* v. *Magone*, 157 U. S., 154, 15 Sup. Ct., 566, 39 L. Ed., 654. In that case there was no disputed question of fact, and it only remained for the court to state to the jury what the facts were, and what the law applicable to those facts was. And what the court there held in effect was that the court might state the facts as agreed, and not submit them to the jury. The language of Mr. Justice White, taken apart from the case before the court, might justify the conclusion which the counsel draws from it. But it would seem that the decision cannot be regarded as furnishing a rule for cases where the evidence is conflicting, and where the party whose request is refused has coupled with his request other requests directed to particular aspects of the case, which repel the implication

that the party had consented to a submission of the facts to the court. And in all the cases in which the case of *Beuttel* v. *Magone* has been cited in the appellate courts the conditions were the same; there was no disputed question of fact, and there were no special requests. *Merwin* v. *Magone*, 70 Fed., 776 17 C. C. A., 361; *Magone* v. *Origet*, 70 Fed., 778, 17 C. C. A., 363; *Bradley Timber Co.* v. *White*, 121 Fed., 779, 58 C. C. A., 55; *United States* v. *Bishop*, 125 Fed., 181, 60 C. C. A., 123; *Phoenix Ins. Co.* v. *Kerr*, 129 Fed., 723, 64 C. C. A., 251, 66 L. R. A., 569.

"In *Beuttell* v. *Magone* it is expressly stated that such request made by the respective parties is not the equivalent of a submission of the case to the court without the intervention of a jury, within the intendment of Rev. St., sections 649, 700 (U. S. Comp. St. 1901, pp. 525, 570). The rule must therefore rest upon an implication of consent. Can any implication of consent be fairly drawn when, as here, the party couples his request for a peremptory instruction in his favor with further requests for instructions on the questions of law applicable to certain assumed facts which the jury may find? The presentation of requests for instructions in that form necessarily imports that the party expects that, if his first request is refused, the case will go to the jury, and that the court will give his other requests, or such of them as the court thinks are proper. For, if his request for a peremptory instruction is given, the others are futile. May not a party ask for a peremptory instruction in his favor, without depriving himself, if the court thinks he is not entitled to it, of the right to have the jury pass upon the evidence and determine the issue? No valid reason is perceived why he should pay the penalty of losing a constitutional right by invoking the opinion of the court *pro hac vice* upon the preliminary question. It is, we believe, a common practice of the state and federal courts in Michigan and elsewhere in this circuit, when the question whether there is any evidence which could fairly be relied upon to defeat his claimed right, and, if the opinion of the court should be that a question for the jury is presented, then to ask that appropriate in-

structions to be given to guide their deliberations, to present all his requests in a body, and the courts understand that to be the purpose, and conform to it. This was the course pursued here, and we do not think we should be justified in extending the rule stated in *Beuttell* v. *Magone* to a case thus differently circumstanced. In the case before us it is apparent that the judge did not suppose he was intrusted with the ultimate finding of facts in the case. It appears that, before the plaintiff's requests were filed, the court had already indicated to the plaintiff's counsel that it was about to give a direction in favor of the defendant, and had already determined that the plaintiff was not entitled to recover. The court also stated that it would give to the plaintiff the benefit of his requests. But these could be of no benefit if the case was to be concluded by the judge's opinion on the facts. All this indicates that the court was co-operating with the plaintiff's counsel in his effort to save the questions presented by his requests."

So far as we have been able to observe, it is true of all of the cases, state and federal, in which this question of waiver where both parties have joined in asking a peremptory instruction alone, arose that each case presented a single issue on the part of the plaintiff, and that an issue of fact triable by the jury; and as we have seen, save and except the decision of the Court of Appeals in this case, in each of that class of cases involving a single issue alone, the rulings have been that where either party at the time of presenting a request for a peremptory instruction also presented a series of instructions to be given to the jury in the event of the denial of the peremptory instruction, the party thereby did not waive the right to go to the jury on the issues of fact.

But in the case at bar, there were and are two issues tendered by the plaintiffs. In the case at bar, from the beginning of the case as made by the petition, the plaintiff claimed a liability on the part of the defendant rail-

way carrier upon two grounds, one on the ground of deviation, without plaintiff's consent, of the shipment from its line running to Topeka and Atchison, to Kansas City, from which point it had no line to Atchison, the other the grounds of negligence aforesaid.

We contended in the Court of Appeals, that the authorities are practically unbroken to the effect that where a shipment is deviated by the carrier, as in the case at bar, without the consent of the shipper, the carrier assumes by such deviation absolute responsibility, and the act of God is no defense in that class of cases.

In our brief in the Court of Appeals in this case, in support of the proposition of absolute liability of the defendant carrier, on the ground of deviation, we cited the following authorities:

Crosby v. *Fitch*, 12 Conn., 410, l. c. 419, 420, 423;
R. R. Co. v. *Beck*, 125 Pa. St., 620;
Phillips v. *Bingham*, 26 Ga., 623;
R. R. Co. v. *Cole*, 68 Ga., 623;
Cassilay v. *Young*, 4 B. Mon., 263;
Sager v. *R. R. Co.*, 31 Me., 228, l. c. 238;
R. R. Co. v. *Washburn*, 22 O. St., 324;
Ex. Co. v. *Smith*, 33 O. St., 511;
Brown Co. v. *R. R. Co.*, 63 Minn., 546;
Hedricks v. *Steamship Co.*, 18 La. Ann., 353;
Hastings v. *Pepper*, 11 Pick., 41;
Proctor v. *R. R. Co.*, 105 Mass., 512;
Ry. Co. v. *Allison*, 59 Tex., 193;
Johnson v. *Ry. Co.*, 33 N. Y., 610, l. c. 611;
Goodrich v. *Thompson*, 44 N. Y., 324;
Maghee v. *R. R. Co.*, 45 N. Y., 514;
Keeney v. *Ry. Co.*, 47 N. Y., 525;
Robertson v. *Nat. S. S. Co.*, 14 N. Y. Sup., 313;

Seavey Co. v. *Union Trans. Co.*, 106 Wis., 394;
Ry. Co. v. *Brichetto*, 72 Miss., 891;
R. R. Co. v. *Odil*, 96 Tenn., 61;
Mer. Dis. Tr. Co. v. *Kahn*, 76 Ill., 520;
Vol. 1, Am. & Eng. Enc. Law (2nd Ed.), 594;
Vol. 5, Am. & Eng. Enc. Law (2nd Ed.), 422, 426;
Hutchinson on Carriers, Secs. 190, 191;
Lawson on Bailments, Sec. 127;
Vol. 6, Cyc. of Law & Procedure, 383, 384;
Marsh v. *Un. Pac. R. R. Co.*, 9 Fed. Rep., 873;
Ins. Co. v. *LeRoy*, 7 Cranch., 26;
Hostetter v. *Park*, 137 U. S., 30, l. c., 40;
Constable v. *Steamship Co.*, 154 U. S., 51, l. c., 66.

In the Court of Appeals, in our brief in this case, we contended in support of the proposition that in cases like this where the act of God is claimed to be the cause of the result, the carrier is still liable if it is guilty of contributory negligence, operating in connection with the act of God to cause the injury, and in support of that proposition in our brief in the Court of Appeals, we cited the following authorities:

Sweezy v. *Philadelphia*, 64 Pa. St., 106;
Helbling v. *Cemetery Co.*, 201 Pa. St., 171;
Morrison v. *Davis*, 20 Pa. St., l. c. 176, 177;
Williams v. *Grant*, 1 Conn., 487;
Wallace v. *Clayton*, 42 Ga., 443;
R. R. Co. v. *White*, 88 Ga., 805;
Merritt v. *Earle*, 29 N. Y., 115, l. c. 116f;
Michaels v. *R. R. Co.*, 30 N. Y., 564, l. c. 570;
Bibb Broom Corn Co. v. *A. T. & S. F. Ry. Co.*, 102 N. W. Rep. (Minn. Sup. Ct.), p. 709;
R. R. Co. v. *Curtiss*, 80 Ill., 324;

Wald v. *R. R. Co.*, 162 Ill., 545;
Blodgett v. *Abbott*, 72 Wis., 516;
Nelson v. *Ry. Co.*, 72 Pac. Rep. (Mon. Sup. Ct.), 643, l. c. 651;
Steamboat Co. v. *Tiers*, 24 N. J. Law Rep., 697;
R. R. Co. v. *David*, 6 Heisk, 261;
McGraw v. *R. R. Co.*, 18 W. Va., 361;
Smith v. *Ry. Co.*, 91 Ala., 455, l. c. 456;
Coosa Steamboat Co. v. *Barclay*, 30 Ala., 12, l. c. 127;
Nugent v. *Smith*, 1 C. P. Div., 19 and 423;
Vol. 1 Am. & Eng. Enc. Law (2nd Ed.), 595;
Vol. 5 Am. & Eng. Enc. Law (2nd Ed.), 234;
Hutchinson on Carriers, Secs. 181, 187, 188;
Vol. 6 Cyc. Law & Proced., 377, 384;
Strauss v. *Ry. Co.*, 17 Fed. Rep., 209, l. c. 212;
Caldwell v. *Sou. Ex. Co.*, 4 Fed. Cas. No. 2303, p. 1036;
Thompkins v. *Duchess of Ulster*, 24 Fed. Cas. No. 14087a, p. 32;
Southern Pac. Co. v. *Schoer*, 52 C. C. A., 269, l. c. 274;
Newport News Co. v. *U. S.*, 9 C. C. A., 579;
Clark v. *Barnwell*, 12 How., 272, l. c., 280;
Holladay v. *Kennard*, 12 Wall., 254;
Gleason v. *R. R. Co.*, 140 U. S., 433;
The Majestic, 166 U. S., 376, l. c. 386.

Petitioners further represent, that their counsel in the Court of Appeals in this case, in their brief in support of the proposition that the question of what was the proximate cause of the loss in this case and whether it was the carrier's negligence or whether it was solely the act of God, as claimed by the carrier, were questions of fact for trial by the jury, and in support of that prop-

osition the case of *Milwaukee & St. Paul* v. *Kellogg*, 94 U. S., 469, was cited. And in the brief of counsel of petitioners in the Court of Appeals, in support of the proposition that the questions of negligence in this case were questions of fact to be decided by the jury, the following cases were cited:

> *R. R. Co.* v. *Stout*, 17 Wall., 657, l. c. 653;
> *Ry. Co.* v. *McDonald*, 152 U. S., 662, l. c. 275;
> *Marande* v. *R. R. Co.*, 184 U. S., 173.

It is thus seen that in this case two issues were involved, both in the Court of Appeals and in the trial court, which, as already stated, were the issues of the carrier's liability on the grounds of deviation and negligence. The liability of the carrier in this case on each of those grounds stands separate and wholly apart from its liability on the other ground. The carrier in this case might be liable on the ground of deviation and not liable on the ground of negligence, or it might be liable on the grounds of negligence and not be liable on the ground of deviation. The carrier in this case might be liable on both grounds. The decision in this case of either question of liability, namely, deviation or negligence, is not in the nature of things a decision of the other question.

The question of liability on the ground of deviation was a law question, pure and simple. In this case the deviation was without plaintiffs' consent and without any consultation with plaintiffs. And the question of liability of the defendant carrier in this case on the ground of deviation, being a law question, pure and simple, there was no other way for the petitioners in the trial court to reach and obtain a proper determination of that question except to ask, as they did ask, a peremptory instruction to the jury based on that legal proposition of liability.

Since the questions of negligence were questions of fact, triable by the jury, there was no way under the law, since there was not a waiver of the jury trial in the case, for a decision of the questions of negligence except by the jury. Therefore petitioners in asking the court to give a peremptory instruction to the jury, on the basis of liability founded on deviation and at the same time asking the court to give certain instructions on the propositions of negligence, was simply asking the court to pass upon all of the law questions in the case.

As we have already seen, in the case of *Beuttell* v. *Magone*, 157 U. S., 154, and in the other Court of Appeals cases cited in the opinion of the court in this case, there was but a single issue, but if the rule adjudged by the Court of Appeals in its opinion in this case is erroneous and unjust as applied to a case where the plaintiff rests his case on a single proposition of fact, how much more would that result be true in the case at bar, where the liability is claimed on two grounds.

It is undoubtedly true, petitioners say, that while a decision of the case in favor of the plaintiffs on the ground of deviation would absolve the court from the necessity of a decision on the question of negligence, still judgment against the plaintiffs cannot be given in this case without a decision against them of both questions of deviation and negligence. Petitioners had the right to the trial of both issues by the aforesaid tribunals of judge and jury before a final judgment could be given against them. The trial court in this case assumed to decide and did decide both issues of deviation and negligence against the petitioners.

Our contention in the Court of Appeals was, that the decision of the trial court on the question of deviation was against the unbroken authorities applicable to the question of deviation in such cases, and that the

trial court, in taking the case from the jury on the questions of negligence, usurped the province of the jury. However, the Court of Appeals practically refused to decide either question of deviation or negligence, because, as held by the Court of Appeals, petitioners had lost their right as litigants in the case by asking the trial court to decide all the law questions in the case arising on both issues. If the rule sanctioned by the Court of Appeals in this case becomes the rule applicable to all such cases, it would seem that the result would follow that because a litigant in the trial court asks the court to decide all the law questions in the case, the Court of Appeals on becoming possessed of the case will be prevented from saying anything more in an opinion in the case than if without any consideration of the case the word "affirmed" only were written therein.

In view of the conflict between the decision of this Court of Appeals in this case and the other decisions referred to, state and federal, we submit that in harmony with the decision of this court in *Forsythe* v. *Hammond*, 166 U. S., 506, the writ of *certiorari* prayed for by this petition is the proper remedy to settle the conflict made by this decision. If the decision of the Court of Appeals in this case on this question of practice is correct and is important to every litigant and lawyer in this country, this court ought, we submit, to grant this writ of *certiorari* and on the hearing of this case overrule the decisions of the other Circuit Courts of Appeals with which the decision in this case is in conflict. If, on the other hand, this court is of opinion that the decisions referred to of the other Circuit Courts of Appeals and of the Court of Appeals of New York are correct, then we submit that this court on the hearing of this case should so decide, in order to settle the conflict. A duly certified copy of the entire record in this cause in said Court of Appeals, and

the number of uncertified copies required by the rules of this court, accompany this petition and are filed herewith as a part of this petition.

Petitioners pray this court to grant the writ of *certiorari* herein to said Circuit Court of Appeals of the Eighth Circuit and on the hearing and decision of this case by this court that this court will reverse the decisions and judgments of the said Circuit Court and of the said Circuit Court of Appeals herein and remand this case to the Circuit Court for a new trial on both the issues of deviation and negligence.

JAMES S. BOTSFORD AND
R. E. BALL,
Attorneys for Petitioners.

State of Missouri, County of Jackson, ss.

James S. Botsford, being duly sworn, on his oath states, that he is one of the attorneys of petitioners in this case, and has been in both the Circuit Court and the Court of Appeals; that he has read the foregoing petition and that the matters set forth therein are true, as he verily believes.

JAMES S. BOTSFORD.

Sworn to and subscribed before me this 14th day of December, 1906.

My commission expires November 26, 1908.

VINNIE A. THOMAS,
(Seal) *Notary Public.*

Office Supreme Court, U.
FILED.
FEB 26 1908
JAMES H. McKENNEY

—IN THE—

Supreme Court of the United States.

OCTOBER TERM, 1907.

EMPIRE STATE CATTLE COMPANY, ET AL., *Petitioners,*
vs.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *Respondent.*
No. 178.

MINNESOTA AND DAKOTA CATTLE COMPANY, *Petitioner,*
vs.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *Respondent.*
No. 179.

PLAINTIFFS' REPLY BRIEF.

JAMES S. BOTSFORD,
BUCKNER F. DEATHERAGE,
ODUS G. YOUNG,
Attorneys for Empire State Cattle Company, et al.
R. E. BALL,
Attorney for Minnesota and Dakota Cattle Company,
Petitioners.

—IN THE—

Supreme Court of the United States.

OCTOBER TERM, 1907.

EMPIRE STATE CATTLE COMPANY, ET AL., *Petitioners*,
vs.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *Respondent*.
No. 178.

MINNESOTA AND DAKOTA CATTLE COMPANY, *Petitioner*,
vs.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *Respondent*.
No. 179.

PLAINTIFFS' REPLY BRIEF.

The petitioners in these two cases desire to submit to the court the record, and to have the court pass upon the question which is the central question in the case, whether the trial court committed error in declaring as a matter of law on the whole evidence, that the case should not have been submitted to the jury. The record comprises some seven hundred pages.

There are some things in the respondent's brief which we naturally resent. The composer of the parts of

the brief to which we now refer has seen fit, in divers and frequent instances, to exhibit his notions of professional gentility, by casting personal imputations upon the counsel for the plaintiff; and not content with pointing out the errors of plaintiffs' contentions, if such there should be, deems it within his duty to impugn their integrity and charge them with intentional misrepresentation and garbling of the proof. At page 3 of the brief, it is said: "Telegrams concerning these shipments were seemingly jumbled together by plaintiffs to create confusion. * * * It will be putting a premium upon an unfair practice, if this court were to accept such statements, and because of the confusion thus created and the garbling of evidence or facts, hold, therefore, that the case should have been submitted to the jury." Again, at page 84, we are accused of "juggling the telegrams to make it appear that Mr. Hurley was not acting in good faith, and counsel try to pervert the language used so as to make it appear that said Hurley, etc." * * * "Such juggling of evidence is not fair to court or counsel." * * * "It is not a candid, straightforward construction of the telegrams."

Then again (brief, p. 158), referring to the explicit recital of the bond (Rec., p. 19), on which this defendant grounded a cross-action for the expenses incurred at Kansas City and in the subsequent pasturage of the remnant of the cattle, which recital shows that all of said shipments were originally routed via Atchison and not Kansas City, we are treated to the decent and generous inquiry as to whether it was not "slipped into the bond by the astute counsel for the Cattle Company, in expectation of making some evidence on this point." The point is, if you cannot answer the argument, abuse the plaintiffs' attorney.

We mention these things only to resent them and because resentment is due. We had not heretofore supposed that it was necessary to try the counsel instead of the case, or to resort to such tactics in order to expose a fallacy or to establish a sound position. In this record, voluminous as it is, we had thought and think that there ought not to be any personal reflections by counsel on the one side against counsel on the other. It so happens that we are in a better position to know about the good faith of our contentions than are our opponents. The lawyer who makes a contention in bad faith, and with the purpose of confusing the issues and attempting to deceive the court, is always reprehensible. We respectfully decline to enact that role or to submit without protest to the accusation of having done so.

I.

As to the telegraphic orders concerning the movement of these trains.

Throughout the brief of the defendant the contention is made that the plaintiff has juggled and confused the telegrams, with the purpose and intent of attempting to fool the court into holding that the case ought to have been sent to the jury, contrary to the ruling of the trial court. We are charged with jumbling the telegrams. Counsel overlooked and paid no attention to the fact that all of these telegrams relative to the movement of these trains were wholly and solely within their control. In their brief they treat the matter as if the plaintiff had these telegrams and had put them in evidence in a designedly confused way, the purpose of confusing being to deceive the court.

If the court will refer to the stipulation in regard to these telegrams, printed at page 178 of the record,

it will see how unjust and unfair is the inference drawn by defendant's counsel. Naturally and necessarily, all of the wires or telegrams which passed between the defendant company and other connecting railroads were in the possession of the defendant. Naturally and necessarily the plaintiffs in this case could not get any of these telegrams until they were produced on demand, by the defendant. A call for all of the telegrams was made by the plaintiffs, and, as a result of that, the stipulation shown at page 178 of the record, was entered into. That stipulation showed that what purported to be a rescript of the telegrams was furnished by the defendant railroad company. It also showed that the counsel for the company agreed to have endorsed on the copies of said telegrams, the hours when they were respectively sent or received. The confusion in the order of the submission of the telegrams, and they are confused, is due entirely to the copies which the railroad company presented, and the form in which they did present them.

The court will not overlook the fact that the pledge of the stipulation by the railway company, to give the hours, or note the hours, of the time of the receipt by it of the different wires, was not complied with by it. The plaintiffs in these cases could not help that.

Mr. Hurley, who is now general manager of the defendant company, and at that time was superintendent of the Eastern Division of the Santa Fe System, extending from Emporia to Chicago, says, at page 212:

> Q. You aimed to give to the counsel of the road all of the wires pertaining to the movement of this stock, did you not?
>
> A. I didn't know that the counsel of our road had gotten those telegrams. I don't know yet how they got them, as far as I am concerned. They didn't ask me.

Q. As far as you were personally concerned?

A. Yes, sir.

Q. You don't know whether there was any other advice, except as contained in those telegrams, which were read?

A. *I couldn't recite the language of some of the telegrams, but my memory is that we did have more telegrams. I think I know of more.*

Q. If you do, where are they?

A. They must be in my office.

Q. Did you look for them?

A. I have not looked for them; I have not been told I needed them or any telegrams in this case.

Q. You don't mean to say you left the file of telegrams, furnished counsel, incomplete?

A. I mean to tell you I don't know how counsel got those telegrams, as far as I am concerned. They never got them from me personally, and I don't know.

Q. You don't know where they did get them?

A. No, sir.

Q. And in any selection which ones would go in and which ones wouldn't go?

A. I couldn't tell you, as long as I didn't furnish them.

Q. You have not since been asked to produce any additional or other telegrams than this batch we have had here?

A. At Topeka, when yourself and Judge Botsford and Mr. Hurd were questioning me, it was agreed I believe, certain accepted telegrams would be sent to show the hour and minute of the transmission of these telegrams. I had not heard anything about it personally since. It is possible that our counsel may have gone to my office for that information, but, personally, I don't know anything about it. He has not called on me for it.

Q. Referring to your last answer, do you not recollect that this transcript of this bunch of telegrams we have read here today was left there at Mr. Hurd's office for the purpose of having those hours and minutes put on by you, or some of your office force?

A. Really I haven't any recollection whether they were left or not. I recollect that it was decided that you would leave them with me.

Q. At any rate, they were not sent to your office, as far as you know, for that purpose?

A. As far as I know; I don't know.

Now, if the court please, is it just or fair where the central question is whether the court should direct a verdict as a matter of law on the whole testimony, for the railroad company to charge the plaintiffs with jumbling these telegrams? The frankest and fairest and most straightforward officer of the defendant company said that they did not furnish us with all of the telegrams. He said that he remembered of other dispatches. The court will appreciate that we had no means of obtaining, for use in evidence, these telegrams, except as they might be produced by the defendant company.

We have abstained heretofore from inferring that any wires relative to the movement of these trains had been withheld or suppressed. It is plain, from this record, that the pledge of having entered on the defendant's telegrams the hour and minute of their receipt was not complied with. It is also plain from Mr. Hurley's testimony that not all of the telegrams were produced. Why were they not? Who is responsible for the alleged confusion? Who was interested in not frankly producing the entire telegraphic correspondence pertaining to these shipments?

The copies of telegrams produced by the defendant are in printed record, 179-195. In the main they

are arranged from day to day, but the arrangement of them was made by the defendant, and not by the plaintiffs. The hour and minute of their sending and recepit was never entered on the copies, as it was stipulated should be done by the stipulation at page 178. They did not produce all of the telegrams relating to these shipments, as they were required to do. In the whole list there is not a one that pertains to the alteration of the freight rate, made necessary by the fact that the Santa Fe was undertaking to turn over the shipments to a connecting carrier at Kansas City, instead of at Atchison, as required by the original shipping contract and way bills. There is nothing in the proof as to what correspondence took place between the Santa Fe road and the Missouri Pacific and the Burlington, relative to the altered condition. It is not reasonable to suppose that there was no correspondence between these railroads on that subject. We repeat what we said in our former brief, that no railroad would haul the cattle from Kansas City to Omaha for the same proportion of the freight rate that would be charged for hauling them from Atchison to Omaha. The dispatches furnished omit very conspicuously any reference to this point, and, taken in connection with Mr. Hurley's statement that there were other telegrams relating to the matter, we submit that it is not an unfair deduction that the railroad company did not produce all of the telegrams called for. If there was any testimony suppressed, certainly the inference ought not to be drawn against the plaintiffs.

II.

The diversion of the shipments from the main line to Kansas City was solely the act of the defendant railway company.

There is a great deal of talk at one place and another in defendant's brief to the effect that Mr. Frost, of the Empire Cattle Company, requested and favored the idea of the diversion of the shipments. There is no such claim made in reference to the trains of the Minnesota & Dakota Cattle Company. The unfairness of this contention is again made apparent by reference to Mr. Hurley's testimony, at page 195:

Q. Do you know Mr. Frost?

A. I do not—never met him. No, sir.

Q. Do you know Mr. Mullen, the president of the Minnesota & Daokta Cattle Company?

A. I do not.

Q. You had no communication with him, in making these orders and sending these telegrams, did you?

A. No, sir, I did not.

Q. Or with anybody representing the plaintiffs in either of these cases?

A. No, sir.

Q. These orders you made on your own motion, didn't you?

A. Yes, sir; that is right.

Q. All of which was done by you, or any of your subordinates, in respect to the movement of these trains, and was done of your own motion?

A. Yes, sir; that is right.

Again, Mr. Hurley says, Record, 203:

Q. Is that what you immediately attempted to do, upon being notified by the Burlington that they couldn't receive the stock?

A. Yes, sir; it was my aim and intention to move not only the stock, but all sorts of traffic that the Atchison, Topeka & Santa Fe Railway Company had to their destination by using any line we could have use of in divergence or detouring, in case it was from a point on our line to a point on another line.

Stube, who was with the Minnesota & Dakota Cattle Company cattle, says of his arrival in Kansas City:

When I got near the yards, I said: "Well, we have got to Atchison at last;" and a man said "Kansas City, you mean."

Q. That was the first you knew of it?

A. Yes, sir. (Record, 407.)

It is apparent from the foregoing testimony that there was no consultation with the plaintiffs or their representatives and no acquiescence by them in the diversion of the shipments, and whatever the fact may amount to, it is made perfectly certain that the order of diversion was solely that of the railroad company.

III.

There was no delivery of the cattle to the Missouri Pacific Railroad.

The contention on the part of the railroad company in their brief in this regard enlarges very much over what they set up in their answers in the two cases. In the Empire State Cattle Company case they do not claim in their answer that they delivered the cattle to the Missouri Pacific Railroad Company, although they do claim that they had arranged with that company to make such delivery. In the Minnesota & Dakota Cattle Company case they claim in their answer that they had the same arrangement with the Missouri Pacific, and, in fact, delivered twenty cars to the Missouri Pacific.

In their brief (page 43), they claim that the cattle were delivered to the Missouri Pacific road to be forwarded, and that they were thereupon relieved from all responsibility for the shipments.

At pages 169 to 172 of our original brief we have set forth the telegrams showing that this contention about the delivery of the stock to the Missouri Pacific is entirely untrue. It is true that Mr. Hurley wired the Missouri Pacific, as stated in their brief, that he had loaded the stock on the faith of the Missouri Pacific taking it. It is also true that on the same day (Rec., 189) he wired his superintendent, McClelland, at Topeka: "I have told Fox to load stock held at Strong City and Wellington, which amounts to 100 cars, K. C. St. J. & C. B. now advise they are open and can accept it. If anything arises so they cannot accept it, before it reaches Kansas City, deliver to Missouri Pacific."

This wire shows that primarily the defendant intended after loading and ordering forward these trains of cattle, to deliver them to the Burlington at Kansas City; and the court will see by the testimony of Kendrick, agent of the Burlington at Kansas City (Rec., 283) that that road was ready and prepared to take these cattle out at Kansas City, and was not permitted to do so by the defendant.

We charge, as one of the acts of negligence on the part of the defendant, that from Friday, the 29th, until the culmination of the flood on Sunday morning, the 31st of May, the defendant fooled away the opportunity to get these cattle out of this valley, and did so by reason of attempting to deal at the same time with the Burlington and the Missouri Pacific. By the defendant's own act they had brought these cattle in here to Kansas City, a point away from the original line of transportation. By that act the defendant deranged the

original contract of shipment and apportionment of the freight rate. In order to get that re-arranged, they consumed so much time that the cattle were, by their fault, caught in the flood.

But the most astonishing contention of fact which the defendant makes, is that these cattle were delivered to the Missouri Pacific, and that when the defendant turned them in to the stock yards, it was entirely exonerated from any further responsibility in regard to them.

Mr. Roberts, local live stock agent of the Santa Fe, says that the way bills for these cattle were not delivered to any connecting line, and says, Rec., 469:

> Q. So that these way bills were not delivered to any connecting carrier at Kansas City, were they?
>
> A. Not that I know of; no, sir.
>
> Q. You found them there in your office after the flood went down?
>
> A. They were found there; yes, sir.

In the stipulation (Rec., 528) introduced by defendant to support its cross-action in the Minnesota & Dakota Cattle Company case, it is recited as follows:

> It is agreed in this case that the defendant was compelled to pay out and did pay out on account of plaintiff's cattle, at the stock yards at Kansas City, $2,428.60, and at Emporia, $2,820.38.

Now, why, we again ask, should the railroad company be in any position to say on the record in this case, that it had no further responsibility for these cattle, after turning them in to the stock yards at Kansas City, when, in this same case, they sue for a large amount of money, which they claim they were compelled to pay and did pay to the Stock Yards Company? How can they at one and the same time assert that they are wholly

exonerated from any responsibility for the cattle, and yet be heard to sue on the basis that they are responsible and because of that responsibility had to pay the Stock Yards Company? Why should the defendant be compelled to pay anything, if in truth it had delivered the cattle to the Missouri Pacific? We refer the court to pages 183-184 of our original brief.

At page 86 of defendant's brief, referring to the testimony of Mr. Douthitt, general live stock agent of the Missouri Pacific, defendant states that his evidence that no cattle were delivered only proves the reckless manner in which he was willing to testify. It appears that in discussing the question of whether the court ought to have declared, as a matter of law, that there was no case made, defendant's counsel has seemed to think it necessary to assault the integrity of the witness. Mr. Douthitt was the highest officer, as the record shows, of the Missouri Pacific Railroad Company, in control of their live stock business and of the shipments of stock received by them from connecting carriers. He stated, as a fact, that the Missouri Pacific did not receive for shipment any of these cattle; that none of the way bills were delivered to him or to his office, and that none or any of the customary things looking to delivery were done in this case; but, because he told the truth about it, and because there is no answer to the facts which he stated, the defendant resorts to the expedient of denouncing him as being willing to testify to anything that may be desired.

The defendant on the record, in which it seeks to recover several thousands of dollars of expense and to recover it on the assertion and basis that the cattle were in its custody, and it was compelled, therefore, to pay out the money sued for, is still willing and does contend that the cattle were not in its custody and it was

not obligated to pay out anything, and was not further responsible for the cattle after delivery to the stock yards. It contends this, notwithstanding its pleading, notwithstanding the bond taken, notwithstanding the fact that it shipped the remnant of the cattle out to Emporia, pastured them for a month or so and then forwarded them on their original way bills to their destination.

In the face of this testimony of Douthitt and in spite of the evidence of its own live stock agent, that the way bills were still in defendant's own office and found there after the flood, it is still boldly asserted in the defendant's brief (p. 86): "It is conclusively shown by the testimony of those who delivered to Mr. Isitt, the Missouri Pacific freight agent who received that one train load of cattle in the yards, together with the way bills, was delivered to the Pacific road in its yard." This is a misstatement of the testimony. What Isitt calls an interchange slip, he explains fully (Rec., p. 633), and finally states, in answer to the pointed inquiry:

> Q. It does not indicate anything then, in reference to whether your line has accepted for further transportation to another point those cars or not?
>
> A. Not at all.

As we have heretofore pointed out (plaintiff's brief, 179 and following), nothing was done with these twenty car loads of cattle, except to run them to the Missouri Pacific chutes, there unload them and then drive them through the alleys back to the shipping division where all the rest of the cattle were. There was no delivery to the so-called connecting carrier at all, and not until after this litigation commenced was there any pretense or contention of such delivery. The whole course of the defendant in respect to the cattle is absolutely inconsistent with such a contention. It brought the cattle into

Kansas City of its own motion; it recognized and was bound to recognize that they were still in its custody; it paid several thousand dollars of expenses and could only have paid that for the reason that they did remain in the defendant's custody; it took what was left of them out of the yards for the same reason, and pastured them near Emporia, at its own expense, for the same reason; and after they had attained sufficient strength to endure further shipment, the defendant forwarded them on the same identical way bills, and under the same shipping contract under which they had originally been received. All this talk about delivering them to the Missouri Pacific at Kansas City or to the Stock Yards Company for the Missouri Pacific, and thereby acquitting the defendant of all further responsibility in the matter, is simply ridiculous.

IV.

The defendant and its managing officers should have anticipated the heavy rise of Sunday morning, May 31st.

Repeatedly, in the course of the brief, attention is called to the undoubted fact of the great devastation wrought in the Kaw Valley at Kansas City by that flood. Much emphasis is laid on certain portions of the testimony of Mr. Connor of the Weather Bureau, as tending to show that this great rise could not have been anticipated. Italics are extensively employed in reciting that residents of Kansas City, business people and others, did not know of the coming of this heavy rise, and our reference to it as a tidal wave is scouted as a fable. Is this defendant and its conduct to be measured by the same standard as would be a resident or store-keeper in the Kaw Valley, living or doing business at Kansas

City? Is there no difference between the two in respect of their circumstances and ability and duty to know the conditions? All the orders moving these trains emanated from defendant's head offices at Topeka, Kansas. Is the responsibility of the great transportation line, with its head offices at Topeka, on the Kaw River, sixty-five miles above Kansas City, precisely the same as that of a store-keeper or a restaurant man on State Line Street, in Kansas City? This defendant had better facilities for knowing that this heavy rise, which reached Kansas City Sunday morning, the 31st, was coming, than even the weather bureau. Mr. Child, general supply agent of the Stock Yards Company, who was called by the defendant, testifies, page 537:

> Q. Do you know, Mr. Child, where that flood water came from? That is, I mean to say whether it came from beyond Manhattan or from beyond Topeka?
>
> A. From reading since, I am satisfied that it came from beyond Manhattan. * * *
>
> Q. All that volume of water, which you attribute this rise to, went into the Kaw River the other side of Manhattan, and necessarily would have to pass Manhattan?
>
> A. Yes, sir.
>
> Q. And the same is true of Topeka?
>
> A. Yes, sir.

He says also that communication with Topeka, and even with Manhattan, was open up until Sunday, but that during Sunday they got no reports at all.

> Q. I know, but before Sunday. It took the flood forty hours to get to Kansas City from Manhattan?
>
> A. Yes, the day before and all I could do and that is to give you the reports I did get. There was nothing alarming in them. The telegrams will show for themselves in that.

Q. There was communication, was there not?
A. Communication up to Sunday morning.

Then, on being requested, Mr. Child produced two telegrams from Topeka (Rec., 538), the last of which appears to have been sent at 8:10 p. m., Saturday. So that the facts from this record not only tend to show, but conclusively show, that this heavy rise entered the Kaw River beyond Manhattan, Kansas, from the tributaries of that river; that its rate of movement would take it forty hours to reach Kansas City, and Mr. Connor of the weather bureau, at page 311, gives the rate at which the crest of the flood moved, as being 2.6 miles an hour, and computed that it would take it thirty hours to come from Topeka to Kansas City. The fact cannot be sneered or asserted out of existence that this great volume of water passed the offices of the defendant company at Topeka during the night of Friday, the 29th. The fact cannot be denied that certainly, up until Sunday, the Topeka wires were open. If the officers of the defendant company did not know of the passage of this heavy rise, they certainly should have known of it. They argue this question as if this nine or ten feet of water had dropped out of the skies right at Kansas City; they take their denial of all knowledge of its coming as being a complete defense to the plaintiffs' charge of negligence on the part of the company in that respect.

We submit that it is not a complete defense or any defense. We submit that the evidence should be viewed, not with reference to the circumstances that surrounded private persons and business men in the flooded district at Kansas City, but with reference to the circumstances surrounding the officers of the defendant company, their facilities and opportunities of knowing, their actual knowledge of the flood Friday morning,

and their keeping in touch with the condition of the river along defendant's railroad above Kansas City, and their duty and responsibility in handling these trains of live stock.

It is no answer to this contention for the chief official to say he did not in fact know about this rise coming until it arrived at Kansas City, and within two or three hours raised the Kaw River some ten feet clear across its valley. It is no answer to the charge of negligence in running these trains into this valley ahead of this flood, which was done demonstratably after this heavy rise had passed Topeka, to say, as Mr. Hurley does say, that he was anxious to forward these shipments to their destination and that was why he ordered them in to Kansas City. It would have cost more, of course, to have retained the cattle on the highlands of Kansas, but it would not have cost anything like what it eventually did cost by reason of the reckless and negligent act of hauling nearly one hundred thousand dollars worth of live stock into the valley and unloading it near the mouth of the river and in front of this devastating flood. It seems to us that nothing could have excused the orders of Mr. Hurley, with reference to the forwarding of these trains from Strong City and Wellington, except he had a reasonable certainty of being able to get them away from Kansas City. This he did not have and knew that he did not, as is shown by his wire (Rec., 189) to the superintendent at Topeka, in which he says:

> I have told Fox to load stock held at Strong City and Wellington, which amounts to 100 cars. K. C. St. J. & C. B. now advise us they are open and can accept it. If anything arises so they cannot accept it before it reaches Kansas City, deliver to Missouri Pacific.

It is true this wire was sent and is dated May 28th, which was Thursday—the hour is not given; but there was abundant time to stop these trains after the more perilous condition of the river at Kansas City was known, or, by the exercise of reasonable care, could have been known. We cannot but regard the persistence with which the orders were adhered to and carried out, even to the extent of getting into the city over the tracks of another railroad, as being grossly negligent and reckless.

V.

The act of driving these cattle into the overhead viaducts was one of the greatest folly and negligence.

There are many grossly inaccurate statements of fact contained in the brief. It is mentioned in one place that thousands of sheep and hogs and cattle were drowned in the stock yards. There is not a word of testimony to sustain that statement. On the contrary, if such a thing had been true, it is not supposable that the evidence of it would have been overlooked. The testimony shows that, aside from these cattle, there was another small bunch which likewise was put up in the viaducts, and, aside from this live stock, there was no evidence that any live thing, man or beast, was lost in the stock yards by that flood.

It is iterated and reiterated that these were wild Texas cattle, and therefore it would have been a hazardous matter to drive them some half a mile to the highlands. There is not a word of testimony to show that the cattle were of any such character, and, whether they were or not, they would not have starved and died or been lost, if they had been taken to the high-

lands. As we have heretofore pointed out, even on Sunday morning, the men of the mule market took about seven hundred mules to the hills, which were penned immediately across the alley from the shipping division where these cattle were penned.

The evidence of Stube, of the Minnesota Company, who stopped at a hotel immediately adjacent to the yards, shows that these cattle were up in the viaducts when he arose Sunday morning. This fact itself shows that the submergence of the yards was, in fact, anticipated some hours before it occurred. We submit that it is not true, as a matter of law, that the act of driving these cattle into those overhead viaducts, instead of taking them to the highlands, was not a negligect act. On the contrary, it seems to us it was most negligent as a matter of fact. It was plain that they could not be fed there. Neither is it a fair criterion to compare the conduct of the railroad in this respect, or in respect to these cattle, with its conduct in regard to the carloads of dead freight. A very different difficulty confronted the defendant company and other roads in respect to carloads of dead freight from what confronted them in regard to live stock.

The cases cited from Missouri and Kansas have no bearing or tendency toward showing that the railroad company was not negligent in respect to these cattle. In the first place, it will not be assumed that the evidence of those records is the same as the evidence in this; in the second place, they concerned property that could not walk. There was no showing in any of those cases that any transportation facilities at all adequate existed to save the merchandise in those cars, or the property in the stores and houses located in the Kaw Valley. It will not do, we submit, and is not fair to generalize and assume that because the railroad tracks did not run up

over the surrounding hills, therefore the company was not negligent in failing to drive these live animals out of that valley.

Again in the cases cited, the shipments in question were destined and routed to or through Kansas City, which was not the case here. Again in the cases cited, there was no opportunity to move the stuff out by a connecting carrier, whereas in this case, in spite of asseverations to the contrary, there was such opportunity.

Kendrick, the Burlington man, certainly cannot be accused, as Mr. Douthitt, of the Missouri Pacific, was accused, of being willing to testify to anything. On the contrary, if the court will read his testimony it will appear that he was rather reluctant; but it will also appear that as the man in charge of the Burlington business at the stock yards, he was expecting to take these cattle. It will appear that he was surprised when the Santa Fe office advised him (wrongly, as we have seen), that the Missouri Pacific was going to take the cattle. He took the pains of personally confirming that, by telephoning defendant's Argentine office.

Of the 142 cars which defendant's counsel insistently claimed they had arranged with the Missouri Pacific to take at Kansas City, the only portion of the 42 cars which had arrived had been turned over to the Burlington. He had the cars and the engines and was accessible to the highest part of the yards, which the Missouri Pacific was not, and the facilities of the Burlington are shown by the fact that Mr. Kendrick sent out thirty-five cars over that road as late as 6:00 o'clock Saturday evening, the 30th.

They try to escape this by saying that that train went East. It would have made little matter to these plaintiffs in view of flood conditions at Kansas City what

direction the railroad took in getting those cattle out of that valley and away from danger.

Mr. Stube testifies, as we have cited in the original brief, that he personally told the man in charge of the defendant's office, on Saturday morning, that the Burlington was ready to take the cattle out, and the answer he received was, "The Missouri Pacific will take your cattle out."

VI.

Summary and Resume.

Counsel for the railway company, at the bottom of page 2 of their brief, cite a couple of cases as authorities in their favor, one against the Missouri Pacific Railway Company, and the other against the St. Louis & San Francisco Railway Company.

It is proper to observe, respecting those two cases, that neither of those two companies have lines in the Kaw Valley. The flood in this case was a Kaw Valley flood. Those two railways touch the Kaw River at Kansas City, and the Missouri Pacific Railway has an unimportant branch extending from its Southern Kansas railway, up to Topeka, but, as already indicated, neither of the railways of the Missouri Pacific Railway Company or the St. Louis & San Francisco Railway Company run parallel with or in the valley of the Kaw River.

Of course, it requires no argument to demonstrate that neither the head officers nor the operating servants of either of those railway companies could have such extensive knowledge of the rise and development of the Kaw Valley flood in this case, as was had by the head officers and the employes of the defendant railway company, for nearly a week before the climax of

that flood on Sunday, May 31, 1903. The testimony of Mr. Hurley, Mr. Cafferty and Mr. McClelland, who were either general or division officers of the defendant railway company, with headquarters at Topeka, show that all of the lines of the defendant railway company in the eastern part of the State of Kansas were flooded early in the morning of Friday, May 29, 1903, and out of operation, and that they knew those facts. Their lines had been in that condition for eight hours before the transit of these cattle of the plaintiffs was resumed, Friday at two o'clock, at Strong City.

Again, in another part of the brief of the railway company's counsel in this case, it is suggested and sought to be demonstrated by the arguments which counsel employs, that it was not negligence to drive these $100,000 worth of cattle up on the viaducts in the stock yards, because, as is argued, the railway company, or the stock yards company (which is the same thing, because the stock yards company was the bailee of the defendant railway company), had the right to suppose that the flood would subside within a few hours after its climax, so that the cattle might be taken down from the viaducts.

It seems to us that this is a strange argument and a very singular sort of logic. It took a month for this flood to rise to its climax, and as conditions existed on that Sunday morning when these cattle, instead of being driven up on the uplands, were driven upon those viaducts, the situation was such as to warrant a man of the most ordinary prudence to believe that it would take days and days, as it did take, for the flood to sufficiently subside so that the cattle could be taken down from those viaducts. In driving the cattle up on the viaducts, they were driven to certain death. Nothing was more, or could be more, inevitable than that result. The

only wonder is that the whole of the two herds did not perish. Besides, the condition of the water in the Missouri river at Kansas City at the point where the waters of the Kaw empty into the Missouri, was such at that time, as to convey the idea to a child, even, that the Kaw River flood could not subside short of a week or ten days, at the outside. Both the Missouri River and the Kaw River at Kansas City, for forty-eight hours before that Sunday morning, were more than bank full.

The strange feature of the brief of the learned counsel of the railway company, as it seems to us, is the persistency with which it is sought to be shown, in contradiction of the overwhelming and uncontradicted facts in the case, that the defendant railway company, upon the question of the anticipation of the flood at Kansas City, stood in the same position as the people at Kansas City.

Reference has already been made quite fully in this brief to that point. But, as a sample of the suggestions made throughout the brief, we call attention to the following sentence at the top of page three of counsel's brief:

> Indeed, it is now a well known historic fact, that this flood at Kansas City was so extraordinary, unprecedented and sudden in its final catastrophe, as not to have been anticipated by the inhabitants in that locality.

The inhabitants of West Kansas City, who live in the valley of the Kaw, are, as is well known, largely made up of the laboring classes, who work from early morn till late at night, in the packing houses and other large industries at Kansas City, and for counsel to suggest and to persistently argue that the people of West Kansas City who live in the valley of the Kaw, could or did, know as much about the flood condition of the

Kaw Valley from Manhattan to the Kaw's mouth, as is shown by the evidence in this case to have been known by defendant, seems to us to evince a closing of the eyes on the part of the learned counsel to the overwhelming evidence and conceded and undeniable facts of the case, which shows that the general officers and employes of the defendant company, with head offices at Topeka, actually knew of the flood for four days before its climax, on May 31st.

Throughout the brief of the learned counsel of the railway company in this case, it seems to be assumed that the law of deviation in this class of cases only applies in cases where there is an express agreement of the parties as to the line of transit which the carrier is to follow in making the shipment.

A perusal of our statement of facts in our other brief and the brief and argument therein, we think, will point out very clearly that there is plenty of evidence in this case to establish that there was an express understanding of these parties that these shipments were to go by way of the main line, through Wellington, Strong City, Topeka and Atchison, where the delivery to a connecting carrier was to be made.

The testimony of Frost and Newton, on the part of the Empire Company, and of Stuby and Mullen on behalf of the Minnesota Company, together with the manner of making up the way bills and shipping contracts, with the endorsements on the back thereof, all show that there was a clear and distinct understanding of these parties that these shipments should go by way of Topeka and Atchison, as above stated. The shippers were paying a through rate for the entire shipment, and the amount of the through rate which they paid for the shipment over the usual route, by way of Wellington, Strong City, Topeka and Atchison, was less

than the through rate would have been, had it been understood by the parties that the shipment was to be made in a round-about way, by way of Kansas City, or some other round-about transit. Besides, Judge Pollock, in his opinion in this case, clearly indicates that he understood the evidence in the case as showing the understanding of the parties as to the line of transit to be by way of Topeka and Atchison, as a reference to his opinion will show.

In addition to that, we have the testimony of Mr. Hurley, the general superintendent of the railway company, given in the most clear, explicit and conclusive manner, that the line of railway of the defendant company from Amarillo north by way of Wellington, Strong City, Topeka and Atchison, was the usual traveled route of those shipments.

Aside, however, from the proposition of there having been the express agreement as to the line of transit in this case, we think the law is well settled, as an examination of the authorities cited in our other brief and argument will show, that even where there is no express agreement on the subject, but there is a usual traveled route and line of transit for such shipments as that made in the given case, then as the courts and law writers say, the shipper and carrier are presumed to contract with reference to that usual route, and the carrier is as much bound in the given case, even though there be no explicit or express agreement on the subject, to take the shipment the usual traveled route, as if there were an express agreement to that effect. And the rule of liability for deviation in such cases is just the same as if there had been an express agreement of the shipper and carrier as to the line of transit.

At several points in defendant's brief it is suggested that plaintiff's agents Frost and Stuebe did not protest

or object against or to the movements of the cattle by defendant railway company, through Supt. Hurley. It was not their part or place to object or except or protest. They were in the position described in Tennyson's poem of the "Light Brigade:"

"Theirs not to reason why,"
"Theirs but to do and die."

The soldiers of Napoleon on the famous and disastrous retreat from Moscow did not object, except or protest. But Napoleon was not then more supreme than was Supt. Hurley in ordering the movements of the cattle in these cases. Counsel suggest that these cattle could not have been left in or taken out of the K. C. stock yards without plaintiff's consent. This is a mistake. Such consent was not thought of or even dreamed of till now. There is nothing in the record or evidence warranting or supporting such a suggestion.

VII.

Additional Authorities.

We desire to call attention at this point to some cases which have come to our attention since the printing of our other brief in this case.

The case of *Fentiman* v. *A. T. & S. F. Ry. Co.*, 98 S. W., 939, is one of those cases. That was decided December 12, 1906, by the Court of Civil Appeals of Texas. The case arose out of this same flood under consideration in this case. The judgment in that case in the trial court was for the defendant, but that judgment, on appeal, was reversed and the case remanded by the Court of Civil Appeals.

It was held in that case that:

> A carrier is liable as an insurer for the loss of goods intrusted to him for transportation, unless

the loss is caused by the act of God, the public enemy, inherent defects in the goods, or negligence of the shipper.

It was further held, that:

Where a shipper, suing a carrier for loss of goods received for transportation, makes out a *prima facie* case by proving that the goods were delivered to the carrier and were destroyed while in its possession, the burden is on the carrier to prove that the goods were destroyed proximately by an act of God, the public enemy, inherent defects in the goods, or negligence of the shipper.

It was further held in that case that:

Where, in an action against a carrier for loss of goods received for transportation, a *prima facie* case of liability is established by proof that the goods were delivered to the carrier and were destroyed while in its possession, the question whether the carrier discharged the burden of proof that the goods were destroyed by an act of God, the public enemy, inherent defects therein, or negligence of the shipper is for the jury, except where the evidence is so overwhelming as to leave no room for a reasonable doubt that the *prima facie* case has been destroyed.

It was also held in that case that:

Where the negligence of one person with reference to a duty he owes to another concurs with an accidental cause, resulting in injury to the latter, the former must answer for the consequence as though his negligence was the sole cause of the injury.

Accordingly it was held by the Court of Civil Appeals of Texas, in that case, that since the evidence showed negligence on the part of the railway company, concurrent with the act of God, the defendant carrier

was liable. This, it will be observed, is contrary to the ruling made by the trial judge in this case, as by reference to his opinion in the record, is seen.

In the opinion in that case, as will be seen by consulting that part of it at pages 940 and 941 (98 S. W. Rep., 940) is a summary of the testimony of Mr. Connor, of the Kansas City Weather Bureau, which he gave in that case. And it will be seen that his testimony from his daily memorandum of the rise and progress of the flood, which he made, is identically the same in the report of the Texas case as is his testimony given from the same memorandum by him in this case. See pages 300-303 of the record herein. We ask the court in this case to compare the testimony of Mr. Connor, as given from that memorandum in that case, with his testimony given in this case, for the reason that upon that same identical testimony, the court in that case held that there was evidence tending to prove negligence such as to authorize and require the submission of the case to the jury.

In the opinion in that case, the Texas Court of Appeals, as a summary of the evidence, uses the following language:

> The flood was caused by one general rise, which began on May 20, 1903, and continued a steady gradual rise from day to day until May 31. Then during the next twenty-four hours occurred an enormous rise of seven and one-half feet.

It would seem that the court in that case found from the evidence, which as we have seen was the same as the evidence in this case, and which involved the same flood and facts; that there was a sort of a tidal wave. However, we have not succeeded in convincing our learned friends on the other side, of the fact of such tidal wave. The evidence shows in this case, that on Thursday and

Friday, growing out of the rains, there was a tidal wave of about eight or ten feet that passed down the Kaw river by Topeka during those days, which tidal wave reached Kansas City during Sunday, or Sunday morning.

It seems that the Court of Civil Appeals of Texas also learned something about that tidal wave. The learned counsel of this same defendant in that case does not seem to have succeeded in convincing the court there that there was no enormous rise amounting to a tidal wave during the three or four days that preceded the climax of the flood on May 31st.

Another case to which we desire to call the court's attention is that of *Warehouse Co.* v. *Missouri, Kansas & Texas Railway Co.*, 124 Mo. App., 545. That was a decision by the St. Louis Court of Appeals, April 30, 1907. That also was a case which grew out of this same flood. The facts of the case took place at St. Louis, on the arrival of this flood down the Missouri and Mississippi rivers, in June, 1903.

In that case the following propositions were ruled by the court:

> A railroad company received a carload of corn for shipment, and, in the usual course, with ordinary diligence, the car would have been taken out of the yards several hours before the occurrence of an unprecedented flood which destroyed it. In an action for the loss of the car, it was a question for the jury whether the railroad company negligently delayed getting the car en route.
>
> Where a railroad company, in order to preserve its main line intact from the ravages of an extraordinary flood, cut an embankment so as to turn the water on its yards whereby they were flooded sooner than they would otherwise have been, the railroad company was negligent and liable for loss

of a car load of freight caused by such premature flooding of the yards.

In order that a common carrier may escape liability for loss of freight, lost through the act of God, the act of God must be the sole cause of the loss; if the carrier's negligent act commingled with the act of God as an active element, the carrier is liable for such loss.

In that case, the trial court refused to give an instruction peremptorily directing the jury to give a verdict for defendant, and the judgment of the trial court based on that refusal, was affirmed by the St. Louis Court of Appeals.

The court in its opinion in that case, which exhaustively considers the subject of negligence in this class of cases, uses the following language (pp. 559-561):

> There is substantial proof of two separate elements of negligence with which the court must reckon. First, it appears as an established fact and uncontroverted in the proof, that the defendant issued its bill of lading for the car of corn in question about 1 o'clock on June 3, and from its own witnesses, it is established by the usual course, the billing of the car would have been communicated to its intermediate office by 4 o'clock that afternoon; that it would be retained there from one to two hours, until proper records were made, and passed on and reach the yard office on the morning of June 4, and therefore, had defendant's agents been ordinarily diligent and passed the bill of lading on, as was the usual course, it would have actually been in the hands of the yard men at the time, and several hours prior to the actual physical receipt of the car at 1:25 on the same day. There is no doubt from the record, in fact it is an uncontroverted fact, that the car was not delivered until 1:25, June 4, and while this is true and defendant could not be liable

for neglect thereabout, until the car was actually received, some one must have been inattentive about the process of forwarding the billing from the commercial office, for it appears the billing was not received in the yard office until the morning of June 5, whereas, ordinary diligence would have placed it there on the morning of June 4, in advance of the car, and in the usual course of handling cars in and transporting them from the yard in an outgoing train, as testified to by the general yardmaster, the car would have gone forward on a train in the course of eight or ten hours after shipping instructions were received from the commercial office, or at least prior to the morning of June 5, or in other words, prior to the delivery of the billing by its intermediate office, to the yard office. So it appears from this that the defendant's agents were inattentive and negligent with respect to their duty in passing the billing on to the yard office, which negligence operated to hold the car in the yards until June 5, when in the usual course it should have been en route to its destination before midnight on June 4. * * * Now, it is well settled law that if the defendant's negligence commingled with and operated as a contributive element proximate to the injury, even though such injury is to some extent and even a paramount injury, operated by the act of God, the defendant will be liable as though its negligence were the entire and sole cause of the loss. In order for the defendant to escape liability under the exemption afforded by the law to the entailments of an act of God, the act of God must be the sole and only cause of the injury and this, too, unmixed with the negligence of the defendant, for if the defendant's negligent act commingled with it in the loss as an active and cooperative element and the loss is proximate thereto, or, in other words, is a reasonable consequence of the negligent act, it is regarded in the law as an act of the carrier rather than as an act of God. The

> principle is manifest from all of the cases and evidence of its proper application abounds in the books. (*Wolf* v. *Amer. Ex. Co.*, 43 Mo., 421-425; *Davis* v. *Railroad*, 89 Mo., 340; *Grier* v. *Railway*, 108 Mo. App., 565; *Prince* v. *St. Louis Cotton Compress Co.*, 112 Mo. App., 49, 86 S. W., 873; *La Mont* v. *Railway*, 9 Heisk (Tenn.) 58; *Moffat Com. Co.* v. *Railroad*, 113 Mo. App., 544.) It seems clear, first, that the negligence of defendant's agents in not advancing the shipping bill and instructions, operated to detain the car in a place which proved to be of peril for many hours after it should have been en route to its destination, if they had been ordinarily diligent.

Another recent decision to which we invite the court's attention is that of the Supreme Court of Alabama, delivered April 20, 1907, in the case of *Ala. Great Southern R. R. Co.* v. *J. Elliott & Son*, 43 So. Rep., 738. The case is also reported in Vol. 65, Central Law Journal, p. 317.

In that case, it appears that a consignment of flour was delivered to the carrier for shipment. It was detained four days before being forwarded. Upon the day of its arrival at its destination, at 1 o'clock P. M., notice of its arrival was sent to the consignee. On the morning of the next day at 1 o'clock a cyclone damaged the goods. And the court on those facts held that the carrier was liable for the damage, since its negligence resulting in the delay at the place of shipment continued to be an active cause until the consignee had a reasonable time after the arrival within which to remove the goods.

According to the doctrine of that case, the defendant railway company in the cases at bar is, we submit, clearly liable for its three days' unnecessary delay of the cattle in question in these cases, at Wellington and Strong

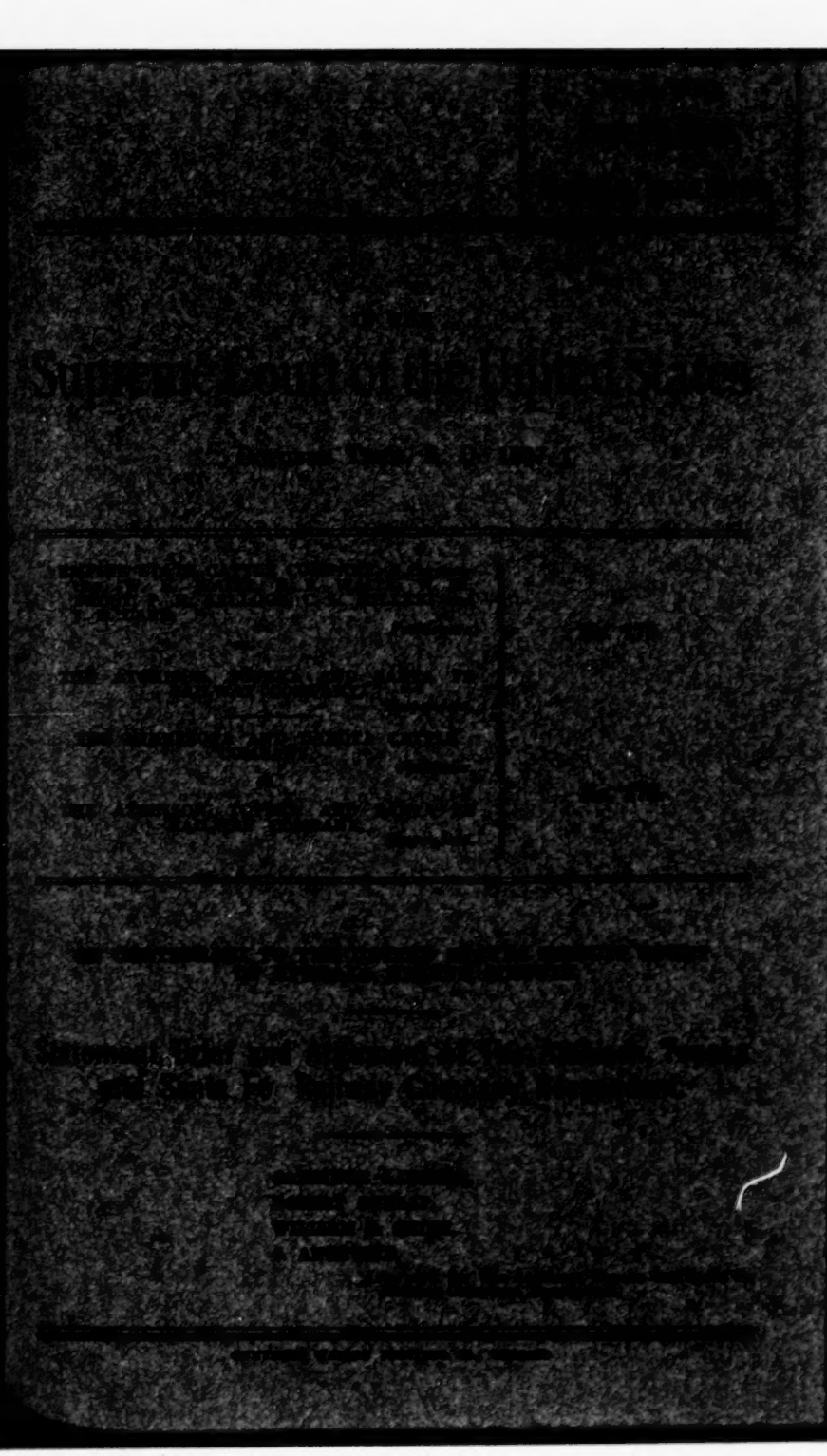
City. According to the doctrine of the Alabama Supreme Court in that case, the delays in the case at bar, at Wellington and Strong City, were the first proximate cause of the damage and injury and to these cattle. The subsequent negligences also contributed.

Respectfully submitted,

JAMES S. BOTSFORD,
BUCKNER F. DEATHERAGE,
ODUS G. YOUNG,
Attorneys for Empire State Cattle Company, et al.

R. E. BALL,
Attorney for Minnesota & Dakota Cattle Company,

Petitioners.



IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1907

EMPIRE STATE CATTLE COMPANY, a Corporation, W. E. WAITE, E. F. WAITE, W. H. FROST, P. H. KELLOGG, C. L. MILLETT and J. D. CARR, *Petitioners,* vs. THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *Respondent.*	No. 178.
THE MINNESOTA AND DAKOTA CATTLE COMPANY, *Petitioner,* vs. THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *Respondent.*	No. 179.

BRIEF AND ARGUMENT FOR DEFENDANT.

STATEMENT.

The statement of the case made by the petitioners is inaccurate in many respects. Some of the statements are wholly unsupported by any evidence, and others are directly contrary to the evidence. This is particularly true with reference to the main fact as to the character of the flood of May 31st, 1903, in question, and

therefore whether the defendant should have anticipated that it would be so unprecedented and extraordinary at Kansas City as to cause damage to petitioners' cattle in the Union Stock Yards at that point, where the damage complained of was occasioned. The conclusion is repeatedly stated in petitioners' brief that the agents of the Railway Company had notice in ample time and should have anticipated that a flood in the Kaw River would be of such an unprecedented and extraordinary character as it finally proved to be, and that the defendant was consequently negligent either in transporting and placing the stock in the Kansas City Stock Yards or in not removing the same therefrom instead of driving the animals upon the viaducts in those yards after the flood waters had begun to submerge the same. Yet two very respectable courts in that vicinity have held with reference to this very flood and its effects at Kansas City that it was so extraordinary and unpredecented, and its approach and the final result thereof so unexpected, that any reasonable human being in that locality could not be held as negligent for failing to anticipate the same, and that, therefore, a railway company would not be held liable for loss of or damage to freight which was allowed to remain in Kansas City until overtaken by the flood or which was overtaken by the same at that place. (See case of *Rodgers* v. *Missouri Pacific Railway Company*, decided by the Supreme Court of Kansas, February 9, 1907, reported in 88 Pacific Reporter, 885; also the decisions of the Kansas City Court of Appeals in the cases of *Lightfoot* v. *St. L. & S. F. Rld.*, 104 S. W., 483, and *Moffat Commission Company* v. *Union Pacific Rail-*

road Company, 113 Mo. App., 544; s. c., 88 Southwestern Reporter, 117.) Indeed it is now a well-known historical fact that this flood at Kansas City was so extraordinary, unprecedented and sudden in its final catastrophe as not to have been anticipated by the inhabitants in that locality.

The main faults in petitioners' statement, in addition to the unwarranted and unjustifiable conclusions, are that many of the facts are confused whilst others are but statements of half the truth and, therefore, misleading, because if all the facts established by the undisputed and uncontroverted evidence had been clearly stated in chronological order there would be little occasion either for confusion or for erroneous impressions which naturally follow from a statement of but a portion of the facts unexplained and unenlightened by other facts concerning which there was no dispute. Telegrams concerning these shipments were seemingly jumbled together by plaintiffs to create confusion, so that defendant was obliged in its evidence to set them out in order and explain them so as to make them intelligible. If it was hoped that on account of the bulk of the record this court would not have time to review the evidence to verify any of the conclusions or statements made, we respectfully submit that such hope should not be realized, as it would be putting a premium upon an unfair practice if this court were to accept such statements, and, because of the confusion thus created and the garbling of evidence or facts, hold therefore that the case should have been submitted to the jury.

The main question involved was as to the character of this flood at Kansas City. Was it merely of such a character that prudent persons in that locality should have reasonably anticipated before the disaster that it would finally inundate the Kansas City Stock Yards, or was it so unprecedented, sudden and unexpected that the resulting damage could not have been reasonably anticipated? The latter proposition was established beyond reasonable controversy.

According to plaintiff's petition the damage to the cattle was caused by reason of inability to feed and water the same on account of the height of the flood waters at the Kansas City Stock Yards where the cattle were. It was alleged by them that

> "*an unprecedented flood had* commenced in the waters of the Kaw and Missouri Rivers, extending from the source of the Kaw River to its mouth and extending down the Missouri River from its source to the point where said Kaw River empties into said Missouri River."

It was alleged that defendant negligently detained the cattle at Strong City until May 29th; also that on arrival at Kansas City on the morning of May 30th defendant, instead of leaving the cattle on the uplands where they would have been safe from the continued rise in the Kaw River, deposited them in pens near the mouth of the river, at which point in said Kaw River on May 31st the flood reached its climax and extended far back from the ordinary channel of the river so as to fill and cover said pens; that on May 31st

> "defendant, in order to save said cattle from being drowned, drove said 798 head thereof into the viaducts extending over said pens and above the waters which, in consequence of said flood, had

submerged said pens, and that in so driving said cattle into said viaducts defendant mixed and intermingled said 798 head with 2200 head of other cattle that were in said pen at said time, and that said 798 head and 2200 head of other cattle remained on said viaducts from May 31, 1903, to June 7, 1903. * * * *That said waters so made by said flood extended from said May* 31, 1903, *to June* 7, 1903, *back from said pens a distance of three-quarters of a mile and more and were of a depth of from eight to fifteen feet, and that in consequence of said waters and of the placing of said cattle on said viaducts it was impossible to feed and water said cattle in said period of seven days and that, by reason of the location of said cattle and by mixing and intermingling same with said* 2200 *head of other cattle, it was impossible for said plaintiff to feed and water the said* 798 *head of cattle.*"

Defendant's answer denied all charges of negligence and denied any agreement to transport by way of Atchison but alleged that the cattle were shipped under certain written contracts, copies of which were attached to the answer as hereafter stated. It also showed the necessity of taking the cattle by its line to Kansas City instead of to Atchison for delivery to a connecting carrier as originally contemplated by it. It set up specifically that the damage was caused by an extraordinary and unprecedented and sudden rise of the waters of the Kansas River, overflowing the banks thereof and inundating the Kansas City Stock Yards; that the same constituted an act of God, for the consequences of which the defendant was not liable.

The Pecos and Northern Texas Railway Company operates a line of railway from Kenna, N. M., to Amarillo in connection with the Atchison, Topeka and Santa

Fe Railway. The Atchison, Topeka and Santa Fe Railway extends from Amarillo in a northeasterly direction through Oklahoma and Kansas and has two lines reaching the Missouri River, one extending to Kansas City and the other to Atchison, about fifty miles north of Kansas City. The main line extends by way of Topeka to Kansas City and another and shorter line branches off at Emporia and extends by way of Ottawa and Olathe returning to the main line at Holliday, thirteen miles west of Kansas City, and thence over the main line to Kansas City. Atchison is at the terminus of the branch extending from the main line at Topeka to Atchison. The K. C., St. J. & C. B. Ry. Co., commonly called the "Burlington," and The Missouri Pacific Railway Company have lines of railway extending from Kansas City in a northwesterly direction along the Missouri River to Council Bluffs and Omaha, which are on opposite sides of the Missouri River, and each connects with the Atchison, Topeka and Santa Fe Railway at Kansas City and at Atchison. The Chicago, Milwaukee and St. Paul Railway extends from Omaha and Council Bluffs to Evarts, S. D., and connects at Council Bluffs and Omaha with the Missouri Pacific and Burlington roads, respectively.

The defendant had feeding yards at Wellington in Southern Kansas and at Strong City and Emporia in Central Kansas where cattle were unloaded for feed and rest, but it had no such yards between Emporia and Atchison nor at Atchison where stock could be unloaded and kept. Neither did the Burlington Road have such yards at Atchison. (Rec., 173, 199, 200, 477.)

There is a public stock yard at Kansas City which is

one of the largests stock yards in the country, second only to Chicago, at which stock in transit is unloaded for feed and rest and for transfer from one road to another; and where the equipment is not to accompany the cattle the general custom is for the delivering company to deliver the cattle to the Stock Yards Company for the forwarding company, the Stock Yards Company acting as agent for both companies. (Rec., 251, 252, 265, 266, 532, 533, 540, 541, 542, 543, 544, 545.)

On May 25, 1903, the respective plaintiffs or petitioners entered into contracts with The Pecos and Northern Texas Railway Company for the transportation of the cattle in controversy, something over three thousand head, from Kenna, N. M., and Bovina and Hereford, Tex., upon its line, to Evarts, S. D. Several written contracts were executed by the respective shippers and also signed by *"The Pecos and Northern Texas Railway Company and connecting carriers"* in the case of the shipments involved in the case of the Empire State Cattle Company, and by "The Pecos Valley and Northeastern Railway Company *and connecting carriers"* in the case of The Minnesota and Dakota Cattle Company, the Pecos Valley and Northeastern Railway being the line in New Mexico connecting with the Pecos and Northern Texas Railway. These written contracts are set up in the answers of the defendant as being the contracts under which the cattle were shipped and under the Kansas practice are admitted to be true, the execution thereof not being denied under oath. Each contract covered two or more cars. They are all alike except as to the number of cars, number of cattle, names of consignor and con-

signee. Copies of these contracts are contained in the record from pages 12 to 18 as Exhibits A, B and C to the answer in the Empire State Cattle Company Case, and on page 17 of the record in The Minnesota and Dakota Cattle Company Case as Exhibits A to J to the answer in that case. The destination stated in each contract is Evarts, S. D. The entire contract for the shipment of said cattle is contained in said written contracts and each contains the following provisions:

The initial line, called the "Company," acknowledges receipt of the cattle and agrees to transport, upon its own road only, the livestock described, to be carried by said company to the place of destination, if the same be upon the line of road of said company, but if such place of destination be beyond the line of road of said company then to deliver or tender such shipment at a connecting point on the line of its road to the connecting carrier, to be forwarded to the place of destination.

> "FIFTH. That at his or their own risk and expense, the shipper will load the stock at the first named station, take care of, feed and water and attend to same while they may be in the stock yards of the Company or lots where awaiting shipment, and while the same is being loaded, transported, unloaded and reloaded, and to load, unload and reload the same at feeding and transfer or other points wherever the same may be unloaded for any purpose whatever, and will properly attend to and care for the stock while in the cars in transit or otherwise, and hereby agrees that the Company shall not be liable for any loss or damages to said stock while being so in the shipper's charge, and so cared for and attended to by the

shipper or his or their employes as aforesaid; and in cases where the Company shall furnish laborers to assist in the loading, unloading or reloading of said stock, it is understood they are furnished for the accommodation of the shipper, and they shall be entirely subject to the shipper's orders, and shall be deemed the shipper's employes while so engaged, and the Company shall in no wise be liable for their acts or negligence."

"SIXTH. The shipper hereby assumes and releases the Company from risk of injury or loss which may be sustained by reason of any delay in such transportation of said stock or injury thereto, caused by any mob, strike, threatened or actual violence to real or personal property, or by the refusal of the Company's employes to work or otherwise, or by failure of machinery, engines or cars, *or injury to tracks or yards, storms, washouts*; * * * the liability of the carrier or any fact essential thereto in any instance or case shall not be presumed, but the burden of establishing such liability is assumed by the shipper in the event of a suit."

"TENTH. And whereas the through rate made for the said transportation to destination, and guaranteed by the above named Company, is the rate fixed by said Company, and the companies or carriers operating the connecting lines of railroad to the point of destination in their tariffs or schedules for similar shipments at owner's risk, under and in view of the limitations and exemptions contained in this agreement, and is less than the rate fixed where such shipments are made without limitation of liability, or at carrier's risk:

It is further understood and agreed that each and all of the provisions, limitations and exemptions in this contract applicable to or in favor of the Company, shall also apply to and inure separately in favor of each of the several connecting carriers to the point of destination, and *that each of such carriers shall only be obligated to trans-*

port said stock over its own road and deliver to the next connecting carrier, and the last carrier to the place of destination, under the provisions of this agreement, and no carrier or carriers shall be liable, in any event, for any loss or damage which may occur upon the road or roads, connecting or otherwise, of any other carrier or carriers; that each of the connecting carriers shall transport said stock over its own road under said through rate, in accordance with the provisions of this agreement, and *that this agreement is entered into by the above named Company in its own behalf and as agent, for and, severally and not jointly, on behalf of each of the connecting carriers operating roads forming part of the route over which said stock may be shipped* to the point of destination above mentioned; that no other contract shall be required or be executed to cover the movement of the shipment over the line of any carrier in the route, it being understood that this contract is hereby adopted by the shipper and each of such carriers as the several contracts between said shipper and each of such carriers respectively, provided for their mutual rights and obligations."

In the twelfth paragraph of the agreement it was distinctly understood that all prior understandings or agreements concerning the transportation of said stock or said shipment were merged and contained in the written agreement,

"and this written agreement contains all the terms, conditions and provisions relating in any manner to the shipment or transportation of said stock."

"THIRTEENTH. In making this contract the shipper expressly acknowledges that he has had the option of making this shipment under the tariff rates either at carrier's risk or at a limited liability, and that he has selected the rate and liability, named herein, and expressly accepts and agrees to all the stipulations herein named."

The entire contract, therefore, for the shipment of the cattle is contained in those written contracts alone, for it was provided in the twelfth paragraph of each,

> *"this written agreement contains all the terms, conditions and provisions relating in any manner to the shipment or transportation of said stock."*

There is no agreement or provision in said contracts that the cattle should be delivered to the Burlington road or any other particular connecting carrier, or that they were to be taken over any particular route or that they were to be delivered to any particular connecting carrier at any particular connecting point.

There is no evidence outside of the contracts that the shippers or any of them requested that the cattle be routed over any particular connecting route or over any particular connecting line of railroad, or that delivery to a connecting carrier be made at any particular point, and probably such evidence, if offered, would be incompetent as tending to contradict or vary the written contracts. The selection of connecting carriers and the route was left entirely to the initial carrier, The Pecos and Northern Texas Railway Company, and to each connecting carrier which should receive the shipment, the contracts being made on behalf of the initial line and such connecting lines as should receive and transport the shipment. The initial carrier had the right to select any reasonably direct route and designate the connecting carriers, but such designation does not become a part of the contract. It is made after the execution of the contract. In this case the initial carrier, by way bills made out by its station agent and delivered to the

train conductors for their guidance and for the guidance of connecting carriers, routed the cattle by the Atchison, Topeka and Santa Fe Railway to Atchison, the Burlington from Atchison to Council Bluffs and the Milwaukee Road from Council Bluffs to destination at Evarts. Such station agent also made an endorsement or notation on the back of some of the contracts "Hereford to Atchison"; on others his endorsement was "Kenna, N. M., to Evarts, S. D."; on others the endorsements was "Kenna, N. M., to Atchison, Kan."; on others his endorsement was "Bovina, Tex., to Atchison, Kan." (See record in Minnesota and Dakota Cattle Company case, page 19, and endorsement on the copy of contract between pages 16 and 19.)

These "*waybills*" counsel for petitioners, in the face of the record and of the well-known practice of railways, persist in incorrectly designating as "bills of lading." No bills of lading were issued, but the contracts of shipment are those designated as the livestock contracts heretofore mentioned. The "waybills" as stated and as the word itself implies are made out by the initial carrier to accompany the shipment as a guide to train conductors and they are delivered by one conductor to another and from one road to another with the cattle. They are no part of the contract of shipment and the shipper has nothing to do with them and seldom sees them. They are not made out or intended for his use or inspection. The endorsements on the written contracts were made by the initial carrier after the execution of the contracts and were no part thereof, but were put on as mere

notations of certain *points* on the route selected by the initial carrier on behalf of itself and such connecting carriers as should receive the shipment. *They do not designate the lines or routes.*

Under those contracts the cattle were shipped and arrived in due time at Wellington and Strong City, where they were unloaded for feed and rest. As there was no claim made that there was any negligence in handling the cattle prior to their arrival at Wellington and Strong City we will give a brief statement of the shipments prior to the arrival of the cattle at Strong City and a detailed statement of the movement after that time.

Movement of Trains.

The Empire State Cattle Company had two train loads of cattle. The first train in charge of G. W. Cloyd, left Hereford, Texas, on May 25, 1903, about 5:30 P. M. (Rec., 31), and arrived at Strong City on May 26th about 5:30 P. M., when they were unloaded for feed and rest. (Rec., 32.) Mr. Cloyd was notified by the railroad company that his cattle would be reloaded the next morning. (Rec., 35.) The next morning they did commence loading the cattle about 8 o'clock and loaded seven or eight cars (pages 34-35), when the loading was stopped by telegrams announcing that on account of a washout on its line, the Burlington road would not receive the cattle. On that morning, May 27, 1903, at 6:56 A. M. A. T. Perkins, superintendent of the Burlington road, wired J. H. Garside, agent of the defendant road at Atchison as follows:

> "Please notify A. T. & S. F. that on account of washout we cannot accept at Atchison the 20 cars Evarts stock reported to arrive at Atchison 10:30 A. M. and the 22 cars reported to arrive at Atchison about noon; will advise later about third train." (Signed A. T. Perkins.) (Rec., 448, 183.)

That telegram was reported to the defendant's trainmaster at Topeka (page 448), and he notified L. E. McClure, trainmaster at Newton, in whose division Strong City is situated, of the washout, and ordered the loading stopped. (Rec., 183.) He also notified conductor O'Byrne who was at Burlingame with one train load of cattle to take his train back to Emporia (Rec., 182). It was in consequence of these telegrams that the loading was stopped. On the same day, May 27, 1903, at 3:43 P. M. the Burlington road advised the defendant's agents at Atchison, that the Burlington road was repaired and ready for business (Rec., 542). This message was repeated to the trainmaster at Topeka, at 4:02 P. M. and the cattle were again loaded and started from Strong City, as Cloyd testified, on Wednesday, May 27th, about 8:30 P. M., and arrived at their destination on June first. Those cattle are not involved in this suit and are only mentioned because of the claim made that because that train got through, the other cattle would have gotten through but for defendant's negligent delay in forwarding them. Cloyd testified that his train left Strong City on May 27th about 8:30 P. M. (Rec., 32-35), and Mr. Carr testified that they arrived at Evarts on June first, making five days from Strong City to Evarts. (Rec., 177.) Mr. Cloyd testified that he was not caught in the flood, but he did not testify as to the

route taken from Strong City, or that he went by way of Atchison, or by way of the Burlington road. The running time for stock trains from Strong City to Atchison is eight and one half or nine hours. (Rec., 176.) If Cloyd's train left Strong City at 8:30 P. M. on May 27th, it should arrive at Atchison on May 28th about five or six o'clock A. M. But on that morning, May 28, 1903, at 1:01 A. M., Mr. Perkins, superintendent of the Burlington road, wired the defendant road:

> "We cannot now accept Evarts stock; our line washed out again, will notify you when we can transmit stock." (Rec., 452.)

The conductors and division trainmasters were notified of this telegram and ordered to unload the stock, one train load of which had started and was at Saffordville. (Rec., 191.) It will thus be seen that before Cloyd's train could have been moved half way from Strong City to Atchison, the Burlington road was again washed out and notified the defendant that it could not receive the stock. Emporia is about twenty miles east of Strong City. After the flood the remnant of the cattle were shipped from Emporia via Atchison and Council Bluffs to Evarts. (p. 397.) They left Emporia on July 10th and arrived at Evarts on July 13th, being three days in transit. (Rec., 333.) As Cloyd's train was five days in transit, it must have been laid out two days on account of the flood, or diverted to some other line. If the other trains had been started from Strong City at the time Cloyd's train was started, as petitioners claim they should have been, they would all have been caught somewhere between Strong City and Atchison by the second washout on the Burlington, and there was no yard at Atchi-

son, or between Emporia and Atchison where they could have been unloaded.

Movement of the Trains Containing the Cattle in Controversy.

In considering whether or not there was culpable negligence in handling the trains containing the cattle in controversy, we must consider that the act of Congress then in force did not permit cattle to be kept in cars in transit more than twenty-eight consecutive hours, without unloading for feed and at least five hours rest. The cattle in question had been on the train nearly the full time allowed when they arrived at Strong City, and the time would expire before they could reach Atchison. The defendant had no feed yard north or east of Strong City, except the yard at Emporia, twenty miles east of Strong City. Other cattle were then in the Emporia yard (Conductor O'Byrne's train at least, see telegrams, Rec., 181, 182, 184, 188, 191, 193.) Strong City is a small station (Rec., 77), and only one train can be loaded or unloaded there at a time (Rec., 32). Emporia, twenty miles from Strong City, is the division point from which engines must be procured to move trains on that division (Rec., 200). Other cattle that were to be handled over the Atchison division were ahead of the cattle in controversy in this suit; Cloyd's train, one train at Burlingame, and some cattle at Emporia, how many, not shown. The telegraph service on the defendant's road was crippled during May 28th, 29th and 30th. (Rec., 197.) The water was high along the Atchison line, threatening to disable the line, and

a bridge near Atchison became impassable early on the morning of May 29th, completely disabling that line. (Rec., 196, 198.) The loss of that bridge also disabled the line from Holliday to Atchison, so that Atchison was completely cut off. (Rec., 196, 202.) The defendant had no yards between Emporia and Kansas City, nor between Emporia and Atchison, where a train load of cattle could have been unloaded and held. (Rec., 202.) *Where a connecting carrier notifies a preceding carrier that, owing to washouts on its line, or for any other reason, it will not receive and forward the stock, the universal custom and practice is to secure a route that will receive and forward the cattle if it is possible to do so.* (Rec., 202, 203.) The place where the Burlington road was disabled was at Hamburg, Iowa, and that disabled the line from Kansas City to Council Bluffs, as well as the line from Atchison to Council Bluffs. (Rec., 204.) The defendant promptly commenced negotiating with the Missouri Pacific road to receive the stock at Kansas City, and forward the same upon being notified by the Burlington that its road was disabled, and took the stock to Kansas City, as soon as practicable after obtaining an agreement from the Missouri Pacific to receive and forward it. (Rec., 203, 204.) There was no line from Kansas City to Omaha, or Council Bluffs, except the Burlington and the Missouri Pacific. (Rec., 203.) All of the foregoing facts were shown by the plaintiff's evidence, and were not contradicted. With these facts established as a part of the plaintiff's case, let us examine the movement of the cattle in dispute.

The first train load of cattle involved in this case,

to be considered is the train in charge of W. H. Frost, one of the plaintiffs. That train was designated on the train sheets in the trainsmaster's office as P. V. Symbol, 130 (Rec., 444), and consisted of 21 cars and contained 792 cattle, as shown by the shipping contracts (Rec., 11 to 18). That train left Hereford, Texas, on May 25, 1903, about 9:30 P. M. (Rec., 37, 38), and according to the testimony of the above mentioned W. H. Frost, arrived at Strong City on May 26th, about 11:30 P. M. (Rec., 38), but as shown by the train sheets in the train dispatcher's office, which were made at the time, and are undoubtedly correct, they arrived on May 27th, at 12:10 A. M. (Rec., 444), and were then unloaded for feed and rest (Rec., 39).

The Minnesota and Dakota Cattle Company had three train loads of cattle. The first train of 21 cars in charge of William Welsh left Kenna, New Mexico, on May 25, 1903, between 5 and 6 P. M. (Rec., 385.) They arrived at Wellington between 10 and 11 o'clock on the evening of May 26, 1903, where they were unloaded for feed and rest. (Rec., 349.) They were reloaded the next morning, May 27th, about 5 o'clock A. M. and then unloaded again. (Rec., 349.) They were unloaded because of the washout on the Burlington road, notice of which was received at Topeka that morning at 6:56 A. M. They were again loaded after the Burlington road was repaired, and left Wellington May 27, 1903, at 7:55 o'clock P. M. (Rec., 444), passed Strong City going east on May 28th at 1:11 A. M. and arrived at Staffordsville, eight miles east of Strong City, at 1:28 A. M., where they were stopped owing to a telegram announcing the second washout on the

Burlington road, and returned to Strong City, arriving there at 2:08 A. M. on May 28th. (Rec., 444.) That train was known as P. V. Symbol, 129. That train and Frost's train known as P. V. Symbol 130 were consolidated as one train and left Strong City on May 29th at 12:50 P. M. (Rec., 444), and arrived at Kansas City the morning of May 30th, and were unloaded at the stock yards about 7:00 A. M. (Rec., 42.)

The second train of 19 cars in charge of Rufus Cleveland, left Kenna, New Mexico, on May 26, 1903, about 6 o'clock P. M. (Rec., 328, 385), and arrived at Wellington on May 27, 1903, about 5:30 P. M. and were then unloaded for feed and rest (Rec., 328, 329), and arrived at Kansas City on May 29th at 5:00 P. M. (Rec., 328). The third train in charge of Chas. Steube, left Bovina with 17 cars on May 26, 1903, between 9 and 10 o'clock P. M. (Rec., 386). At Amarillo they picked up three cars which had been dropped from the second train making their train from Amarillo 20 cars. That train arrived at Wellington on May 27th, between 6 and 7 o'clock in the evening, and was there unloaded for rest and feed (Rec., 386). That train left Wellington on May 29th about 7 or 8 o'clock in the morning (Rec., 387), and arrived at Kansas City on May 30th, between 6 and 7 o'clock in the morning. The delay at Wellington was on account of the washouts on the Burlington road, telegrams having been sent to Wellington to hold the stock. (Rec., 180, 181, 184.)

Before giving the telegrams hereinafter copied, we will, for convenience, give the names and positions held by those sending and receiving such telegrams, as per stipulation in the record at page 187:

H. G. Clark, superintendent Mo. Pac. Ry., Atchison.
J. E. Hurley, general superintendent A. T. & S. F. Ry., Topeka.
E. A. Austin, trainmaster, A. T. & S. F. Ry., Topeka.
H. W. Sharp, superintendent, A. T. & S. F. Ry., Kansas City.
C. T. McLellan, superintendent, A. T. & S. F. Ry., Topeka.
W. K. Etter, chief clerk to General Superintendent Hurley.
F. C. Fox, superintendent, A. T. & S. F. Ry., Newton, Kan.
E. A. Gould, general superintendent, Mo. Pac. Ry., Kansas City.
C. W. Cook, assistant general freight agent, A. T. & S. F. Ry., Topeka.
W. J. Healy, freight auditor, A. T. & S. F. Ry., Topeka.
A. T. Perkins, superintendent, K. C. St. J. & C. B. R. R., St. Joe, Mo.
J. O'Byrne, conductor, A. T. & S. F. Ry.
J. H. Garside, agent, A. T. & S. F. Ry., Atchison.
H. B. M.—H. B. Morse, yardmaster, A. T. & S. F. Ry., Emporia.
L. E. M.—L. E. McClure, trainmaster, A T. & S. F. Ry., Newton.

On May 27th at 6:56 A. M. the Burlington road wired the Santa Fe road as follows:

> "Please notify A. T. & S. F., that on account of washouts cannot accept at Atchison the 20 cars Evarts stock reported to arrive Atchison 10:30 A. M. and the 22 cars reported to arrive at Atchison about noon; will advise later about third train. (Signed) A. T. Perkins." (Rec., 179; 448.)

The date of that telegram given on page 179 of the record as May 26, 1903, is incorrect. It should be May 27th, as shown by the same telegram on page 448, and as shown by the other telegrams relating to the same

matter. That telegram was received early on the morning of the 27th before the defendant could have loaded the cattle and started with them, even if Mr. Frost, one of the owners who accompanied the cattle, had requested that they be started early, which he did not do; and before the five hours rest required by the law expired. The cattle were held in the yards at Strong City pending the repair of the Burlington tracks, or a change of routing. On that day, May 27th, at 3:43 P. M., the Burlington road wired the defendant as follows:

> "We are now in shape to accept South Dakota stock at Atchison. Advise when it will be delivered. (Signed) A. T. Perkins." (Rec., 182, 452.)

That message was repeated to the general officers of the defendant company, at Topeka, at 4:02 P. M. on May 27th. (Rec., 452, 182.) The cattle were then reloaded into the cars about four or five o'clock according to Mr. Frost's testimony. (Rec., 39.) The defendant then at 10:25 P. M. on May 27th, wired the Burlington road:

> "First train of Evarts stock reloaded this P. M. should reach Atchison about 4 A. M. Second train 20 cars reloaded this P. M. should reach Atchison about 8 A. M. Third train of 20 cars reloaded at 7 P. M. should reach Atchison about 8:30 A. M. On account of high water we may be unable to handle this stock over the Atchison line in which case it will be about two hours later." (Rec., 184, 452.)

It will be seen by the testimony introduced by the plaintiff, that Strong City is a small station, and but one train could be loaded or unloaded at a time.

Cloyd's train was the first train in the yards at Strong City, and the first taken out. Conductor O'Byrne's train at Emporia was also ahead of Frost's train. Those trains and other business ahead of Frost's train must be handled ahead of Frost's train. The usual time required by a stock train to run from Strong City to Atchison, when the road is in good condition, is eight and a half or nine hours. (Rec., 176.) Mr. Frost testified that he superintended the unloading of his cattle into the pens at Strong City, and that it took from 11:30 until about 2 o'clock, about two or two and one-half hours, to unload the cattle. (Rec., 70.) It would probably take fully as long to reload them. At 4:02 P. M. on May 27th, the general officers of the defendant company at Topeka were notified of the repair of the Burlington tracks. (Rec., 452.) Nine hours afterwards, on May 28th, at 1[illegible]:01 A. M. the defendant road received from the Burlington road the following telegram:

> "*We cannot now accept Evarts stock; our line washout out again, will notify you when we can transmit stock.* (Signed) A. T. Perkins." (Rec., 452.)

This message was repeated to the tranmaster of the defendant's road at Topeka, and on that day, May 28th, at 1:13 A. M., the trainmaster at Topeka wired the trainmaster at Newton, in whose division Strong City is located, as follows:

> "Burlington just advise cannot accept stock for Evarts. Please hold all this stock until you are advised further." (Rec., 191.)

The trainmaster at Newton promptly ordered the conductors of the trains at Strong City to unload what

stock they had loaded, and also ordered the return of one load of stock from Saffordville to Strong City. (Rec., 191.) Allowing a reasonable time for loading Frost's train of cattle at Strong City, after the defendant was notified at 4:02 P. M. that the Burlington road was open, it will be seen that it would have been impossible by any degree of diligence to have transported that train to Atchison and delivered it to the Burlington road before 1:01 the next morning, when the defendant road was notified of the second washout on the Burlington road. After receiving the telegram from the Burlington notifying the defendant of the second washout on the Burlington line the cattle were again unloaded to await the repair of the track, or to make other arrangements.

When the telegram from the Burlington, announcing the second washout on that line was received at the office of J. E. Hurley, general superintendent of the defendant road, his chief clerk, W. K. Etter, wired him at Kansas City, where he then was, informing him of the second washout. Mr. Hurley then wired H. Miller, general superintendent of the Burlington road, as follows:

> "*H. Miller, Gen. Supt.*
> *Burlington, St. Jo. Mo.,*
> Understand you are again unable to accept stock account washouts. We have a number of shipments in sight for you and should be given prompt notice when you cannot accept them and as to what prospects are for accepting them. Please keep me posted. (Signed) J. E. Hurley." (Rec., 186.)

No answer appears to have been given to this tele-

gram, and Mr. Hurley again wired Mr. Miller as follows:

"TOPEKA, KAN., May 28, 1903.

H. Miller, Genl. Supt. Burlington,

We have 142 cars stock for you destined Sioux City, Iowa, Evarts, S. D., and Stair, Canada. Can you not accept this at Kansas City and handle it through. Answer quick. J. E. Hurley." (Rec., 183.)

No answer was made by the Burlington to that telegram, and Mr. Hurley commenced negotiating with the Missouri Pacific Railway to receive the stock at Kansas City and forward the same. He wired E. A. Gould, general superintendent of the Missouri Pacific road, on May 28th, at 12:40 A. M., as follows:

"We have three trains stock destined Evarts, S. D., by Burlington from Atchison, which Burlington cannot accept account washouts. Is your line open so that you can accept them and handle to a connection with C. M. & St. P." (Rec., 185.)

Not receiving a prompt answer to that telegram, Mr. Hurley wired H. G. Clark, division superintendent of the Missouri Pacific at Atchison, at 10:50 A. M., as follows:

"We have three train loads of stock for Evarts, S. D., via Burlington, which latter line cannot accept account of washouts. Are you in a position to accept." (Rec., 185, 453.)

On the same day Mr. Clark wired Mr. Hurley an answer at 11:52 A. M. as follows:

"ATCHISON, KAN., May 28, 1903, 11:52 A. M.

J. E. Hurley, Topeka, Kan.

This line is open. How many cars for Evarts, S. D., when and how many cars will you deliver at a time? Assume you will deliver at Atchison and stock to be delivered C. M. & St. P. at Omaha. H. G. Clark." (Rec., 185.)

Mr. Hurley properly considered this an agreement to receive and forward the cattle, and on the same day, at 2:35 P. M., he wired Mr. Clark as follows:

> "We will deliver stock to you at Kansas City. Will advise you number of cars and how they will arrive later." (Rec., 186, 453.)

Later during the same day he wired Mr. Clark as follows:

> "We will deliver you 22 cars of stock for Sioux City and 20 for Evarts, S. D. about 2:00 A. M. tomorrow, 29th." (Rec., 186.)

And afterward during the same day, still acting on the belief that the Missouri Pacific would receive and forward the stock, Mr. Hurley wired Mr. Clark as follows:

> "In addition to the 42 cars of stock which we will deliver to you at Kansas City tonight, we have one hundred cars in transit and which will reach you at Kansas City sometime tomorrow morning, 20 of these are destined to Stair, Canada." (Rec., 187.)

Relying on the agreement of the Missouri Pacific road to receive and forward the cattle, Mr. Hurley sent to his division superintendent at Topeka, the following telegram:

> "Let the stock for Evarts, S. D. go to Kansas City and deliver to Missouri Pacific." (Rec., 185.)

The same order was given to F. C. Fox, Division Superintendent at Newton, in whose district Strong City and Wellington are situated, and on that day, May 28th, at 3:20 P. M., Mr. Fox wired Mr. Hurley as follows:

> "Your pink. We will let Evarts stock go to Kansas City. We have two trains, 41 cars at

Strong City and one crew there will be ready to start as soon as they can load out, also have two trains 39 cars at Wellington and crews waiting there to protect, also will have one train with two cars horses and 18 cars cattle reach Wellington at 5:00 P. M. destination Stair, Canada, via Atchison and K. C. St. J. & C. B. which suppose will also have to go to Kansas City." (Rec., 186.)

Other telegrams passed concerning the forwarding of the cattle but the plaintiff introduced them in evidence without reference to chronological order, or any relation, one to another, and they so appear in the record, so it is only by carefully considering the contents of the telegrams, and the time of sending, when given, that we can determine the true relation, one to another.

While the defendant was preparing to forward the stock to Kansas City for delivery to the Missouri Pacific road, Mr. Gould, the general superintendent of that road sent to Mr. Hurley the following telegram:

"KANSAS CITY, May 28, 1903, 4:49 P. M.

J. E. Hurley, G. O.

Our line north of Atchison is in bad condition account high water and recent rains, being washed out and cribbed up in a good many places, but we may manage to get through. We will endeavor to handle your three trains of stock from Kansas City or Atchison to Omaha, with the distinct understanding that you assume all responsibility for damage to your equipment and stock and to our equipment on account of any accident to which the shipment may be involved from any cause whatsoever, and to pay usual detourage charges. Please advise if you desire it handled on this basis, and where you will deliver our trains and what time. Give us ample notice." (Rec., 187.)

On the same day, at 6:36 P. M., Mr. Clark, Superin-

tendent of the Missouri Pacific road at Atchison, wired Mr. Hurley as follows:

> "Will accept the 42 cars stock at Kansas City for Sioux City and Everts S. D. with the distinct understanding your line will accept all responsibility and pay any claims that may arise by reason of delay due to high water. Our line is threatened by high water, but desire to accommodate you if possible, and think will get through but cannot accept responsibility for delays. Stock will not move unless above accepted. Answer quick." (Rec., 188, 453.)

The hour of sending above message given on page 188 of record as 7:36 A. M. is incorrect as shown by the time of receipt and forwarding of the same telegram as shown on pages 453-4, and by the fact that Mr. Hurley's first telegram to Mr. Clark was sent at 10:50 A. M. as shown by the same telegram on page 453, and Mr. Clark's answer to the first telegram was sent at 11:51 A. M. (Rec., 453.) This discrepancy in time of sending this message was noticed by the attorneys for plaintiff at the trial. (Rec., 454.)

This defendant could not accept the remarkable offer of the Missouri Pacific road to accept the stock if this defendant would be responsible for all damages arising "from any cause whatsoever" and wired Mr. Gould as follows:

> "Cannot give you the stock under conditions referred to in your telegram. Your traffic dept. have advised our traffic dept. as to participation in rate and your supt. at Atchison advised you would accept the stock. If you dont want to accept on this basis wire at once as stock is now loading. Ans. quick." (Rec., 187.)

He also wired Mr. Clark on the same day at 8:05 P. M. as follows:

> "The stock goes to you on revenue basis is not detoured therefore cannot accept any responsibility; we loaded it on your previous acceptance and have it in transit. Will you protect at Kansas City. Ans. quick." (Rec., 185, 189, 454.)

While awaiting developments with the Missouri Pacific road, Mr. Hurley wired Mr. Fox to stop loading stock (Rec., 188), and during the progress of the negotiations, Mr. Clark, Superintendent of the Missouri Pacific at Atchison, wired Mr. Hurley as follows:

> "Cannot accept 100 additional cars stock at Kansas City until further advised." (Rec., 188.)

Mr. Hurley then called up Mr. Gould by telephone and had a conference with him about the transportation of the stock, and Mr. Gould agreed to receive and forward the same, and in confirmation of that agreement he wired Mr. Hurley on May 28th, at 8:32 P. M. as follows:

> "KANSAS CITY, May 28, 1903.
>
> Confirming phone, we will accept stock coming from your line here. Your wires to our Supt. Clark, Atchison this date. E. A. Gould." (Rec., 188.)

On the same day, May 28th, at 9:52 P. M. H. G. Clark, Superintendent of the Missouri Pacific road, wired Mr. Hurley as follows:

> "Will accept the stock at Kansas City. Advise when you will deliver the 100 car lot." (Rec., 189, 455.)

The above telegrams and the telephone conversation between Mr. Hurley and Mr. Clark, constitute the

agreement of the Missouri Pacific road to receive the stock at Kansas City and forward the same.

Mr. Hurley ordered the stock forwarded to Kansas City. (Rec., 189.) He also directed Mr. Sharp, Division Superintendent, at Kansas City, to keep the Missouri Pacific advised when the 100 cars of stock for them would reach Kansas City. (Rec., 190, 192.)

On May 29th, Mr. Clark wired Mr. Hurley as follows:

> "All arrangements made to handle the 142 cars cattle. Am now advised first 42 cars delivered Burlington. Advise. Also inform me in regard to other 100 cars. When will it be delivered." (Rec., 192.)

Mr. Hurley answered that telegram as follows:

> "The first 20 cars stock for Evarts S. D. will reach Kansas City about 8:00 P. M. 41 cars more destined Evarts about 8:30 P. M. 20 cars more destined Medicine Hat, Canada will reach Kansas City early tomorrow morning. 19 cars more destined Evarts, S. D. being delayed and cannot say when they will reach you." (Rec., 193.)

The date of that telegram is given as May 28th but should be 29th, evidently being a mistake in copying.

On May 29th at 9:14 A. M. Mr. Clark again wired Mr. Hurley as follows:

> "We are holding crews at Kansas City to protect stock. Am now advised you turned 42 cars over to Burlington. Can you say if we will get the 100 cars? If not wish to turn the crews back to Atchison. Please answer quick." (Rec., 194.)

Mr. Hurley answered that telegram as follows:

> "Your wire in regard to stock. 19 cars will reach Kansas City about 1:30 P. M. today. Balance of it will reach Kansas City late this evening

> or tonight. Cannot give you correct figures on it now, but will do so as early as possible." (Rec, 194.)

The 19 cars mentioned in that telegram arrived in Kansas City May 29th about 5:00 P. M. (Rec., 328), and were delivered in the cars to the Missouri Pacific road on May 30th, at 6:35 A. M. and receipted for by Mr. Isit, the Missouri Pacific agent at Kansas City. (Rec., 473, 474, 494, 520, 629, 630, 632, 633, 634, 194.)

On May 29th after those cattle were delivered to the Missouri Pacific road, Mr. Clark wired Mr. Hurley as follows:

> "The 19 cars stock on arrival at Kansas City were set to yards to be unloaded for feed and rest. Please advise quick when other 81 cars will reach Kansas City and if they will require feed and rest at that point." (Rec., 194.)

Upon receipt of the 19 cars of cattle the Missouri Pacific road unloaded them into the stock yards for feed and rest on May 30th, at 9:25 A. M. (Rec., 508, 509, 551), without the knowledge of the defendant. (Rec., 475, 522.) The remainder of the cattle arrived at Kansas City on May 30th, and were unloaded into the stock yards for the Missouri Pacific road at 7:00 A. M. as stated by Mr. Frost (Rec., 42), or at 8:20 A. M. as shown by the stock yards record (Rec., 548, 549), that being the usual and customary way of transferring cattle from one road to another at Kansas City, as we shall show elsewhere. Telegrams other than those above copied, show that the Missouri Pacific road was kept fully advised as to the movement of those cattle. (Rec., 190, 192.) As the records in the offices of the Missouri Pacific and Santa Fe roads at Kansas City

were destroyed by the flood, local telegrams between the two roads at that point could not be produced.

We have stated that Mr. Miller, of the Burlington, did not answer Mr. Hurleys' telegram asking if the Burlington could not accept the 142 cars of stock at Kansas City. That statement is true although a Mr. Barnes of the Burlington did wire Mr. Kouns of the Santa Fe, on May 28th, 7:26 P. M. that they could accept the stock at Kansas City (Rec., 189) but that telegram was sent to Mr. Hurley's office in Topeka, and Mr. Hurley was then in Kansas City negotiating with and making arrangements with the Missouri Pacific to handle the cattle, and it is not shown that Mr. Hurley ever saw or knew of that telegram.

The telegrams above quoted were introduced by the plaintiff as part of their case and they not only fail to show any negligent delay on the part of the defendant in the movement of the cattle, but on the contrary, with the other evidence introduced by the plaintiff, they affirmatively show beyond controversy the necessity for the delay that occurred at Strong City and Wellington. The undisputed evidence shows that it takes from five and a quarter to six and a quarter hours to run a stock train from Wellington to Strong City (Rec., 444), and from eight and one-half to nine hours from Strong City to Atchison. (Rec., 176.) About 15 hours from Wellington to Atchison, and about eight and one-half hours from Strong City to Atchison.

There were four train loads of cattle caught in the flood. One belonging to the Empire State Cattle Company, and three to the Minnesota & Dakota Cattle Company. The Empire State Cattle Company's train in

charge of Frost, President of the company, arrived at Strong City on May 27th, at 12:10 A. M. (Rec., 444.) The first train belonging to the Minnesota & Dakota Company, in charge of Welsh, arrived at Wellington on May 26, at 10:00 or 11:00 P. M. (Rec., 349), and were unloaded and fed, and reloaded on May 27th at 5:00 A. M. (Rec., 349.) The second train in charge of Cleveland arrived at Wellington May 27th at 5:30 P. M. (Rec., 328.) The third train in charge of Steube arrived in Wellington on May 27th about 6:00 or 7:00 P. M. (Rec., 386.) The Santa Fe road received notice of the first washout on the Burlington road on May 27th at 6:56 A. M. (Rec., 484, 179.) At that time the first train of Minnesota & Dakota Company cattle, at Wellington, were reloaded ready to start, but were unloaded on account of the washout. The other cattle belonging to the Minnesota & Dakota Company had not reached Wellington at that time. The Empire State Cattle Company cattle, at Strong City, had not been fed. Frost said they were fed and ready to start at 11:00 A. M. that day. (Rec., 39.) Notice of the repair of the Burlington road was received on May 27th at 3:43 P. M. (Rec., 182, 452.) On May 28th at 1:01 A. M. notice was received of the second washout on the Burlington road. (Rec., 186, 191, 452.) All cattle that had been loaded, were unloaded after each washout. See the following telegrams, pages: 180, last telegram; 181, 183, first and fifth telegrams; 184, first and last telegrams; 185, first telegram; 191, third, fourth, and fifth telegrams.

After the second washout on the Burlington, the Santa Fe arranged with the Missouri Pacific to receive the cattle at Kansas City and forward the same.

(Rec., 185, 3rd, 4th and 5th telegrams.) The stock was then reloaded for shipment to Kansas City. (Rec., 185, last telegram; 186, 1st, 2nd, 4th and 5th telegrams; 187, first and last telegrams; 192, 1st telegram.) Then the Missouri Pacific road made its demand that the Santa Fe road assume all responsibility for loss or damage "from any cause whatsoever," and all stock that had been loaded was unloaded. (Rec., 187; 188, first telegram; 191, second telegram.) Then on May 28th at 8:32 P. M. the Missouri Pacific road again agreed to receive the stock (Rec., 188, 4th telegram and Rec., 189, 4th telegram), and it was promptly loaded and forwarded to Kansas City. (Rec., 191, first and last telegrams; 190, all telegrams; 189, 3rd telegram.)

The telegrams and the testimony of Mr. Hurley show that the defendant's line from Topeka to Atchison was in bad condition near Atchison and at Valley Falls and near Topeka, and that a bridge near Atchison went out early on the morning of May 29th, totally disabling that line. All of this testimony was introduced by the plaintiff, the copies of the same telegrams produced by defendant's witness Garside, commencing on page 448, being introduced for the purpose of fixing the dates and hour of sending and receiving, where it could be done.

During the time the stock was held at Strong City and Wellington there was nothing in the condition of the weather, or the state of the river to indicate any necessity for any extraordinary haste in forwarding, or caution in handling the cattle. They were going to pastures and not to market. When the cattle left

Wellington and Strong City the Kansas river was swollen but there was no unusual flood. There was water over the railroad track at two places between Topeka and Kansas City, at Holliday and at a point about three miles west of Lawrence. (Rec., 293, 296, 297.) But those were low places and overflowed when the water was high. (Rec., 293, 296, 297.) Superintendent McLellen was receiving reports from the Rock Island railroad as to the condition of the river above Topeka, but from the reports received he did not think the railroad tracks would be flooded. (Rec., 348.) There is no evidence in the record that would indicate to any one, on May 28th or 29th that the river would rise to a height that would injure stock in cars or in pens in the valley.

THERE WAS NO CULPABLE NEGLIGENCE IN TAKING THE STOCK TO KANSAS CITY. THE FINAL FLOOD CONDITIONS WHICH CAUSED THE DISASTER WERE UNPRECEDENTED THERE AND COULD NOT HAVE BEEN REASONABLY ANTICIPATED.

The final agreement of the Missouri Pacific to receive the cattle at Kansas City, and forward the same, was made on Thursday, May 28th, at 8:32 P. M. and 9:52 P. M. by the general superintendent and by the division superintendent. (Rec., 188, 189.) The same evening orders were issued for the reloading and shipment of the stock. (Rec., 190, 191.) They arrived at Kansas City, one trainload on Friday evening May 29th, and the others on Saturday morning May 30th, about six or seven o'clock (Rec., 387) and were unloaded into the stock yards and receipted for by the

Stock Yards Company, one train on May 29th at 3:15 P. M., two trains on May 30th, at 8:20 A. M., and one train, delivered to Missouri Pacific and by it to the Stock Yards Company, at 9:25 A. M. (Rec., 548, 549, 550, 551.)

At the time the cattle were delivered to the Stock Yards Company for the Missouri Pacific Railway Company, there was nothing to indicate the disastrous and unprecedented flood that came on May 30th, 31st and June 1st.

The danger line at Kansas City, that is the stage of the river at which it begins to overflow the lowlands, is 21 feet. (Rec., 315.) The greatest flood at Kansas City since the country was settled by white people, and prior to 1903, was in 1881. (Rec., 553, 572, 530.) At that time the river rose to 26.2 feet, 5.2 feet above the danger line. (312.) In 1892 the river rose to 24.9 feet, 3.9 feet above danger line. (Rec., 315.) In 1902 it rose to 23.1 feet, 2.1 feet above the danger line. (Rec., 316.) *During those floods there was no water in the stock yards at Kansas City, except in a low place that was the old abandoned bed of Turkey creek.* (Rec., 552, 572, 577, 578.)

During the flood of 1902 when the water rose to 23.1 feet at Kansas City, the defendant's tracks were overflowed at Holliday and west of Lawrence, the same places that were overflowed on May 27th and 28th, 1903. (Rec., 293, 296, 297.) The defendant's division superintendent, who was then attending the protection of the tracks near Lawrence, and who was receiving reports from the Rock Island road, of the river conditions above Topeka, did not believe, and had no rea-

son to believe, that the flood would be of such magnitude as to cause serious trouble, or to cover the tracks at Kansas City. (Rec., 348.)

The stock yards at Kansas City are located on the highest part of the river valley. (Rec., 577.) Mr. Child, a witness, had lived at Kansas City thirty-five years before the flood of 1903, and had been in the employ of the stock yards as yard master, superintendent, assistant manager or supply agent, for over 33 years. (Rec., 529.) Mr. Fletcher had lived in Kansas City 33 years. (Rec., 552.) Mr. Swingley, 44 years. (Rec., 564.) Mr. Cable, 38 years. (Rec., 576.) They were all familiar with the Kansas river valley at Kansas City during that time, and with the location of the stock yards; Mr. Swingley and Mr. Cable being familiar with the land there before the stock yards were located. They were all witnesses at the trial, and testified that *there never was any overflow of the stock yards, or of the grounds where it was located, except a little in the abandoned bed of Turkey creek, during the flood of* 1881. (Rec., 530, 552, 553, 572, 577, 578.) Mr. Swingley was at the stock yards during the highest part of the flood of 1881, and there was no water except in the low place that was formerly the bed of Turkey creek. (Rec., 572.) *No witness testified that there had been water in the stock yards prior to* 1903, *except in that low place.*

On May 28th the stage of the river was 21.7 feet. On May 29th it was 23.3. On May 30th it was 25 feet (Rec., 300), and still there was no water in the stock yards, nor even in the basement of the exchange building in the stock yards when Mr. Coombs left his office

on Saturday evening, May 30th, at 7:00 o'clock (581); and at that time there was nothing to indicate that the yards would be flooded.

Some of the witnesses speak of the rains in the Kansas river valley being continuous, or nearly continuous during the month of May, but that is not true as shown by the weather reports. At Manhattan there was no rain on May 1, 3, 4, 6, 9, 10, 16, 17, 18, 20, 24, 28, and only a trace of rain on May 8, 11, 15 and a very little rain on May 2, 7, 13, 14, 22, and 25. (Rec., 322, 317.) At Concordia there was no rain on May 1, 2, 3, 4, 6, 8, 9, 10, 14, 16, 17, 18, 20, 24, 30, 31, and but very little on May 7, 21, 25, 26 and the 28th. (Rec., 323, 317, 318.) At Hays City there was no rain on May 1, 2, 3, 4, 5, 9, 10, 14, 16, 17, 18, 19, 20, 21, 24, 25, 26 and 31, and only a trace on May 12 and 15, and but little on May 5, 13, 23. (Rec., 323, 318.) At Dresden there was no rain on May 1, 4, 5, 9, 12, 14, 16, 17, 18, 19, 20, 21, 23, 24, 27, 28 and 31, and only a trace on May 3, 8, and 25. (Rec., 323, 318.) These are all the stations in the Kansas river watershed that reported to Mr. Connor at the Kansas City office, and they fail to show continuous rains for showery month of May, or any unusual rainfall, except the heavy rain of May 29th at the western stations but which was only 0:02 of an inch at Kansas City. (Rec., 300.)

That heavy rainfall on the 29th, 2.38 inches at Manhattan, 3.78 inches at Concordia, and 2.21 inches at Hays City (Rec., 317, 318), *would not be reported to the Kansas City office in the usual course of business until May 30th, but as May 30th was a legal holiday*

they were not received on that day. Mr. Connor says in his report issued on May 30th,

> *"Being a legal holiday no weather reports received, and only vague reports from Kaw points, telegraphic communications very, very poor."* (Rec., 302.)

In his comments of May 31st, Mr. Connor says:

> *"No reports of any kind received. Cut off from telegraph or telephonic communications, excepting to eastward, nothing could be said except what was actually happening in this vicinity."* (Rec., 302.)

On June 1st Mr. Connor says "No reports received from Kaw points." (Rec., 302.) *As he did not receive the report of the heavy rain of the 29th on the 30th or 31st or on June 1st, they were not received until after the flood subsided, and of course would be no information to bring notice of the flood to the defendant, even if it had received his reports. But Mr. Connor says he did not send his reports to the Santa Fe road.* (Rec., 309.)

On May 29th Mr. Connor gives the stage of the river as 23.3 feet (Rec., 300), and in his warnings and comments of that day he says:

> "Both Missouri and Kaw rivers continue rising. The flood in the Kaw may become very serious without the addition of rains liable to fall today and tonight. *It may go 2 or 3 feet higher in next 36 hours."* (Rec., 301.)

The 2 or 3 feet higher predicted by Mr. Conner, added to the present stage of the river, 23.3 feet, would make the stage of the river 26.6 feet at the highest, which would be only 0.4 of a foot higher than the flood of 1881 which did no damage at the stock yards.

There was therefore no alarming conditions on the evening of the 28th and morning of the 29th of May when the stock was loaded and started for Kansas City. *There was nothing to indicate to the defendant that the stock yards at Kansas City would be flooded, or that the stock would be endangered at Kansas City.*

Mr. Steube, one of the owners of the Minnesota & Dakota Company's cattle, was with and in charge of those cattle. Mr. Frost, the president of the Empire State Cattle Company, was with and in charge of those cattle. They were with the cattle in central Kansas and had been there for two days. They knew the amount of rain that had fallen, and were as capable of understanding the conditions surrounding them, as was the defendant. Mr. Frost was at Strong City where the water was then high in the Cottonwood river. They knew that they were being detained on account of high water on the Burlington road between St. Joe and Council Bluffs. In his testimony Mr. Frost testified concerning the delay at Strong City, as follows:

"Q. Now did you have any talk with the agent at Strong City, during that day (May 27th) as to washouts on the Burlington road?

A. I had some talk with the agent, yes, sir.

Q. And he told you that the Burlington road had reported that its track was washed out and could not forward the cattle, did he?

A. Yes, sir.

Q. And it was by reason of that delay that the cattle were there awaiting advices from the Burlington road as to when they could receive them?

A. I don't know.

Q. That is what the agent told you, was it?

A. Yes, sir.

Q. He told you that the Burlington road had notified them that they could not receive the cattle until their track was repaired, did they not?

A. All he said to me was, washouts.

Q. Washouts on the Burlington road, did he?

A. At one time he said on the Burlington road, but at another time between St. Joe and Council Bluffs.

Q. At one time he told you there was a washout on the Burlington road, and at another time he told you there was a washout between St. Jo. and Council Bluffs?

A. Yes, sir.

Q. You know of your own knowledge that the road running from St. Jo. to Council Bluffs is the Burlington?

A. Yes, sir.

Q. You know that there is only one road running through St. Jo. to Council Bluffs direct, on that side of the river?

A. That is all I know about.

Q. That is called the Burlington road?

A. Yes, sir.

* * * * *

Q. So that the road is the same road, when you speak of washout on the Burlington you mean the road your cattle was going over?

A. Yes, sir.

Q. So when you were detained at Strong City, you were advised by reason of the washout on that road, were you not?

A. Yes, sir." (Rec., 71, 72, 73.)

This testimony relates to the delay caused by the first washout on the Burlington road. After the washout was repaired the cattle were reloaded and moved from the yards ready to go out (Rec., 73). The agent then notified Mr. Frost that he had received word that the Burlington road was again washed out, and they

backed up and unloaded the stock again (Rec., 73). Mr. Frost testified:

"Q. Did you object to their being unloaded again?

A. I had nothing to say in the matter.

Q. You did not say anything one way or the other?

A. No, sir." (Rec., 73.)

On the morning of the 28th they commenced reloading the cattle again when they were again stopped by the washout on the Burlington road, and the cattle were again unloaded. (Rec., 73.) Mr. Frost was again notified that they were being unloaded on account of a washout. (Rec., 73.)

When the cattle were unloaded the third time Mr. Frost said to the defendant's station agent at Strong City, that he "was getting pretty tired of that kind of business."

"Q. Getting pretty tired of holding the cattle there?

A. Yes, sir.

Q. Did you tell him you wanted them sent on whether they ran into washouts or not?

A. No, sir.

Q. You did not say you wanted him to forward them on their way, whether the forwarding road would receive them or not?

A. No, sir. *I asked him if they could not be run around the flooded district.*

Q. *You asked him if they could not run them around the flooded district?*

A. *Yes, sir.*

Q. *You asked him to run them around the flooded district?*

A. Yes, sir.

Q. When was it you asked him that?

A. I think it was the 28th, the last time we unloaded." (Rec., 74.)

Mr. Frost asked that the cattle be run around the flooded district. There were three routes from Strong City to Council Bluffs; one by way of Atchison and from there over the Burlington road which was then washed out. One by way of Superior, Nebraska, and from there to Council Bluffs over the Elkhorn road, but the Superior line was then under water, and in a dangerous condition and was washed out during the evening of that day (Rec., 200); *and the third by way of Kansas City and from there over the Burlington or Missouri Pacific to Council Bluffs, which latter was the only line open and was the one adopted.*

It will be seen that Mr. Frost was fully informed as to the cause of the delay at Strong City, *and he protested against such delay and asked that the stock be run around the flooded district.* That necessitated a change of the route via Atchison or the Burlington. He suggested the line by way of Superior and over the Elkhorn road but the Superior line was under water, and the Elkhorn road had no officers nearer than Omaha who would have authority to arrange to move the stock, and that would be inconvenient, and would cause unnecessary delay in communicating with them. The Missouri Pacific officers were at Kansas City and St. Jo. and their line was much more direct. The change of routing by the defendant via Atchison or the Burlington was requested by the shipper; it was necessary and proper under the circumstances and was in accordance with custom. It was made with all reasonable diligence.

The cattle were transported from Strong City and Wellington to Kansas City without unnecessary delay,

part of them going all the way over the defendant's tracks, and part of them over the Frisco tracks from Olathe to Kansas City, which is a shorter line than the Santa Fe, being 21 miles by the Frisco, and 25 miles by the Santa Fe. So that if the Empire State Cattle Company's cattle were taken over the Frisco (St. Louis and San Francisco) road as stated in the petition for the writ of certiorari, and in its brief, they were not taken in a "round about way" as therein stated, but in a more direct way. But we think those cattle were taken to Kansas City on the Santa Fe, and not on the Frisco road, as Frost testified that they passed through Argentine, which is on the Santa Fe, and not on the Frisco road. (Rec., 41, 78.)

THE CATTLE WERE DELIVERED AT THE KANSAS CITY UNION STOCK YARDS TO THE MISSOURI PACIFIC ROAD TO BE FORWARDED.

One train load of the cattle arrived at Kansas City and was delivered to the Missouri Pacific road together with the way bills, on May 30th at 6:35 A. M., and was receipted for by that road (Rec., 473, 474, 475, 493, 494, 495, 518, 520, 524), and Mr. Clark, the division superintendent, acknowledged receipt of them by wire, although the date of message is wrong, no cattle being delivered on the 29th. (Rec., 194.)

The way bills were changed by the chief clerk in the Santa Fe office by striking out the word Atchison and inserting K. C., and striking out K. C. St. Jo. & C. B. and inserting Mo. P. (for Missouri Pacific) before they were sent to the Missouri Pacific road. (Rec., 495.)

The Missouri Pacific unloaded the cattle into the stock yards for feed and rest on May 30th at 8:20 A. M. (Rec., 549, 508.)

Mr. R. P. Isitt, the freight and ticket agent of the Missouri Pacific road, was called as a witness by the plaintiff, for the purpose of proving that the Missouri Pacific road did not receive the cattle. He testified among other things, as follows: Mr. Ball handed the witness two papers that were introduced by the defendant, Exhibits 14a and 14b, and asked:

"Q. Those are bills, receipts for the way bills are they not?

A. These are receipts interline way bills.

Q. They appear to be stamped by the Missouri Pacific, passed June 30, 1903? (Rec., 630.)

Q. Question read, what does that stamp mean?

A. This is a stamp put on by a clerk in my office when he handles these interline bills which are referred to, instead of the document, and stamps that as an indication they have been received.

Q. And do you know how they got on there a month after the flood?

A. No, sir, I could not tell, there were many things happened at that time nobody can explain. (Rec., 630, 631.)

Q. Have you your record there?

A. Yes, sir, I have part of the record, *I have the receipt of the cars, the cars were received from the Santa Fe.*

Q. That the cars or the cattle?

A. That the cattle were unloaded, they were placed to the unloading chutes and unloaded.

Q. By the Court: By the Missouri Pacific?

A. They were unloaded by the stock yards.

Q. They were unloaded at your chutes?

A. *Yes, sir, unloaded at our chutes.*

Q. Who placed them there?

A. *We placed them there. By the Missouri Pacific road.* (Rec., 632.)

Q. By the Court: Can you tell at the time the person signing this receipt whether or not they were receipting for loaded or unloaded cars?

A. Yes, sir.

Q. *And this is a receipt for loaded cars?*

A. *Yes, sir.*" (Rec., 634.)

The receipt spoken of by Mr. Isitt was returned to the Santa Fe road by mail. It usually took several days before such receipts were returned, but owing to the flood, the Missouri Pacific office being flooded and partly destroyed and their records damaged or destroyed, it took thirty days for the return of that receipt.

The other cattle were delivered to the stock yards company, together with the waybill stubs, for the Missouri Pacific road. The Missouri Pacific road had been advised that the cattle were enroute, and were notified that they were in the stock yards for them. *The universal custom and practice at the Kansas City stock yards, where cattle are brought in by one road, to be forwarded by another, where the cars are not to accompany the cattle, is for the company bringing in the cattle, to deliver the cattle with the waybill stubs, to the stock yards company, and the stock yards company delivers the cattle to the company that is to forward them.* The waybill stub is practically a duplicate of the waybill, and shows everything that the waybill shows.

Upon such delivery the rights and liabilities of the delivering company cease. From the waybill stubs that accompany the cattle, the stock yards company

enters in a book kept for that purpose, the names of consignor, consignee, the routing, and final destination. (Rec., 543.) This book is accessible to the public, and the live stock agents of all the railroads consult it to ascertain what cattle are consigned to their roads. The agent of the forwarding road gives the order for the reloading and forwarding of the cattle in the absence of the owner. (Rec., 532, 539, 543.)

> "The connecting line through their live stock agent, took (takes) the matter up, from our records, noting by our records that they are routed by their line, and the agent would make a memorandum of it, and if the owner was not there to give the order—written order, the agent himself would give it upon the stock yards company, on blank forms which the stock yards company furnish, for the reshipment over their line. Upon receipt of that order, from that agent, the stock yards company would take the cattle from the pens and reload them." (Rec., 540.)

Upon the question of the custom and practice of the various railroads and the stock yards company, in regard to the shipment of cattle through Kansas City, the following testimony was introduced.

Mr. Roberts, local live stock agent of the defendant, at the stock yards, testified as follows:

> "Q. Do you know the custom of the various railroads doing business in Kansas City, at the stock yards in Kansas City, in regard to the shipment of stock through Kansas City, that is where one road brings in the stock to be delivered to another road, what is the custom as to delivery through the stock yards?
>
> Q. By the Court: Do you know the custom?
>
> A. Yes, sir, I do.
>
> Q. What is the custom?
>
> A. For the road bringing in the stock to de-

liver it to the stock yards company with the waybill stub showing the final destination of the shipment.

Q. The waybill stub?

A. Yes, sir. *In addition to that a verbal notice to the representative of the connecting line informing them that the stock was there at their disposal.*

Q. Has it not been the custom and practice ever since you have been connected with the business?

A. Yes, sir. (Rec., 464.)

Q. What was the custom about notifying the agents of the roads of the arrival of the stock; was there any formal notice?

A. No, sir, just called them, just told them, and called them up over the 'phone, any way just so they knew it.

Q. Is it or is it not the custom of the stock yards company to notify the agents of the different roads when they receive stock for them; what is the practice in that regard?

A. The notice of the stock yards company is pasted in their records in a book accessible to the public.

Q. Is it the custom of the agent of the ~~defendant~~ roads to consult those records for the purpose of ascertaining the arrival of stock for them?

A. Frequently it is." (Rec., 465.)

Mr. H. P. Child, supply agent of the stock yards company, who has been in the service of that company as yardmaster, superintendent, and assistant general manager for over 33 years, testified as follows:

"Q. Are you familiar with the customary manner of transacting live stock business through the yards, by the stock yards company, and the various railroads that connect therewith?

A. Yes, sir.

Q. State fully what the custom and practice has been and is, in relation to stock that is shipped

into Kansas City by one railroad to be shipped out of the city by another railroad to its destination?

A. The stock yards company acts as the agent of both companies, to the extent of receiving the stock at the platform, unloading it into the chutes, taking it to the proper pens, and feeding and watering it, in such quantities as the owners may designate; and, at the proper time for reshipment, the connecting line, through its live stock agent, delivers the stock yards company a written order to load their stock on such trains as he may designate, which order is invariably accepted and acted upon and carried out.

Q. *State whether or not in cases where shipments of live stock are made through Kansas City, and delivered by one railroad to the stock yards company to be transported over another line of railroad from Kansas City to the ultimate destination, the delivering company has anything whatever to do with the stock, after they have been turned over to the stock yards company?*

A. *Nothing at all.*

Q. *Nothing at all?*

A. *No.*

Q. *When turned over to the stock yards company, the delivering company, so far as that car is concerned, ceases to have any control of it afterwards—is that correct?*

A. *The stock yards company receives the stock, and receive the charges and bills, which are charged to the stock yards company, and the stock yards company pays the delivering road the charges, through freight charges, or whatever charges they bring, and the stock yards company afterwards, puts these same charges on the receiving road,* if they are not paid by the owners in cash—and collects them at the terminus—the receiving road collects them at the terminus, and then reimburses the stock yards company.

Q. Where cattle are fed by the stock yards

company in the yards and cared for, and the owner does not pay the bills personally, in cash at the time, before the stock are delivered to the railroad company, or is to take the stock away from the stock yards, what is the custom with relation to those charges?

A. They are delivered to the receiving railroad company, with the stock and are accepted by them.

Q. And paid by that railroad company, are they?

A. Collected at the other end, and then paid by that railroad to the stock yards company, the stock yards company in the meantime having paid the delivering road." (Rec., 532, 533.)

In regard to the question as to how the order is obtained, and from whom, for the reloading or reshipment of cattle at the stock yards, Mr. Child testified:

"Q. I believe you said that, customarily, the delivering company after turning over the cattle to the stock yards company had nothing further to do with them, in the matter of getting them to the connecting company, and that the shipping them out was wholly in charge of the stock yards company?

A. No, the connecting line, through their live stock agent, took (takes) the matter up from our records, noting by the records that they were routed by their line, and the agent would make a memorandum of it, and, if the owner was not there to give the order, written order, the agent himself would give it upon the stock yards company, on blank forms which the stock yards company furnish, for the re-shipment over their line. Upon receipt of that order, from that agent, the stock yards company would take the cattle from the pens and reload them. (Rec., 539, 540.)

Q. In transferring cattle beyond Kansas City, from a railroad company in from the west to some other direction, north or east, to some other road

north or east, is it or is it not, considered a delivery when they are turned over to the stock yards company so far as the railroad bringing the cattle are concerned—in other words, *does the road which brings the cattle in the stock yards have anything to do with them, or control over them, ordinarily, after they have been turned over to the stock yards company where they are to be transported beyond?*

A. *It is my understanding that turning them over to the stock yards company, closes the obligation of the delivering road.*

Q. *They—the delivering companies—have no further control over the cattle, then, afterwards, under ordinary circumstances, where the cattle are to be forwarded over another line?*

A. *No sir.*" (Rec., 541, 542.)

J. W. S. Hutchings, superintendent of the stock yards company, and who has been connected with the stock yards business at Sioux City, Chicago and Kansas City, testified:

"Q. You may state, then, what is the custom in regard to the handling of cattle where they are brought into a terminal city by one railroad, on billing to be forwarded over some other road to destination?

A. We have a record in our receiving and shipping office that shows the consignor and consignee, and the final destination, and the information is gotten there, that source, by the connecting line, and ordered out; an order is issued to the stock yards company to load the stock in so many cars at a certain time.

Q. State whether or not the railroad which brings the stock in and turns it over to the stock yards company, under ordinary conditions has anything more to do with it, after it has been turned over to the stock yards company?

A. I think that is practically the end of it.

Q. That ends their connection with it?

A. Yes, sir.

Q. *State whether or not that is considered a delivery so far as the company bringing the stock is concerned?*

A. *Yes sir.*

Q. The stock yards company then takes charge of it, and handles it until turned over and loaded into the cars of the forwarding company, is that correct?

A. Yes sir." (Rec., 543.)

W. A. Combs, assistant general live stock agent of the defendant, testified in regard to the delivery of the cattle to the connecting carrier, through the stock yards, that they were delivered in the usual and customary way. He said:

"Yes sir, we did everything that is customary to do in delivering cattle to a connecting carrier —it was done in the same usual manner that is the custom always to do, we delivered those cattle to the stock yards company, for the connecting carrier, and those that were to go through without feeding we delivered to the Missouri Pacific." (Rec., 582.)

Mr. L. A. Allen, one of the plaintiff's witnesses, testified as follows:

"Q. The Kansas City stock yard is a public yard?

A. Yes sir.

Q. *Whenever cattle are brought in there and turned into the yard by delivery of the railroad company, then the other railroad without any further definite order takes the cattle, loads them out and ships them on?*

A. *Yes sir.*

Q. And that is the usual practice in the yard?

A Yes sir, when they are consigned through.

Q. That is the general custom?

A. Yes sir." (Rec., 251, 252.)

The stock yards company pays to the delivering company all charges up to the time of delivery to the stock yards company, and those charges so paid by the stock yards company, together with the stock yards company's charges for feed and care, follow the cattle and are paid by the forwarding company and collected at the destination from the consignee. (Rec., 533, 540, 544.)

The stock yards company is in fact, one link in the line of carriers, and in legal effect the transfer to and from the stock yards company, is the same as the transfer to and from any intermediate carrier, and a delivery to the stock yards company for the forwarding company terminates the rights and liabilities of the delivering carrier. The Empire State Cattle Company's cattle, and Welsh's train load of cattle, were loaded on May 29th about 7:30 or 8:00 A. M. (Rec., 40) and as one train arrived at Kansas City on May 30th, about 7:00 A. M. (Rec., 41), and unloaded at the stock yards at 8:20 A. M. (Rec., 549.) One train load of the Minnesota & Dakota Cattle Company's cattle was delivered in the cars to the Missouri Pacific road as we have shown. The third train of their cattle in charge of Mr. Steube, one of the owners, was loaded at Wellington May 29th, about 6:00 or 7:00 A. M. and arrived at Kansas City on May 30th about 6:00 or 7:00 A. M. (Rec., 387) and were unloaded into the stock yards at 8:20 A. M. (Rec., 548, 549, 550.) The 28 hours allowed by law had nearly expired when the cattle were unloaded, and would expire before the cattle would reach the next feeding station, so it was proper and necessary to unload them for feed and rest. The

Kansas City stock yard is a public yard, and subject to legislative regulation and control. It is a means of effecting transportation of commerce by affording a connection between the various railroads entering Kansas City. Cattle brought to Kansas City by one road, to be forwarded by another, are unloaded from the cars of one road into the stock yard, and there fed and watered, and loaded into the cars of the forwarding road, all by the stock yards company.

When so unloaded into the stock yards, they have passed beyond the control of the delivering company, and are subject to the orders of the owner, if he is present, or in his absence, to the forwarding company; and are not subject to the orders of the delivering company.

Under the uncontradicted evidence the cattle were delivered to the stock yards company for the Missouri Pacific road, and defendant had lost control of them. Mr. Frost, the shipper and one of the owners of the Empire State Cattle Company's cattle, was with, and in charge of those cattle. Mr. Steube, one of the owners of the Minnesota & Dakota Cattle Company's cattle, was with and in charge of those cattle. They were the representatives of the plaintiffs. Neither of them objected to the cattle being unloaded into the stock yards. Neither of them requested the defendant to resume possession of the cattle, and it could not have done so without their order. Neither of them made any objection or request of any kind, except that the cattle be forwarded to their destination in Dakota, and the defendant had no line by which they could be forwarded.

THE DEFENDANT WAS NOT GUILTY OF CULPABLE NEGLIGENCE AFTER THE CATTLE ARRIVED IN KANSAS CITY AS THE FLOOD ROSE RAPIDLY AND UNEXPECTEDLY THERE.

The plaintiffs, in their petitions, alleged that the flood which injured their cattle was *"extraordinary and unprecedented,"*—an act of God. They then alleged that the defendant was guilty of negligence in not using "due and reasonable care" in not anticipating the flood but in taking the cattle to Kansas City and in not removing same from the stock yards, which rendered it liable notwithstanding the unprecedented flood. They took upon themselves the burden of proving negligence on the part of the defendant. For that purpose they introduced evidence to show the flood conditions and the defendant's knowledge of those conditions. They produced C. T. McLellan, the defendant's division superintendent at Topeka, to prove his knowledge of the situation. He testified that he was near Lawrence protecting the track from the flood. He was receiving reports from points west of Topeka. He testified:

> "There was nothing in the reports to indicate that we would have any serious trouble.
>
> Q. From the reports which you did receive, you believed that your tracks in Kansas City would not be flooded?
>
> A. I had reason to think so.
>
> Q. You did think so?
>
> A. Yes sir, I did think so." (Rec., 348.)

He testified that the main line between Topeka and Kansas City became impassable on May 29th *by reason of low places at Holliday and at or near Lakeview. These places had been flooded during other high waters.* (Rec., 296, 297.)

Mr. Hurley, general superintendent of defendant also testified for the plaintiffs, and identified the telegrams introduced by the plaintiff (Rec., 179 to 195), which show the necessity for the change of the routing from Atchison to Kansas City by reason of washouts on the Burlington road, and the bad condition of defendant's road between Topeka and Atchison, and that all arrangements had been made for the Missouri Pacific to receive the cattle at Kansas City and forward the same, including the participation in rate. (Rec., 187.) Mr. Frost had demanded that the cattle be run around the flooded district. *No other course was open to the defendant than the one adopted by sending the stock to Kansas City, and from there over the Missouri Pacific.* (Rec., 205.) The defendant had numerous other trains of stock to handle, and its stock yards were nearly all full. (Rec., 205.) The defendant had no other yards at or near Kansas City where it could have held the stock. (Rec., 205.) *The cattle were put into the stock yards for the Missouri Pacific which was the usual and customary way of delivering stock to a connecting carrier.* (Rec., 205, 206, 207, 251, 252.) The cattle were taken from Emporia to Kansas City by way of the "cut off" to avoid passenger trains, that being the usual route for stock trains. (Rec., 211.) *The tracks at Holliday are low and frequently flooded, but the stock yards at Kansas City had never been flooded, neither had the tracks in Kansas City been flooded, and Mr. Hurley had no idea that they would be flooded.* (Rec., 214.) *He was receiving advices from Topeka, and personally went to Argentine to investigate the flood conditions, and from the best information he could obtain he did not think the stock yards, or the tracks in that*

vicinity would be flooded. (Rec., 214.) *So confident was Mr. Hurley that the vicinity of the stock yards would not be flooded, that he removed the engines and coaches from Argentine and placed them in their yards near the stock yards, and during the flood a hole was washed out in that yard 220 feet long, 38 feet deep and 110 feet wide, and four engines, a Pullman car and some coaches were submerged therein.* (Rec., 215.) *The waters rose so rapidly that the best passenger train on defendant's road was caught at the Union depot, and submerged.* (Rec., 215.)

Mr. Allen was a witness for the plaintiff. He testified as to the flood conditions, and as to the practicability of driving the cattle from the stock yards through the city to pastures, to get them out of the flooded district. He testified that a few small lots of cattle, probably native cattle, were driven out, but that was frequently done as to small lots of cattle to be held over. He said that there were pastures about six miles from the stock yards, between Kansas City and Independence where they could have been kept. (Rec., 257.) Independence is east of Kansas City, Mo. The stock yards are on the west of Kansas City, Mo., between Kansas City, Mo., and Kansas City, Kansas. As to the practicability of driving 3,000 Texas cattle through the streets of the city, Mr. Allen testified:

> "Q. You know as a matter of fact it very frequently happens when a Texas steer gets out of the yards there, they cause a great deal of trouble in the streets?
>
> A. Yes, sir.
>
> Q. That very frequently happens?
>
> A. Yes, sir.
>
> Q. And chase people in the streets?

A. Yes, sir.

Q. And break through show windows sometimes?

A. I believe that has happened.

Q. And you know as a fact that some have gone through the principal streets of Kansas City, Mo., and went through plate glass windows?

A. Yes, sir.

Q. You know that very frequently it happens, do you not?

A. Occasionally.

Q. You know of people being frequently run down by them in the streets, do you not?

A. Well, yes, not frequently run down.

Q. Texas cattle get loose and take after a man and run over him if he don't climb a telegraph pole?

A. A wild Texas steer will do it." (Rec., 629.)

Mr. Kendrick, live stock agent of the Burlington road was called to prove that the cattle could have been shipped on May 30th over the Burlington road. He tried to say that the Burlington road had equipment and could have taken the cattle, but when the court asked him directly he said he did not know.

"Q. By the Court: That is not the question; the question is whether you know you had plenty of equipment to take these cattle out?

A. I don't know.

Q. (By Mr. Ball.) You do not know whether you had?

A. No, sir." (Rec., 288.)

Mr. Kendrick also testified that the Burlington road did send out thirty-five cars of cattle on Saturday evening, May 30th, but when asked in what direction they were sent, he said "east." (Rec., 290.) Sending them east would be toward St. Louis or Chicago, to both of which places the Burlington had lines of road. But

the cattle in question were to be sent northwest, to Omaha, and not east.

No other way is suggested by which they might have been sent out of the flooded district. It is not shown that the Burlington could have taken them; and driving 3,000 wild Texas cattle through the streets of the city is entirely impracticable. (Rec., 580, 581.)

The viaducts seemed as safe as any place and the stock yards company had the right to suppose that the flood would disappear from its yards as rapidly as it had approached.

Flood Conditions.

As to the flood conditions there was no dispute as to the facts, and there is no room for dispute as to the reasonable inferences to be drawn from the facts that were known at Kansas City before the catastrophe was upon that city.

When the cattle arrived in Kansas City. on Saturday morning May 30th, the stage of the river was 25.00 feet (Rec., 300), 0.1 foot higher than the flood of 1892 (Rec., 315), and 1.2 feet below the flood of 1881 (Rec., 312.) The rainfall for the preceding 24 hours was 0.64 of an inch. (Rec., 300.) *The heavy rainfall in central Kansas had not been reported at Kansas City, and was not reported until after the flood subsided. The only rains reported by the weather bureau, were the rains in eastern Kansas, and the only danger predicted was for points below Kansas City* (Rec., 302.) There was then no water on the stock yards, nor in the basement of the exchange building at the stock

yards. *There was then no information from western points that would indicate a flood that would overflow the stock yards, or damage stock therein. Mr. Child, the general supply agent of the stock yards company at Kansas City, whose special duty it was to look after flood conditions* (Rec., 529, 530), *and who was by special arangement receiving telegrams from Mr. Jennings, the officer in charge of the weather bureau at Topeka* (Rec., 531), *did not know the dangerous magnitude of the flood.* He testified that there was nothing alarming in the reports he received. (Rec., 531, 537, 538.) Mr. Child could only find two of the telegrams that he had received. They were both dated May 30. One was sent at 3:47 p. m. and is as follows:

"River rose 6 inches since noon."

The other one, sent at 8:10 p. m. is as follows:

"River risen 6 inches since 3 p. m." (Rec., 538.)

These telegrams show a rise of 6 inches from noon to 3:47 p. m., and of six inches from 3 p. m. to 8:10 p. m., only six inches in the last five hours, showing that instead of the rapidity of the rise increasing it was diminishing. That was not an unusual rise and gave no hint of a dangerous flood. *Mr. Connor, the United States Weather Bureau officer at Kansas City, whose sole business it was to keep posted on the weather conditions, had no information that would indicate a flood at Kansas City sufficient to flood the stock yards, and he did not anticipate such a flood.* Being a legal holiday, Mr. Connor had no reports from western stations

of the rainfall for the preceding twenty-four hours. All he could say was that the "heavy rains in Missouri and eastern Kansas last night renders the situation more alarming *for points below Kansas City.*" (Rec., 302.) The last telegram from Mr. Jennings of Topeka, to Mr. Child, at 8:10 p. m., showed that the river was not rising as fast as it had been, indicating that the flood was at about its highest point. (Rec., 538.)

The live stock exchange building is located in the stock yards at Kansas City. The basement of that building is several feet lower than the level of the ground at the stock yards. The basement was all occupied by offices. The offices of the live stock agents of all the railroads at Kansas City, were in that basement. (Rec., 241.) Not one of those agents anticipated a flood that would damage their property and records, and not one moved anything from their offices. The first floor above the basement was occupied by the Inter-State National Bank, and by 25 or 30 offices. Nothing was removed from the bank or from any of those offices. The water was about two feet and a half on the floor of the bank and offices, destroying furniture, records and papers. There were several other banks in the flooded district. Every packing house in Kansas City is in that district. Nearly all the railroad shops, yards and offices were located there. Nearly all the large warehouses, implement houses and wholesale grocery houses were located in that district. The union depot is there. Nearly all of the large factories were there. Thousands of car loads of merchandise were standing in the railroad yards in the flooded district; over 1,400 of them in the Santa Fe

yards alone. There were numerous hotels, stores, lumber yards and other large industries in that district. *Not a dollar's worth of property was removed by any of the above named industries in anticipation of the flood. The owners and agents left their places of business on Saturday night, May 30th, feeling perfectly secure, and having no information or intimation of the calamity so soon to overtake them.* The only things removed from the flooded district before the flood were a few cattle and some mules; and the water got up to the mules' bellies before they got out. (Rec., 243.) *Thousands of hogs, cattle and sheep were left in the stock yards and drowned.* (Rec., 258.)

Mr. Hurley, general superintendent, and Mr. Sharp, division superintendent, were in Kansas City closely watching the flood situation, and receiving reports from Topeka. They got on the top of a box car and went from Kansas City to Argentine, which is immediately west of Kansas City, for the purpose of investigating the condition of the flood, returning from Argentine on May 30th about 12:30 p. m. At that time the lowest part of the yards in Argentine were flooded, about four inches of water being over the rails. There was also a low place near the Rex Mill, between Argentine and Kansas City, that was flooded, *but there was no water in the yards at Kansas City.* After carefully investigating the situation from Kansas City to Argentine, and at Argentine, and considering all the information they could obtain from points up the river, they concluded that the crest of the flood had about reached Argentine, and that there was no danger. Mr. Sharp testified as follows:

"Q. Now, while you were at Argentine investi-

gating the flood conditions with Mr. Hurley, as to the probable further rise in the river, based on the information that you had from up the river; what conclusion did you and Mr. Hurley come to at that time as to condition of the flood, whether it would probably rise any higher or not?

A. We thought from the information which we had, and which he told me, and from the way the water had been rising that the crest of the flood had about reached Argentine, and we figured that even in the lowest part of the yard, we believed if we got as much as two feet more, that the contents of the cars would not be damaged. * * *

Q. From your personal examination of the flood conditions at that time at Argentine and from your conferences with Mr. Hurley, and the best information you could obtain from up the river, did you at that time, apprehend that there would be any further rise in the river?

A. We did not think that there would be any further rise that would cause us, or that could possibly cause us any trouble. * * *

Q. Was there anything in the information which you had to indicate at that time that you would have a rise, or further rise of two feet?

A. No, sir; there was not, and we did not think there would be that much.

Q. Well, you may state whether or not at that time you had any reason to apprehend any further rise in the Kaw river?

A. We had not; the fact of the matter is we went up there for the purpose of sizing up the situation, and to see and talk the matter over, and to judge of the conditions, and we did as I have stated and Mr. Hurley came to the conclusion that the flood had reached its maximum height, and we thought that we were absolutely safe, because even should it rise as high as two feet more, and which we did not consider it probable, we would be entirely safe on all or our merchandise cars." (Rec., 600, 601, 602.)

So confident were Mr. Hurley and Mr. Sharp that the water would not rise high enough to cover the defendant's Kansas City yards, that they removed the engines and coaches from the Argentine yard, to the Kansas City yard, and placed them in the Kansas City yard near the stock yards (Rec., 603), upon ground that was lower than the stock yards (Rec., 603), where they thought they would be entirely safe. (Rec., 603.) Believing that their yards in Kansas City would not be flooded, Mr. Hurley left his private car in the yards near the depot, where it was caught by the flood and submerged. The places where the engines and cars were placed were submerged, and a hole excavated under the cars, in which hole four engines, a Pullman car and some coaches were submerged. (Rec., 215, 604.) *The best passenger train on defendant's road came into the depot to discharge passengers; the engine was detached and sent to the yard to be coaled to resume the run, but was caught by the rapidly rising waters before it could return to the train, and engine and train were submerged, so rapid was the rise of the river.* (Rec., 595.) The defendant's office building where the division superintendent's office was kept, and where their records were kept, and where Mr. Hurley stopped while in Kansas City, was in the river bottoms near its yard. No records were removed, but they were submerged and destroyed. (Rec., 593, 600.) The defendant had over 1,400 cars of merchandise at Argentine and Kansas City, all of which were submerged and destroyed. (Rec., 601.) *During the night of May 30th, and morning of May 31st the river rose rapidly, and without any notice having been received of the tremendous rise that was approaching.* (Rec.,

610, 611.) *From four o'clock Sunday morning until noon, the water rose 7 or 8 feet.* (Rec., 596, 611.)

Up to the time that the flood actually arrived and overwhelmed Kansas City, the defendant had no knowledge of the approach of a flood that would endanger its property; and no information from which an inference of danger could be drawn. In addition to what has already been quoted from Mr. Sharp's testimony he testified as follows:

"Q. Did you have up to that time, to the time you finished moving that equipment out of the Argentine yard, any information, any time, from up the river indicating a rise which would flood your Kansas City yard?

A. None. (Rec., 603.)

Q. *Up to the time that this flood actually broke into your Kansas City yard and flooded what is called the west bottoms of Kansas City, Missouri, including the stock yards district, did you have any information from up the river which would indicate a rise to the extent of flooding that district?*

A. *No, sir; I did not.* (Rec., 606.)

Q. Do you know, now, that ten feet of water passed Topeka Friday evening about nine o'clock, a ten foot rise on top of the condition you have been telling about?

A. I never heard of it until I heard it mentioned in this court this morning. (Rec., 610.)

Q. So that rise did pass Topeka about nine o'clock Friday evening?

A. No, sir; I never heard of that until to-day.

Q. Do you know when that rise left Manhattan?

A. No, sir; I don't know anything about that ten foot rise, I never heard of that until to-day. (Rec., 611.)

By the form of the questions asked Mr. Sharp and other witnesses, the plaintiff's attorneys attempted to leave the impression that a wall or breast of water ten feet high swept down the valley past Manhattan and Topeka to Kansas City, but that condition was purely the creature of the imagination of the plaintiff's attorney. No witness testified to such a condition or circumstance. That there was a rise at Kansas City, that was unprecedented in volume and rapidity of its rise is unquestioned. That it was also wholly unannounced and unprecedented is equally true. The weather bureau, the stock yards company and the defendant were each and all trying to ascertain the weather conditions. Others were probably doing the same thing. *Yet it is beyond controversy that no one had any intimation of the volume of water that was approaching the city.* They knew a flood was coming, as other floods had had come, but they did not think it would inundate the bottom lands, except in the low places. *No railroad, warehouse, packing house, bank, wholesale grocery house, factory, or other industry moved a dollar's worth of property at Kansas City before the flood came upon them; except the few mules above mentioned, and they were moved as the flood was rising, and the mules were nearly drowned while being taken out, the water being up to their bellies before they got out.* (Rec., 243.) *There were about twenty or twenty-five thousand people living in the flooded district of Kansas City, Kansas, which was on the west side of the Kansas river* (Rec., 565, 573), *and several thousand on the east side of the river above and below the stock yards. None of those people knew of the approach of that flood until it was upon them. They*

saved nothing except the clothing they wore, many of them being rescued by boats, with no clothing but their night clothes. (Rec., 563, ~~559,~~ 570.) *About two thousand houses were washed from their foundations, and many of them floated down the river* (Rec., 558), *and the inhabitants were rescued by boats and otherwise, and about* 25,000 *of them were housed in churches, school houses and other public buildings.* (Rec., 569.) *Large brick buildings were swept away.* (Rec., 571.) *There were sixteen bridges across the Kansas river in Kansas City, Kansas, all supposed to be above the reach of the flood, and every bridge was swept away, except the Missouri Pacific Railroad bridge* (Rec., 531, 558), *and that was saved by placing thereon about* 15 *or* 16 *locomotive engines, extending from one end of the bridge to the other.* (Rec., 460, 558.) Those engines held the bridge but they were completely submerged by the water, and by drift wood brought down stream by the flood. (Rec., 459, 558.) *The streets in the flooded district were filled with houses, freight cars, lumber and other articles to such an extent as to completely fill the same.* (Rec., 570, 571, 579, 461, 463, 555, 560.)

Of all the people living in the flooded district, and of all the railroads, stock yards, packing houses, banks, warehouses, wholesale houses, elevators, factories and other large industries located in that district, not one knew of or was warned of the nature or extent of the approaching flood; and not one moved a dollar's worth of property in anticipation of it; except as above stated. The books, papers and records in the various railroad offices were of great importance, containing as they did,

the record of the immense volume of business passing into and out of and through Kansas City, and could have been easily moved if they had known of the extent of the flood. But they were not removed, but were submerged and destroyed. (Rec., 598.) *The flood was of so much greater volume than any reports that were received, had indicated, that everybody was taken by surprise and they were wholly unprepared for it.* If the true volume of the flood had been reported from Topeka, but little could have been done toward the removal of the 1,400 cars of merchandise and the stock and other property from the flooded district before the flood cut off the movement of trains, as the track was under water between Argentine and Kansas City, and in Argentine, and at Holliday, west of Argentine, even if the cattle had not been delivered to the forwarding carrier.

When the flood arrived in Kansas City on Sunday morning, May 31st it swept fifteen or sixteen bridges from their piers into the river; about 2,000 houses from their foundations; hundreds of freight cars from the tracks; and every lumber yard in the bottom lands was emptied. Houses, lumber, cars and other wreckage was piled in the streets completely blocking the streets, and upon the wrecked bridges, and upon the Missouri Pacific bridge and the locomotives thereon, so that the river was completely dammed and the water ran over the top of the locomotives on the bridge; and the wreckage in the streets added to the obstruction to the flow of water, so that the river rose rapidly, and much higher than it otherwise would, the river being 10.5 feet higher at the mouth of Turkey creek, near the

stock yards, than it was at the Hannibal bridge over the Missouri river, about a mile below. (Rec., 530.)

No ordinary care or prudence could have foreseen the extent of the flood in that locality in time to avoid its consequences. The most prudent and careful bankers, manufacturers, packers, merchants, and business men of all kinds failed to foresee the dangerous character and extent of the flood, or to avoid its consequences. All of this appears from the plaintiff's testimony (see testimony of L. A. Allen on pages 241 to 249), as well as by the testimony for the defense. (See testimony of W. Fletcher, commencing on page 552, H. S. Swingly, page 564, and Ore Cable, page 576.)

This is the character of the evidence upon which the plaintiffs rely, and upon which they must rely, to prove that by the exercise of reasonable care and prudence the defendant should have foreseen that the flood would rise to such a height at the Kansas City Stock Yards as to injure the cattle in such yards, and should have moved them to a place of safety other than upon the viaducts. *The plaintiffs' contention is and must be that the defendant should have foreseen what no one else foresaw; and should have guarded against that which no one else guarded against.*

The testimony introduced on the trial, by the plaintiffs and defendant, conclusively showed that the flood was wholly unprecedented in volume, and in the rapidity of its rise.

THE STATEMENTS OF FACT IN THE PETITION FOR THE WRIT OF CERTIORARI, AND IN PLAINTIFFS' BRIEF, ARE CONFUSED AND MISLEADING, AND IN MANY PARTICULARS ARE UNSUPPORTED BY THE EVIDENCE, OR DIRECTLY CONTRARY THERETO.

In introducing the telegrams found in the record on pages 179 to 195, the plaintiffs, for some resaon best known to themselves, so arranged and introduced said telegrams that they do not follow each other in the order in which they were sent; and in order to ascertain what telegram is in answer to any other particular telegram, regard must be had to the context of the telegrams, and the hour of sending, where that is shown, rather than to the arrangement in the record.

On page 17 of the plaintiffs' brief, it is said that Mr. Connor sent daily weather reports to the public, presumably for the purpose of showing that the defendant received such reports, and thus had notice of the amount of rainfall in the Kansas river watershed. But Mr. Connor said he did not have the defendant on his list of persons or companies to whom he sent such reports. (Rec., 309.) Moreover, the evidence shows that Mr. Connor had no knowledge of the unprecedented conditions until after the flood struck Kansas City.

On page 31 of the plaintiffs' brief, it is said that if the cattle in question had been forwarded from Strong City as Cloyd's train was, the injury to the cattle would have been avoided. But there is no testimony that those cattle went by way of Atchison, and we have elsewhere shown that the second washout on the Bur-

lington road occurred before those cattle could have reached Atchison; and that they were delayed somewhere in transit two days.

In plaintiffs' brief, on page 33, it is said both Frost and Newton testified that the defendant's agent at Strong City informed them that the detention of the cattle at Strong City was on account of high water along the line of defendant's railway. No such testimony was given by Newton or Frost. Mr. Newton testified:

"Q. You got a telegram to what effect? What information came to you gentlemen as to why they were to be unloaded?

A. On account of high water.

Q. Where?

A. Where?

Q. Where was the information that you got that the water was high?

A. Well, I don't know.

Q. That is all that you heard, was it?

A. Just on account of high water. (Rec., 132.)

On cross-examination he testified:

Q. What did the agent say about it?

A. He just said it was on account of high water.

Q. Did he say where the high water was?

A. No." (Rec., 151.)

Mr. Frost testified:

"Q. Now, did you have any talk with the agent at Strong City, during that day as to washouts on the Burlington road?

A. I had some talk with the agent, yes, sir.

A. And he told you that the Burlington road had reported that its track was washed out and could not forward the cattle, did he?

A. Yes, sir.

Q. And it was by reason of that delay that the

cattle were held there awaiting advices from the Burlington road as to when they could receive them?

A. I don't know.

Q. That is what the agent told you, was it?

A. Yes, sir that is what the agent told me. (Rec., 71.)

Q. Washouts on the Burlington road, did he?

A. At one time he said on the Burlington road, but at another time he said between St. Jo and Council Bluffs." (Rec., 72.)

St. Jo and Council Bluffs are both on the Burlington. This testimony refers to the delay at Strong City, on May 27th and 28th. The defendant asked Mr. Frost directly as to the condition of the track on the 29th.

"Q. Didn't he tell you before you left Strong City that the Santa Fe line between Topeka and Atchison was out of business on account of washouts?

A. I don't think so, if he did I have no recollection of it." (Rec., 74.)

The telegrams introduced by the plaintiffs also show that the detention was by reason of washouts on the Burlington road, as we have herein shown. (See Rec., 179, 180, 181, 191, 452.)

On page 34, the plaintiffs say that the situation of this shipment was so exceptional as to call forth the interposition of the general officers of the defendant company, from the time of the arrival of the cattle at Strong City. That statement only shows the lack of information on the part of plaintiffs' counsel, as to the manner of handling train loads of cattle, which are run as extra trains and to be delivered to a connecting carrier. All such trains must be run upon orders from the general superintendent, or from the divi-

sion superintendents. No such train can start without orders from the trainmaster, and he must know the hour and minute when such train passes each station. The connecting carrier must also be advised of the number of cars and probable time of arrivel of such trains, so they may be forwarded without delay. All such orders must emanate from the general officers, regardless of weather conditions.

The plaintiffs assume as a fact that there was a deviation of the cattle from an agreed route to some other route. (Brief, pages 35, 36.) There was no route agreed upon, not even any specified or requested by the shippers, and no deviation. The only contracts were the written contracts shown in the record (pages 12 to 19.) There were no bills of lading issued as stated on page 36 and elsewhere in their brief, and the endorsements on the back of the contracts were made by some agent of the initial carrier, were not uniform, and were not part of the contracts as we have heretofore shown. The endorsement copied on page 36 of plaintiffs' brief, "Live stock contract, Hereford, Texas, to Atchison, Kansas," found on some of the contracts, shows that it was a mere memorandum, indicating two points only on the route designated by the initial carrier for itself and connecting carriers, and not intended as a part of a contract for a through shipment from Hereford, Texas, to Evarts, S. D.

On page 39 the plaintiffs say that on May 28th there was a downpour of five inches of rain in the Kansas river water shed, and in consequence thereof there was a "tidal wave" of nine feet in the Kansas river at Topeka, on May 29th. Those statements are grossly

and inexcusably exaggerated, as well as absurd. Mr. Jennings did testify that there was a rainfall of five inches at Salina, but it was not shown how or where he obtained that information. It was not shown that Salina was a weather station. He may have obtained his information from rumors which are not always reliable. No weather bureau station reporting to Mr. Connor reported such a rainfall. Manhattan, east of Salina, Hayes, west of Salina, Concordia, north of Salina, and Dresden northwest of Salina, are all the weather stations in the Kansas river watershed that report to Mr. Connor, and none of them report such a rainfall. If there was such a rainfall at Salina it was local. No other witness reported such a rainfall, and Mr. Jennings spoke only from memory, and not from records, which he said he kept. (Rec., 220.) As to the "tidal wave" at Topeka, nine feet, on May 29th, Mr. King, the only witness who was in a position to give reliable information as to the actual rise of the river at Topeka, said that the river at Topeka rose 10.1 feet from May 28th at 8:30 a. m. until May 30th at 9 p. m. (Rec., 224.) Instead of a tidal wave of nine feet the river rose ten feet in two days and a half. There was no river gauge at Topeka, and the reports from there and points above only give the rise from time to time, without any indication as to how much the river was above low water mark.

In determining whether or not the defendant's officers in charge of the shipment of cattle, (notice to all others would be immaterial), should have foreseen the danger to the cattle at Kansas City, regard must be had of the *situation and condition existing at Kansas*

City at the time, and of former floods, as well as the condition of the Kansas river, which is a tributary of the Missouri river at Kansas City. Mr. Connor testified that there was not much flood conditions in the Missouri river and particularly none north of the St. Joseph, Mo. (Rec., 313), so that the Kansas river was the only source from which a flood was likely to come. There was no river gauge on the Kansas river above Kansas City, and the reports from points on that river were therefore of but little value as to the actual volume of water in the river.

But if the defendant's officers had known at the expiration of each hour, of the actual height of the river above low water mark at Topeka, or any other point, there would not have been reasonable grounds to fear that *the stock yards at Kansas City* would be flooded, or stock injured therein. Mr. King, the city engineer, of Topeka, testified that at its highest point the flood reached 26.98 feet above low water mark. (Rec., 224.) As there was practically no flood conditions in the Missouri river it would not be reasonable to expect the Kansas river to rise as high above low water mark, at its mouth, where it has an opportunity to spread out over the Missouri valley, as it was at points above. The flood of 1881 reached a height of 26.2 feet above low water mark at Kansas City (Rec., 312), and at that time the stock yards were not flooded. It could not be anticipated therefore, that the river would rise much if any above 26 feet at Kansas City, and that could do no damage at the stock yards. *But the river became choked and dammed up with wrecked bridges, cars, houses, lumber and other articles to such an extent that*

it rose to 35 *feet at the Hannibal bridge, and* 10.5 *feet higher about a mile above at a point near the stock yards.* (Rec., 530.) *The Kansas river rose so much higher than the Missouri river that articles floating out of the Kansas river went up the Missouri river a mile or more before striking the opposite shore.* (Rec., 557.) This condition was evidently caused by the fact that the channel of the river was dammed by bridges, locomotives and driftwood, and that the streets and other passageways by which the water could have escaped, were also filled with buildings, cars and other things, and not by a tidal wave which existed only in the imagination of plaintiffs' counsel.

It is claimed by plaintiffs that no arrangement was made with the Missouri Pacific road to receive the cattle at Kansas City, because Mr. Douthitt, the live stock agent, said he did not make such arrangement (Brief, 40), and this in the face of the telegrams introduced by the plaintiffs, showing that the general superintendents of the two roads did make such an arrangement. When Mr. Douthitt was asked from what source he derived his authority to, in effect, override the contracts of the general superintendent, he said: "I got it from knowledge of the business and the way it is conducted and from experience." (Rec., 275.) But Mr. Douthitt knew that arrangements had been made to forward the cattle, that the cattle were in the yards for them and said they would try to move them (Rec., 281), but were afraid to start with the cattle on account of high water. He testified, "I know we were afraid to start with it, for the reason we went down to try." (Rec., 279.) He then makes the excuse for not moving

them, that they did not have the motive power to handle them. (Rec., 272.) But they had 16 or 17 locomotives to place upon their bridge to hold it in place.

Another instance of misstatement of the facts is found in plaintiffs' brief, on page 42, where it is said that the evidence of Mr. Kendrick "shows that the Burlington railroad, on that day had plenty of engines and cars with which to haul out these cattle from Kansas City north over the Burlington railroad to Council Bluffs." Mr. Kendrick, an agent for a rival road, did attempt to testify that his road, the Burlington road, could have taken out the cattle. The court did not believe his testimony and took him in hand and asked two questions.

"Q. The question is, do you know?
A. I say, we had plenty of stock cars.
Q. That is not the question; the question is whether you know you had plenty of equipment to take these cattle out?
A. I don't know."

Mr. Ball then asked him:

"Q. You do not know whether you had or not?
A. No, sir.'" (Rec., 228.)

They also copy, on page 43, a part of Mr. Kendrick's testimony that the Burlington road did take out 35 cars of cattle on the evening of that day, as tending to show that it could have taken these cattle north to Council Bluffs. On page 44 they say that this testimony of Mr. Kendrick was introduced for that purpose. It is now cited to this court for that purpose. It is remarkable that counsel would cite that evidence to this court for that purpose, when the witness testi-

fied that he did not know that they had sufficient equipment to handle the cattle, and that the 35 cars of cattle, which they did send out, went east where there was no flood, and not north over the line to Council Bluffs, which was washed out, as shown by the telegrams introduced by the plaintiff.

It is also claimed that because some one moved 700 mules out of the bottom lands, taking about three hours to do so (plffs.' brief, page 45), the defendant should have moved the cattle out to some other place of safety. But the defendant had already delivered the cattle to a connecting carrier. The viaducts in the yards were then apparently safe places. It was not shown that the plaintiffs, who were present, requested that the cattle be driven through the city, or were willing to assume the responsibility for the consequences of driving 3,000 head of wild Texas cattle through the streets of the city. It was not shown that the defendant had any means of driving them through the city, either horses or men. It is true Mr. Allen says that the commission men had horses, but no suggestion that they would undertake such a task as driving those cattle through the city. He also said there were two livery stables which hired horses. But there is no evidence that they would have hired out horses to drive 3,000 Texas cattle through that flood which was up to the mules' bellies before they got out, and was rapidly rising, with a swift current, and filled with driftwood, as the evidence shows. Mr. Allen testified that he did not know whether or not the defendant had men and horses at Kansas City, available for use in driving the cattle away from the stock yards (Rec., 628), and the court

struck out his evidence that commission men, traders, etc., had horses, because it was not shown that they were defendant's employes (Rec., 624), and no proper assignment of error on account of such ruling was made by the plaintiff, and as Mr. Allen is the only witness who testified about men and horses being available there is no evidence on that point before this court. It was not shown that there was any place where the cattle could have been driven and held, nearer than six miles, and that place was on the opposite side of the city from the stock yards, and it was not shown that the defendant had any knowledge of that place. Aside from the impracticability of driving 3,000 wild Texas cattle through the city, with dogs chasing them, and the cattle chasing people (Rec., 580, 629), it would have been impossible to drive them out, after it became apparent that the stock yards would be flooded, if horses and men were available for that purpose, which is not shown. The claim that they should have been driven through the city is an afterthought of some one not familiar with the nature and habits of wild Texas cattle, as these were, being from the extreme western part of that state. Moreover the mules were driven out from Sparks' stables or yards because there were evidently no viaducts or high places there upon which they could have been driven for temporary safety.

On pages 49 and 50 of their brief the plaintiffs quote what they claim was the testimony of Gardiner Lathrop, given on the trial of the case. No evidence whatever was given by Mr. Lathrop on the trial. The plaintiff offered his deposition in evidence which was

ruled out by the court (Rec., 415), and that ruling was not presented to the Circuit Court of Appeals by a proper assignment of errors, or even suggested in their brief filed therein, so it is not in the case for any purpose.

On page 52 of plaintiffs' brief, it is said that "the defendant does not deny that it did not perform its duty, if it owed a duty," toward these cattle after they were turned into the stock yards. In other words the plaintiffs would have the court believe that we admit that we were negligent, if we still owed a duty to the plaintiffs concerning those cattle. That is not our position. We prefer to state our position in that matter in our own way. Our contention is that we had delivered the cattle to a connecting carrier, or to the stock yards company for the connecting carrier, and that such delivery, according to the custom, terminated our connection with the cattle, and our liability ceased. If it be held that under the facts shown in evidence, a delivery was not made, then our contention is that as the plaintiff alleged and proved that the cattle were damaged by an unprecedented flood, then to make a case, the plaintiff must allege and prove that the danger should have been foreseen by the exercise of ordinary foresight (not hindsight), and damage prevented by the exercise of ordinary care, that is, such foresight, care and prudence as men of business and heads of families usually exhibit in matters that are interesting to them. (*Railroad Company* v. *Reeves,* 10 Wall., 176, 191.) That instead of proving that by the exercise of ordinary care and foresight the injury would have been foreseen and avoided, the plaintiff proved that the

defendant's general superintendent and division superintendent, who had direct charge of the movement of the cattle, were in Kansas City, personally attending to the flood situation, making a trip to Argentine for that purpose, and receiving reports from Topeka. That they placed some of their most valuable equipment on tracks in their yards, near the stock yards, on ground lower than the stock yards, believing it was there safe, but where it was afterward submerged. That the defendant's best passenger train was caught and destroyed at the Union Depot. That their office was flooded and the records, which were easily removable, were destroyed. That no bank, railroad, packing house, wholesale house or other industry removed a dollar's worth of property, except the few mules, which were nearly drowned while being taken out. *That not one of the* 25,000 *people living in the flooded district foresaw or avoided the flood, but all lost practically everything.* As all this appeared from the plaintiffs' testimony, the defendant was not called upon to admit or deny negligence, or omission of duty. All it did do in defense was to introduce further evidence, making the fact more clearly appear that no one foresaw the danger or did anything to avoid it. As the Kansas City stock yard is a public yard, where all cattle are fed and cared for by the stock yards company, any failure to feed them was not the fault of the defendant, nor in fact of any one, as it was impossible to properly feed and care for them, as indeed was alleged in plaintiffs' petition in these cases.

On pages 53 and 54 of plaintiff's brief the claim is

made that there were practically no cattle in the stock yards, except those of the plaintiffs. Mr. Frost, one of the plaintiffs, testified there were 200 or 300 other cattle there. (Rec., 44.) Mr. Allen, one of the plaintiffs' witnesses, testified that several thousand hogs and sheep were in the stock yards during the flood. (Rec., 258.) They could have been driven out easier than could wild Texas cattle. The witnesses testified that the receipts of cattle were always light the latter part of the week (Rec., 85), and *as May 30th was Saturday and a legal holiday, there were, as could but be expected, but few cattle in the stock yards, and but very few of those were removed, and none of the hogs or sheep.* As there would be no market for cattle on those days there would be fewer cattle held there than on market days. It was a common thing for the traders to move out small bunches of cattle. (Rec., 258.)

Plaintiffs also say in their brief, on page 53, that there was no evidence to show that there were any cattle in the packing houses when the climax of the flood came. Neither was there any evidence that there were not cattle there. There was evidence that nothing was removed from any of the packing houses in anticipation of the flood.

On page 64 of plaintiffs' brief is this statement:

> "Anybody who is at all familiar with the Kansas City stock yards knows that it is in the west bottoms of Kansas City, and that the cattle in controversy could have been driven from those stock yards out to the pastures south of the city without going through any of the streets of either the business or residence portion of Kansas City."

We admit that the stock yards are in the west bot-

toms of Kansas City, but we deny each and every other portion of that statement. Immediately west of the stock yards is Kansas City, Kansas, with the Kansas river flowing east along the southern boundary to a point near the Missouri state line, where it turns north and flows along the west side of the stock yards. Immediately south of the Kansas river is a high bluff up which the cattle could not be driven, and upon which there was no place to keep the cattle if they were there. Immediately south of that bluff and between that and another bluff to the southeast of it is Turkey creek, with the City of Rosedale built along one street in that valley for a distance of two miles or more, there being no place where those cattle could have been driven except along that one street. Immediately east of Kansas City, Kansas, and Rosedale, lies Kansas City, Missouri, extending from the Missouri river on the north, for at least three miles south of the stock yards, and four or five miles east, solidly built up all the way. No witness testified that there were any pastures or yards in that vicinity sufficient to hold those cattle except Kapeck's pasture, six miles east of the stock yards, between Kansas City and Independence (Rec., 257), and to reach that pasture it would be necessary to drive the cattle through the center of the business and residence portion of Kansas City, Missouri, for at least four or five miles.

On page 77 of the plaintiffs' brief it is said that the defendant moved 1,300 or 1,400 cars from its yard at Argentine to the highest place where the cars could be placed at Kansas City. The testimony showed that the defendant had about 1,400 cars loaded with merchan-

dise in the yards at Argentine, but not one of those cars was moved, and there is not one word of testimony in the record that they were moved. The plaintiffs' attorneys made that assertion in argument before the Circuit Court of Appeals, and the correctness of the assertion was then challenged. They now repeat it to this court and we again challenge the truth of the statement. It is true Judge Pollock, in his written opinion mentions the removal of these cars, but that was a mistake, and his attention was then called to the mistake, and he said he would correct it, but by oversight, failed to do so. The only things that were removed from the Argentine yard were some engines and coaches, and they were placed in defendants' yard near the stock yards, on ground a little lower than the stock yards, where Mr. Sharp, the defendant's division superintendent, thought they would be perfectly safe, but where they were submerged and destroyed. Mr. Sharp testified that he did not think the contents of the 1,400 cars were in danger where they were as he thought the crest of the flood was then upon them when he was in Argentine on May 30th. (Rec., 601.)

On page 78 of their brief the "Tidal wave" fable is again repeated, but needs no further answer than that heretofore given.

On page 93 of their brief the plaintiffs say "There was not a single head of cattle in any of the Kansas City packing houses when the flood reached its climax." There is not a word of testimony to support that statement, and the statement has grown somewhat stronger than it was when made on page 54 of their brief.

On page 171 of plaintiffs' brief there is a strange

juggling of the telegrams to make it appear that Mr. Hurley was not acting in good faith with the Missouri Pacific road about delivering the stock at Kansas City. After correctly quoting Mr. Hurley's telegram to Mr. Clark, found on page 194 of the record, counsel try to pervert the language used so as to make it appear that the language "Cannot give you correct figures on it now," apply to the 19 cars, instead of applying it to the time of arrival of the balance of the 100 cars. That language with this meaning is used in other telegrams. (Rec., 182.)

Such juggling of evidence is not fair to court or counsel. The 19 cars there referred to were received by the Missouri Pacific road and placed in the stock yards as shown by Mr. Clark's telegram of May 29th immediately following the juggled telegram. (Rec., 194.) We think we have heretofore clearly shown by the telegrams that a contract was made or understanding arrived at for the Missouri Pacific to receive the cattle at Kansas City. Again on page 172 they attempt to construe the language "Cannot give you correct figures on it now," as referring to a division of freight charges between the roads. That is not what Mr. Clark had asked about. It is not what Mr. Hurley was answering. It is not what the language means. It is not a candid, straightforward construction of the telegram. The traffic departments of the two roads had already agreed upon the division of freight, as shown by Mr. Hurley's telegram to Mr. Gould on May 28th in which he says, "Your traffic dept. have advised our traffic dept. as to participation in rate." (Rec., 187.) And Mr. Hurley's telegram to Mr. Clark of May 28th

in which it is said: "The stock goes to you on revenue basis." (Rec., 185), probably referring to the regular agreed rates, filed with Interstate Commerce Commission.

On page 174 it is said that on May 30th about 8 o'clock the plaintiffs went to defendant's office and were there informed that the Missouri Pacific would take out the cattle, "Although Mr. Douthitt had informed him or his office that under no circumstances could the Missouri Pacific do any such thing." Mr. Douthitt had not so stated. He testified that he talked with defendants agents about the cattle at 8:30 A. M. (Rec., 271), and "We told them we did not have the power to handle that many trains of cattle without notice, that the indications were that we could not get them out under any circumstances; we would make an effort if the water was not any higher by noon to load one train that day." (Rec., 272.) Until near noon on that day they were endeavoring to get cars from the Santa Fe to forward the cattle. The order was given about 10 o'clock for the cars to be ready, but before they were sent over from Argentine, the Missouri Pacific decided not to take them. (Rec., 594.)

On page 176 the plaintiffs say the cattle were put on the viaducts on Saturday night, citing Mr. Steube, one of the plaintiffs for authority. Mr. Steube did attempt to so testify, but his testimony was stricken out because he said he was in bed and knew nothing about it only what he had been told. (Rec., 392, 393.) Mr. Frost, one of the plaintiffs testified that they were put on the viaducts on Sunday morning, May 31st be-

tween 10 and 11 o'clock. (Rec., 42.) We prefer to rely on testimony that was not stricken out.

On page 182 of plaintiffs' brief evidence of Mr. Douthitt is quoted to show that no waybills or orders for cattle were delivered to him, and that none of the cattle were delivered to the Missouri Pacific road. No one pretended that the waybills and orders were delivered to him, and no one pretends that he was present when a delivery was made. But it is conclusively shown by the testimony of those who delivered, and of Mr. Isitt, the Missouri Pacific freight agent, who received, that one train load of cattle in the cars, together with the waybills, was delivered to the Missouri Pacific road in its yard. The fact that Mr. Douthitt testified that no cattle were delivered, only proves the reckless manner in which he was willing to testify. And the fact that the waybills so delivered with that train load of cattle were found with the other waybills in the defendant's live stock office, taken in connection with the fact that the Missouri Pacific live stock office was on the same floor, and near the Santa Fe office, would tend to prove that all the waybills were delivered.

On page 183 of the defendant's brief it is asserted that after the flood the defendant took the cattle from the stock yards to pastures and from there to Atchison, as tending to prove that the defendant had not delivered the stock at Kansas City. Plaintiffs' counsel well know that such removal to pastures, and further transportation was under an arrangement between the plaintiffs and defendant that no rights were thereby waived or impaired.

In the petition for the writ of *certiorari* copied in plaintiffs' brief, pages 195, to 224, it is stated repeatedly, in different forms, that the contract for shipment of the cattle called for their shipment by way of Atchison. (Plaintiff' brief pages 200, 202, 203.) It is hardly necessary to repeat what we have before said, that the contracts do not call for shipment by way of Atchison, and no evidence was introduced showing that there was such a contract. The initial carrier for itself and connecting carrriers designated a route via Atchison, for their own guidance and prepared waybills accordingly, and those waybills were admitted in evidence for the sole purpose of showing that the initial carrier so routed them, and not as evidence that there was a contract to so route them (Rec., 120), and no exception was taken by plaintiffs to that ruling.

In the petition for the writ of certiorari it is said that one train load of the cattle were taken to Atchison, and there delivered to a connecting carrier and forwarded to destination, and the cattle in question might also have been so forwarded. (Plaintiffs' brief, page 208.) There is no evidence that those cattle went to Atchison or where they were delivered to a connecting carrier. Such statements should not be made without some evidence to support them. It is further stated in said petition that on Saturday evening, May 30th, the Burlington road took 35 cars of cattle out of Kansas City, north across the Kaw river and could have taken the cattle in question. (Brief, page 210.) The Burlington agent testified that the 35 cars of cattle were sent east, not north (Rec., 290), and that he

did not know whether or not they had equipment to handle the cattle in question. (Rec., 288.)

The confusing, misleading and unfair presentation of the plaintiff's case in their petition for the writ of certiorari and in the statement of facts and brief, such statements of fact in many material matters being wholly unsupported by any evidence, or directly contrary thereto, has made it necessary to make this statement longer than otherwise would have been necessary. Indeed many of the statements are wholly irrelevant and immaterial so far as the real controversies are concerned. The same is true of much of the evidence. As we shall show in the argument, the questions of fact necessary to be considered in a proper determination of these cases will be found to be few and to fall within a very narrow compass.

ARGUMENT.

I.

ONLY TWO ASSIGNMENTS OR SPECIFICATIONS OF ERROR CAN BE CONSIDERED. (1) THE DIRECTION OF THE TRIAL COURT TO THE JURY TO RETURN A VERDICT FOR THE DEFENDANT UNDER THE EVIDENCE. (2) THE REFUSAL OF THE TRIAL COURT TO PEREMPTORILY INSTRUCT IN FAVOR OF THE PLAINTIFF. ALL OTHER ERRORS HAVE BEEN ABANDONED; NONE OTHERS ARE PROPERLY ASSIGNED SPECIFIED OR PRESENTED TO THIS COURT, NOR WERE THEY PRESENTED TO THE CIRCUIT COURT OF APPEALS.

The first error specified is alleged error of the court in refusing to direct the jury to find for the plaintiffs. This specification is probably too broad under the ruling in *Grand Trunk Ry.* v. *Ives,* 144 U. S., 415 and 416.

The second specification is alleged error in refusing to give instructions numbered 1 to 13, inclusive, requested by plaintiffs. None of these requested instructions, however, were proper or correct, and the assignment or specification, covering generally a number of instructions, was contrary to rule 11 of the Circuit Court of Appeals and is contrary to the rules of this court. The burden should not be placed upon us or upon the court to hunt for supposed error in any one of these numerous instructions or to point out wherein each of the instructions rejected is erroneous and, therefore, was properly rejected or refused. Under Section 997, United States Revised Statutes, as well as under the rules of the Circuit Court of Ap-

peals and of this court, the assignment of errors must be filed with the clerk of the court below with a petition for the writ of error or appeal. Each error assigned must be specifically set out under a separate assignment so as to advise the opposite counsel and the court of the particular legal points relied upon for the reversal of the trial court.

See:

Lloyd v. *Chapman*, 93 Fed., 599.

United States v. *Indian Grave Dist. et al.*, 85 Federal, 928-932.

Van Stone v. *Stillwell & Bierce Mfg. Co.*, 142 U. S., 128.

Supreme Council C. K. of A. v. *F. & C. Co.*, 11 C. C. A., 97; 63 Fed., 48.

The third specification is alleged error in directing the jury to return a verdict for the defendant. This assignment is as broad as the first.

The fourth specification is nothing more than the first and third, referring merely to the opinion of the court in ruling upon the requests for peremptory instructions. No exception was taken to the part of the opinion quoted and no error could be predicated upon a portion of an opinion.

The fifth assignment is directed to the opinion of the majority of the Circuit Court of Appeals to the effect that in joining in peremptory requests the plaintiffs submitted the case to the court to find the facts. Even if there had been error in this course it would not at all follow that the judgment of the trial court should be reversed.

II.

AS EACH PARTY ASKED FOR A PEREMPTORY INSTRUCTION IN ITS FAVOR AND ARGUED AND SUBMITTED SUCH INSTRUCTIONS TOGETHER TO THE COURT, AND THE COURT DETERMINED THE SAME, IT MUST BE ASSUMED THAT THEY BOTH SUBMITTED THE CASE TO THE COURT TO FIND THE FACTS UPON THE ASSUMPTION THAT UNDER THE EVIDENCE THERE WAS ONLY INVOLVED A QUESTION OF LAW AS TO LIABILITY OR NONLIABILITY.

The record in the case under consideration discloses on page 637 the following:

> "And thereupon, upon the conclusion of all the evidence in the case, the plaintiffs prayed the court to instruct the jury as follows: 'The court instructs the jury *to find the issues for the plaintiffs,*' which instruction the court refused to give and which action, ruling and decision of the court in refusing to give said instruction the plaintiffs at the time duly excepted."

The defendant requested a similar instruction in its favor. (See record, pp. 27 and 26, for requests for peremptory instructions filed and submitted.)

It is obvious from the "memorandum of decision on request for peremptory instructions" found on pages 645 and 655 and which is made a part of the record in the bill of exceptions, that the two instructions were submitted together and disposed of by the court. On page 655 of the record it is stated at the end of the decision:

> "It, therefore, follows on the main case the request for instructions to the jury to return a verdict for the defendant must be sustained and the

like request of plaintiffs must be denied. This will be done. And *thereupon* the court, on the motion of the defendant, gave final judgment in favor of the defendant and against these plaintiffs."

It, therefore, appears from page 637 of the record that the plaintiffs asked the court to direct the jury to find the issues for plaintiffs and only *after* this instruction or motion had been refused and the peremptory instruction requested by the defendant had been given, as shown by the "memorandum of decisions," that "*thereupon* the plaintiffs prayed the court to give to the jury the following instructions," (Rec., 638), and there are then set out some thirteen instructions requested, the refusal to give any one of which instructions was never properly assigned or specified as error for the consideration of the Circuit Court of Appeals or for this court, and must therefore be regarded as having been abandoned or it must be assumed that each request was incorrect or erroneous and, therefore, properly refused.

It therefore, fairly appears from the record that plaintiffs did not ask to go to the jury upon any special question of fact until *after* the case had been submitted to the court and the court had plainly found the issues against plaintiffs and directed a verdict for the defendant.

Moreover, owing to failure to properly assign error, there was not for the consideration of the Circuit Court of Appeals any request of plaintiffs to submit the case to the jury upon any question of fact.

The third assignment of error (record page 658) is as follows:

> "The court erred *after the refusal of said peremptory instruction* in refusing to give and charge the jury at plaintiffs' request instructions numbered as follows and in refusing to give each of them to-wit: Instructions 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13."

Under rule 11 of the Circuit Court of Appeals as well as under the rule of this court, each error assigned must be specifically set out under a separate assignment so as to advise the opposite counsel and the court of the particular legal points relied upon for a reversal of the trial court. (See authorities cited under previous heading.)

It could be readily shown if necessary that the fifth instruction requested by plaintiffs, found on pages 639 and 640 of the record, in regard to alleged deviation of the shipment was clearly erroneous and was properly refused. The only alleged errors, therefore, properly assigned and which were for the consideration of the Circuit Court of Appeals were refusal of the trial court to give plaintiffs' peremptory instruction and the giving of defendant's peremptory instruction.

From the record it plainly appears that both plaintiffs and defendant submitted the entire case to the court to determine the facts under the evidence and the law applicable thereto, as to whether the verdict and judgment should be for the plaintiffs or for the defendant. While plaintiffs urged in their petition as reasons for liability several grounds of negligence, there was but one cause of action stated, and plaintiffs

contended that upon all the evidence they were entitled to a verdict and judgment upon this cause of action, while defendant contended that the verdict and judgment upon all the evidence should be in its favor. There was involved in these motions the legal conclusion of liability or nonliability.

A motion for an instruction to find a verdict for a party has superseded the old practice of a demurrer to the evidence, but is nevertheless analagous thereto.

Merrick's Executor v. *Giddings,* 115 U. S., 305.

Parks v. *Ross,* 11 Howard, 373.

There was a joinder in demurrer to the evidence.

Plaintiffs did not, in their peremptory instruction, submit the case upon any particular point or question, but joined with the defendant in submitting the entire case upon all the evidence to the court.

In *Beuttell* v. *Magone,* 157 U. S., 154, it is said:

> "As, however, both parties asked the court to instruct a verdict, both affirmed that there was no disputed question of fact which could operate to deflect or control the question of law. *This was necessarily a request that the court find the facts,* and the parties are, therefore, concluded by the finding made by the court, upon which the resulting instruction of law was given. The facts having been thus submitted to the court, we are limited in reviewing its action to the consideration of the correctness of the finding on the law, and must affirm if there be any evidence in support thereof."

Bankers' Mutual Casualty Co. v. *State Bank of Goffs,* 150 Federal 78 (8th Circuit).

City of Defiance v. *McGonigale,* 150 Fed. 689, (6th Circuit).

To the same effect see

Johnson's Admr. v. *C. & O. Ry. Co.*, 21 S. E., 238; 91 Va., 171.

Having thus submitted the case to the court to determine the facts from the evidence, and the court having acted upon such request and decided the questions of law and fact, plaintiffs were not in a position to insist that such submission should thereafter be ignored or withdrawn and that the case should then be submitted to the jury (after the peremptory instruction had been given) to determine some particular question or fact.

Such was the ruling of the Circuit Court of Appeals for the Seventh Circuit in *Insurance Company* v. *Wisconsin Central Ry.*, 134 Fed., 794 and 798.

See also the reasoning and authorities cited in the opinion of the Circuit Court of Appeals in this case—*Empire State Cattle Co.* v. *A. T. & S. F. Ry. Co.*, 147 Fed. Rep., 459, *et seq.*

See also

Nashville, C. & St. L. Ry. Co. v. *Sansom*, 84 S. W., 615-616; 113 Tenn., 683.

Such also was the ruling of the New York Court of Appeals in *Howell* v. *Wright*, 25 N. E., 912. In none of the cases from the Federal Courts cited by the petitioners has a different decision been made.

In *Signa Iron Co.* v. *Greene*, 31 C. C. A., 477 (cited by opponents) motions by both parties for a verdict were denied and the court, over the exception of one party, submitted a single issue of fact to the jury.

In *Merwin* v. *Magone,* 17 C. C. A., 361 and in *Magone* v. *Origet,* 17 C. C. A., 363, the direction of a verdict by the trial court was affirmed. The same is true of the case of *Chrystie* v. *Foster,* 9 C. C. A., 606.

These cases cannot be regarded, therefore, as authoritative decisions in favor of our opponents.

The case of *Minahan* v. *Grand Trunk Ry.,* 138 Fed., 37 (cited by opponents) is distinguishable. There, in an action, where the facts were not conceded, plaintiff interrupted the court as it was passing on a motion to direct a verdict for the defendant, and asked leave to file certain requests to charge the jury, one of which was a request for a peremptory instruction for plaintiff, and the court permitted such requests to be filed, and assured counsel that he should have the benefit of them. It was held that this did not amount to a submission of the issues of fact to the court so as to preclude plaintiff from objecting to an adverse finding thereon. The plaintiff in that case plainly indicated that the case was not intended to be submitted to the court for its decision only upon the peremptory instruction, and it appeared that the evidence was quite conflicting on material points. Moreover, the court in that case is at pains to point out that its decision was in accordance with the practice in Michigan, where the case was tried.

Moreover, a request to go to the jury must specifically point out the question of fact upon which its judgment is desired. It is settled even in the New York courts, whose decisions are relied upon by our opponents, that a request must be in such form that

the judge may properly charge in the terms of the request, without qualification.

Carpenter v. *Stillwell,* 11 N. Y., 61 and 79.
Winchell v. *Hicks,* 18 N. Y., 565.
Van Akin v. *Caler,* 48 Barbour's Supr. Ct. Rep., 60 and 61.
Waters v. *Marrin,* 13 Daly's Repts., 57.

Therefore, even according to the rule of practice in the New York courts, whose decisions are relied upon, where both parties ask for the direction of a verdict, a motion by one of them to withdraw his request and go to the jury on the case in general will not be granted.

Groves v. *Acker,* 33 N. Y. Suppl., 406; s. c., 85 Hun., 492.

Now, having failed to assign error in the refusal to give any one of the thirteen specific instructions afterwards requested by plaintiffs, they must be deemed to have abandoned any question of error if any in regard to the same and certainly to have waived their right to predicate any error upon the refusal of the trial court to give any one of such instructions. They cannot now claim that they were entitled to go to the jury upon any particular question of fact since it does not appear, and they were not able to show, that any specific request in respect to the submission of any particular question of fact was properly made. The result, therefore, now is that they are simply claiming that after the court overruled their peremptory request and directed a verdict in favor of the defendant, the court erred in not submitting the case *generally*

to the jury. There was, therefore, no question before the Court of Appeals and there can be none before this court in respect to any improper refusal of the trial court to submit to the jury at the request of the plaintiffs some particular question of fact for its determination. Under the above rule, therefore, no such request to submit the case to the jury upon any particular question of fact involved was up for the consideration of the Circuit Court of Appeals, and there can be none, therefore, for the consideration of this court on *certiorari.* It is to be presumed that the action of the lower courts was rightful.

It would seem to be absurd to say that, if under the ruling of this court in *Beuttell* v. *Magone, supra,* where both parties asked the court to instruct a verdict, it was held that this was necessarily a request that the court find the facts and the parties are, therefore, concluded by the finding made by the court, upon which the resulting instruction of law was given, after such submission and the decision of the court thereon the party defeated would still have the right to say that the court erred in finding the facts and in not submitting the case generally to the jury upon some question which might *thereafter* be discovered by the defeated party. The rule adopted by the Circuit Court of Appeals is a reasonable one and tends to certainty in the law.

III.

NEVERTHELESS, AS THE EVIDENCE WAS OF SUCH A CONCLUSIVE CHARACTER IN FAVOR OF THE DEFENDANT THAT THE TRIAL COURT WOULD HAVE BEEN OBLIGED TO SET ASIDE A VERDICT IN FAVOR OF PLAINTIFFS, IT THEREFORE PROPERLY DIRECTED A VERDICT FOR THE DEFENDANT. THIS IS TRUE NOT ONLY IN RESPECT TO ANY QUESTION OF ALLEGED NEGLIGENCE BUT ALSO IN RESPECT TO THE QUESTION WHETHER SUCH ALLEGED NEGLIGENCE WAS THE PROXIMATE CAUSE OF THE DAMAGE AND ALSO WHETHER THERE WAS ANY WRONGFUL DEVIATION FROM INSTRUCTIONS, IF ANY, OF THE SHIPPER OR FROM ANY ALLEGED AGREEMENT OF DEFENDANT.

If, as a matter of practice, the majority of the Circuit Court of Appeals may have erred in determining that the case had been submitted to the trial court by the parties to find the issues, yet the judgment in the trial court in favor of the defendant should not be reversed unless clearly erroneous. If the case for any reason was rightly decided by the trial judge, his judgment should not be disturbed because of some alleged error of practice adopted by the Circuit Court of Appeals, since substantial justice between the parties has been done.

West v. *Camden*, 135 U. S., 508.

The writ of *certiorari* merely brings up the record in the Circuit Court of Appeals to this court. These cases involve trials at common law, so that the only power or jurisdiction of the appellate courts is to determine from the record made in the trial court whether

prejudicial error was committed during the trial by reason of which an erroneous verdict and judgment was rendered. If the judgment in the trial court was right it ought not to be disturbed. No one can be prejudiced by letting it stand.

The trial judge, as well as Judge Sanborn in the Circuit Court of Appeals, reviewed the evidence and found that the same was of such a conclusive character in favor of the defendant that a verdict in plaintiffs' favor could not be sustained.

It is well settled in the Federal Courts that it is the duty of the trial judge to direct a verdict in favor of a party when, if the verdict were against such party as rendered by the jury, it would be the duty of the court to set the same aside and grant a new trial, and that the court may withdraw a case from the jury altogether and direct a verdict for the plaintiff or defendant, as the one or the other may be proper, where the evidence is undisputed *or of such a conclusive character* that the court in the exercise of a sound judicial discretion would be compelled to set aside a verdict in opposition to it.

See

Southern Pacific Co. v. *Pool*, 160 U. S., 440.
Goodlander Mill Co. v. *Standard Oil Co.*, 63 Fed., 400.
Christenson v. *Metropolitan St. Ry. Co.*, 137 Fed., 708.

This rule is recognized in the case cited by our opponents,—*Marande* v. *R. R. Co.*, 184 U. S., 191.

Such a rule tends to certainty and is of great advan-

tage not only to the bar but to litigants who should be enabled to be advised with some degree of certainty as to their rights or liabilities.

In *Bowditch* v. *Boston*, 101 U. S., 18, it is said:

> "It is now a settled rule in the courts of the United States that whenever, in the trial of a civil case, it is clear that the state of evidence is such as not to warrant a verdict for a party, and that if such a verdict were rendered the other party would be entitled to a new trial, it is the right and duty of the judge to direct the jury to find according to the views of the court. Such is the constant practice, and it is a convenient one. *It saves time and expense. It gives scientific certainty to the law in its application to the facts and promotes the ends of justice.* (*Merchants' Bank* v. *State Bank*, 10 Wall., 604, 637; *Improvement Company* v. *Munson*, 14 id., 442; *Pleasants* v. *Fant*, 22 id., 116.)
>
> "The rule in the English courts is substantially the same. (*Ryder* v. *Wombwell*, Law Rep., 4 Ex., 32; *Giblin* v. *McMullin*, Law Rep., 2 P. C., 335.) In the latter case it was said: 'In every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party introducing it, upon whom the *onus* of proof is imposed.'"

Also in *Patton* v. *Texas & Pacific Ry. Co.*, 179 U. S., 658, which involved a question of negligence, Mr. Justice Brewer said on page 660:

> "Hence it is that seldom an appellate court reverses the action of a trial court in declining to give a peremptory instruction for a verdict one way or the other. At the same time, the judge is primarily responsible for the just outcome of the trial. He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of

testimony, but one who in our jurisprudence stands charged with full responsibility. He has the same opportunity that jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record, and when in his deliberate opinion there is no excuse for a verdict save in favor of one party, and he so rules by instructions to that effect, an appellate court will pay large respect to his judgment. And if such judgment is approved by the proper appellate court, this court, when called upon to review the proceedings of both courts, will rightfully be much influenced by their concurrent opinions."

It is, however, contended by our opponents that under the decision of this court in *Ry. Co.* v. *Stout*, 17 Wallace, 657, and in *Milwaukee, &c., Ry.* v. *Kellogg*, 94 U. S., 469, both the question of negligence and proximate cause must always be submitted to the jury. That, of course, is not true, as many rulings of this court will show. It is only where a reasonable inference of negligence or of proximate cause may be drawn from the facts that such questions may in appropriate cases be submitted to the jury. In the former case cited, known as the Turntable case, the railway company left unguarded and unlocked a turntable in a locality frequented by children and upon which children were apt to play, and the case involved injury to a child while his associates were playing upon and moving the turntable. The appliance was known to be attractive to children. The danger to them in leaving it unfastened, by reason of which they were likely to put it in motion, might have been expected. The injury was one which might have been reasonably anticipated by the railway company. The inference of negligence was one which

any reasonable mind might well draw. In the other case the railway company negligently set out a fire in the operation of its railroad and the fire, by reason of a high wind, spread from one building to another. It was claimed that the burning of the second building was a remote result of the setting out of the fire. There was nothing unprecedented about the result, however, and in that case it was but reasonable to infer that the railway company might have anticipated as the result of setting out of the fire in such weather that the same would spread indefinitely.

It is, however, well settled that an inference of negligence cannot be based on a presumption nor on speculation or conjecture.

Leonard v. *Miami Min. Co.*, 148 Fed., 827.

In *Pennsylvania R. R. Co.* v. *McCaffrey*, 149 Fed., 404, plaintiff's evidence was that she, while a passenger, was injured by a missile, a bolt with a nut, entering an open window on the side next to a passing freight train; there was evidence that the missile was thrown through an open window on the opposite side of the car by one of several boys who were pelting the train as it went by. *Held*, that the court properly directed a verdict for the defendant. On page 406 it is said:

> "Undoubtedly, it commonly is within the province of the jury to decide an issue as to negligence by drawing the reasonable inference from the primary facts. *But reasonable inference is one thing, and mere guess or arbitrary surmise is another and very different thing*, and though it may be that the evidence for the plaintiffs, *if alone considered*, would have warranted a sus-

> picion that in some way or other the moving freight train was responsible for Mrs. Caffrey's hurt, yet it is plain that, *from the evidence as a whole,* no more explicit deduction could have been properly made than that the missile which struck her came either from that train or from one of the boys that have been referred to. The jury, however, was allowed to conjecture that it came from the train and upon that conjecture merely to base the further finding, also an inferential, though a legal one, that the defendant had been guilty of negligence. We think this should have been prevented by granting defendant's request for a directed verdict."

In *Charnock* v. *Tex. & Pac. Ry. Co.,* 194 U. S., 432-438, this court determined, in affirming the ruling of the Circuit Court of Appeals, in 113 Federal, 91, as a matter of law that defendant was not guilty of negligence in failing to take certain precautions to prevent a loss by fire, which plaintiffs claimed ought to have been taken.

Many cases might be cited in which this court determined that, as but one inference could be reasonably drawn from the evidence, the defendant in the case involved was not guilty of negligence as a matter of law.

> *Dist. Columbia* v. *Moulton,* 182 U. S., 576, 579.
> *Elliott* v. *C., M. & St. P. Ry.,* 150 U. S., 245, 246.
> *Randall* v. *B. & O. Rld.,* 109 U. S., 478, 482.

In *Metropolitan Ry. Co.* v. *Jackson,* Law Rep., 3 App. Cases, 193 cited with approval by this court in *Randall* v. *B. & O. R. R. Co.,* 109 U. S., 482, and which

involved injury to a passenger by slamming a car door to by a railway porter, it was said on page 197 by Lord Chancellor Cairns:

> "The judge has a certain duty to discharge, and the jurors have another and a different duty. *The judge has to say whether any facts have been established by evidence from which negligence may be reasonably inferred;* the jurors have to say whether, from those facts, when submitted to them, negligence *ought to be* inferred. It is, in my opinion, of the greatest importance in the administration of justice that these separate functions should be maintained, and should be maintained distinct. It would be a serious inroad on the province of the jury, if, in a case where there are facts from which negligence may reasonably be inferred, the judge were to withdraw the case from the jury upon the ground that, in his opinion, negligence ought not to be inferred; and it would, on the other hand, place in the hands of the jurors a power which might be exercised in the most arbitrary manner, if they were at liberty to hold that negligence might be inferred from any state of facts whatever."

He then goes on to show on page 198 that prior negligence in not attempting to remove an extra and inconvenient number of passengers from the carriage and failure to control the action of a number of persons on the platform was not connected with the accident, and, therefore, immaterial. Of such negligence he says, page 198:

> "It must be, if I might invent an expression founded upon a phrase in the civil law, *incuria trans locum injuriae.*

Or, as stated in the concurring opinion of Lord Blackburn, on page 210, such negligence, within a maxim of Lord Bacon's, was remote.

A judgment given for the plaintiff in that case was thereupon reversed and a non-suit ordered to be entered.

So, also, the question of proximate cause becomes a question of law where the casual connection of defendant's alleged negligence with the loss or damage complained of is evidently not proximate.

See

Goodlander Mill Co. v. *Standard Oil Co.*, 63 Fed., 400 (C. C. A., 7th Circt).

Also authorities cited in the dissenting opinion of Judge Sanborn of *Southern Pacific Co.* v. *Yeargin*, 109 Fed., 443-444.

In *Seymour* v. *Union Stock Yards, etc.*, 224 Ill., 579, it was held that whether there is any evidence that the negligence charged is the proximate cause of the injury complained of is a question of law.

As we shall show hereafter the damage in question was directly caused by the unexpected inundation of the Union Stock Yards and as this was caused by an unprecedented, extraordinary and sudden flood in the Kansas river at Kansas City,—an unprecedented rise in the same which no one anticipated,—defendant could not be held in duty bound to anticipate the same and was, therefore, not liable. As we shall show hereafter, the question of whether the alleged negligence under the evidence was culpable or actionable or not.

So, while it was alleged in the petition that the alleged wrongful deviation to Kansas City was negligence, yet the question whether there was any wrongful deviation from any instructions of the plaintiffs or

from any contract of the defendant was also a question of law for the court. Thus, in *Crosby* v. *Fitch*, 12 Conn., 410, which is relied upon by our opponents, upon the question of wrongful and unnecessary deviation from the contract of carriage it was said on page 421:

> "It is claimed, to be sure, that this was a question of fact; and as such, ought to have been submitted to the jury. We have ever supposed, that upon given facts, whether deviation or not, was a question of law; and so we find it treated in all the cases. *Suydam* v. *Marine Ins. Co.*, 2 Johns. Rep., 138. *Graham* v. *Commercial Ins. Co.*, 11 Johns. Rep., 352. *Brown* v. *Betts*, 9 Cowen, 208. *Newell* v. *Hoadley*, 8 Conn., Rep., 381."

Even a departure or deviation from an express agreement to forward by a particular route or to carry in a particular manner is not wrongful unless it appears that such deviation was *unnecessary* or *unjustifiable* under the circumstances. In the case at bar there were no instructions of the shipper nor any express agreement departed from.

IV.

IN PASSING ON THE RULING OF THE TRIAL COURT IN DIRECTING A VERDICT FOR DEFENDANT, IT WOULD NOT BE PROPER TO CONSIDER EVIDENCE OR TESTIMONY WHICH WAS STRICKEN OUT OR NOT ADMITTED BY THE COURT, AS THE RULINGS IN THAT RESPECT COULD ONLY BE CONSIDERED UNDER SEPARATE AND DISTINCT ASSIGNMENTS IN ACCORDANCE WITH THE RULES OF THE CIRCUIT COURT OF APPEALS AND OF THIS COURT.

It is contended that in considering the assignment of error on the ruling of the trial court in giving or

refusing a peremptory instruction, this court must consider alleged evidence or offers of evidence which were rejected by the trial court. A great deal of such rejected evidence is referred to in opponent's brief. It is difficult to understand how such rejected evidence could be considered on an assignment predicated upon alleged error in instructing the jury to return a verdict for the defendant under the evidence introduced or admitted. What this alleged rejected evidence was is not pointed out. The error of the court, if any, in refusing to admit the same was never properly assigned as error and was never insisted upon in plaintiffs' brief or argument by any specification of error.

The rulings of the trial court in rejecting such evidence could only be considered under an assignment specifically directed to such rulings and the full substance of the evidence or offer of the same would have to be set forth. It must be assumed that the ruling of the lower court was correct and the evidence properly rejected in each instance, and, as no specific assignment or specification has been made in respect to such rulings, that plaintiffs have acquiesced in the correctness of the same. The offer, if made, may not have been proper or broad enough and the evidence rejected may not have been competent; no proper exception may have been taken. In any event it is not for us to point out wherein the rulings of the court in that respect were correct since that would unnecessarily prolong this brief and since such rulings are not properly made the subject for consideration here.

See

Van Stone v. *Stillwell & Bierce Mfg. Co.*, 142 U. S., 128.

There is no error in withdrawing a case from the jury where there is no *competent* evidence upon which a verdict could be based.

See

Supreme Council C. K. of A. v. *F. & C. Co.*, 11 C. C. A., 98.

It is, however, contended that the ruling in *Ry Co.* v. *Harris*, 12 C. C. A., 598, justifies plaintiffs' contention. But the plaintiff in that case offered, and was ready, to produce *competent* evidence to prove a material fact in issue. The court rejected it on defendant's objection. Defendant afterwards claimed that the court erred in submitting this issue to the jury on the ground that there was no sufficient evidence thereon. It was held that defendant could not complain of such submission upon that ground, as the action of the court was induced by defendant's objection and defendant was therefore estopped from questioning the action of the court in submitting that issue to the jury.

Defendant, in this case, however, is not complaining of any ruling of the court and no estoppel can therefore arise against it.

V.

ALL CHARGES OF NEGLIGENCE MADE BY PLAINTIFFS ARE BASED UPON THE ASSUMPTION THAT THE DEFENDANT, PRIOR TO THE MORNING OF MAY 31ST, SHOULD HAVE KNOWN AND ANTICIPATED THAT WHICH NO ONE ELSE AT KANSAS CITY IS SHOWN TO HAVE KNOWN OR ANTICIPATED, VIZ.: THAT THE FLOOD WHICH THEN REACHED THE KANSAS CITY STOCK YARDS WOULD BE SO UNPRECEDENTED, EXTRAORDINARY AND SUDDEN AS TO CAUSE THE DAMAGE COMPLAINED OF TO THE CATTLE BY REASON OF INABILITY TO FEED AND CARE FOR THE SAME AFTER BEING DRIVEN UPON THE VIADUCTS.

Plaintiff's petition plainly stated that defendant, in order to save the cattle from being drowned, drove them into the viaducts extending over the pens and above the waters, and that the waters made by the flood extended from May 31st to June 7th, 1903, back from said pens a distance of three-quarters of a mile and more, and were of a depth of from 8 to 15 feet, and that in consequence of said waters and of the placing of said cattle in said viaducts, it was impossible to feed or water them during said period of seven days. It is then charged that the damage complained of resulted from insufficient feeding and watering.

The grounds of alleged negligence are summed up in the petition as follows:

> "Plaintiffs further state that it was the duty of said defendant as such railway company and common carrier *to exercise due and reasonable care* in the carriage and transportation of said cattle from Amarillo, Texas, to said Atchison,

Kansas, but that defendant was *guilty of negligence in the following particulars,* to-wit:

"(1) Defendant did not exercise *due and reasonable care,* but was *negligent* in the detention of said cattle at Strong City from May 27th, 1903, to May 29th, 1903, and in not carrying and transporting on May 27th, 1903, said cattle from said Strong City, Kansas, to Atchison, Kansas, by way of Topeka, Kansas, so that said cattle might have been, by defendant at said Atchison, Kansas, delivered to the continuing and connecting carrier at that point.

"(2) Defendant did not exercise *due and reasonable care* in the transportation and carriage of carriage of said cattle but was *negligent* in not detaining said cattle at Strong City, Kansas, on said May 29th, 1903, until the said unprecedented flood in said Kaw river had subsided so that the transit of said cattle might be safely resumed without liability to damage or injury thereto.

"(3) Said defendant did not exercise *due and reasonable care,* but was *negligent* and acted wrongfully and without plaintiffs' consent in the deviation of the shipment of said cattle by defendant to Kansas City from which last point and city defendant had and has no connecting line extending to Atchison, Kansas.

"(4) Defendant did not exercise *due and reasonable care* in the transportation and carriage of said cattle by *carelessly and negligently* endeavoring to head off the flood of said Kaw river by landing and depositing said cattle in the pens on the bank of said Kaw river at the mouth thereof several days after the rise and increase of the flood of said Kaw river. And plaintiffs say that defendant, by its agents and servants in charge of the transportation of said cattle of plaintiffs had actual knowledge of said flood from said May 27th, 1903, and well knew of said flood and of the continued rise and increase thereof on said May 30th, 1903, when said defendant so de-

posited said cattle of plaintiffs in said pens by the side of said Kaw river at the mouth thereof.

"(5) That defendant having wrongfully transported said cattle to Kansas City, as aforesaid, *carelessly and negligently failed and neglected* to move or cause to be moved the same from their position of peril, aforesaid, at Kansas City, Missouri, as defendant had reasonable time and opportunity to do before the arrival at said Kansas City of said flood, but the same were overtaken by said flood.

"(6) Defendant did not exercise *due and reasonable care* but was *negligent* in not properly or sufficiently feeding or watering said cattle before loading the same at said Strong City, Kansas, and while said cattle were in the viaducts at Kansas City.

"Plaintiffs further state that said several injuries, damages and losses to and of said cattle hereinbefore specified and set out were each and all *caused by the said several negligences and want of due and reasonable care* in the transportation and carriage of said cattle by defendant." (Rec., 7 and 8.)

These grounds of negligence may be briefly summed up as follows:

(1) In detaining the cattle at Strong City and Wellington for two days and in not carrying them on May 27th to Atchison by way of Topeka for delivery to a connecting carrier at that point, by reason of which, in the subsequent transportation to Kansas City, they were overtaken at the latter place by an unprecedented flood.

(2) In not detaining the cattle at Strong City on May 29th until the flood in the Kaw river had subsided (yet it is inconsistently claimed in opponent's brief that the Burlington road shipped cattle out from the stock yards at Kansas City on the evening of May 30th, showing that up to that time

plaintiffs considered these yards to be a safe place for cattle).

(3) In negligently deviating the shipment without plaintiffs' consent to Kansas City, from which point defendant had (as alleged, though contrary to the fact) no connecting line extending to Atchison. (The Missouri Pacific was a connecting line which did extend to and beyond Atchison.)

(4) In endeavoring to head off the alleged approaching flood by taking the cattle to the Kansas City Stock Yards. (This is subject to the same criticism as (2).

(5) In failing to move the cattle from their alleged position of peril at Kansas City, "as defendant had reasonable time and opportunity to do before the arrival at said Kansas City of said flood."

(6) In not sufficiently feeding or watering the cattle before loading the same at Strong City and while they were on the viaducts at Kansas City. (There was no evidence whatever to justify either of these charges and the petition itself alleged impossibility to feed and water the cattle upon the viaducts.)

An examination of all the evidence shows that there was no justification whatever for any of these charges. It was necessary in the first place to hold the cattle at Strong City and Wellington because of inability or refusal of the Burlington Railroad to then receive the same at Atchison if they had then been forwarded. As there were no stock yards at Atchison in which these cattle could be held until the Burlington road could take them, defendant would have been negligent and liable for resulting damages, if it had attempted to take the cattle then to Atchison, where they could not be properly cared for. This necessitated subsequent negotiations with a connecting line at Kansas

City, the line between Atchison and Topeka in the meantime becoming impassable. The subsequent charges of negligence are all predicated upon the assumption that the defendant in the exercise of reasonable foresight and precaution had not anticipated, prior to the morning of May 31st, that the flood in the Kaw river would become so extraordinary and unprecedented as to submerge the stock yards, which had never theretofore been submerged, thus necessitating the driving of the cattle upon the viaducts to prevent their being drowned, as alleged in the petition. Those viaducts were apparently as safe a place as any under the circumstances, and the Stock Yards Company, in whose custody the cattle were, had the right to assume that the flood would recede about as rapidly as it had approached and that the stock could be taken from the viaducts within a day or two at most. No one else in that vicinity was shown to have anticipated prior to May 31st that the rise in the river would be so extraordinary, unprecedented and sudden as to endanger the Kansas City stock yards and the cattle therein. If defendant in the exercise of such foresight as was exercised by people generally in the vicinity of Kansas City, was not bound to reasonably anticipate that sometime during the night of May 30th or the morning of May 31st the flood would come on then to an unprecedented height so as to inundate the stock yards, which had never theretofore been inundated, so far as known, it certainly could not be held to be either negligent or careless in taking the stock to the Kansas City stock yards for delivery to a connecting carrier. Neither was there any negligence in the stock yards

company, in whose custody the cattle then were, in driving the same upon the viaducts, as that seemed to be about as safe a place as any, and anyone would suppose that the waters would recede about as rapidly as they had approached.

As the shippers were becoming impatient at the detention of the cattle at Strong City and Wellington, which detention was due to inability of the Burlington Company to then receive them at Atchison, defendant was acting in the best of faith and, under the circumstances, was exercising reasonable care, and acting under a well established custom or practice, in arranging with The Missouri Pacific Railway Company to receive the cattle at Kansas City and in transporting the same to and depositing them in the Kansas City stock yards for such connecting carrier. It was advisable to forward the cattle towards their destination as soon as practicable, and that is what the shippers, particularly Mr. Frost, wished to have done. A loss having occurred from an unexpected source, they now attempt to saddle the responsibility upon the defendant, whose agents were acting in the utmost good faith and with all due care and diligence in the light of the knowledge then possessed by them.

VI.

THE OVERFLOWING OF THE KANSAS CITY STOCK YARDS BY THIS FLOOD BEING SUDDEN, EXTRAORDINARY AND UNPRECEDENTED, DEFENDANT CANNOT BE HELD LIABLE FOR DAMAGES CAUSED IN CONSEQUENCE THEREOF AS IT COULD NOT BE EXPECTED TO ANTICIPATE THE UNUSUAL CHARACTER OF THE SAME. THE ANTECEDENT DELAY AT STRONG CITY AND WELLINGTON, AS WELL AS THE TAKING OF THE CATTLE TO AND DEPOSITING THE SAME IN THE UNION STOCK YARDS FOR THE CONNECTING CARRIER WAS NOT CULPABLE NEGLIGENCE, AS IT COULD NOT BE ANTICIPATED AT THE TIME THAT THE DISASTER COMPLAINED OF WAS LIKELY TO RESULT FROM ANY OF THE PRECEDING ACTS OF THE DEFENDANT. SUCH A DISASTER WAS NOT THEN PROBABLE.

Every charge of negligence is based upon the assumption that the defendant, prior to the actual inundation of the Kansas City stock yards, knew or should have known that it would be dangerous to take the cattle to and deposit the same in such yards. In other words, that the defendant should have anticipated what nobody else in that locality did anticipate, viz.: that the rise in the Kaw river would become so great, extraordinary and be so sudden as to inundate these yards and the locality thereabouts from 8 to 15 feet, and that such flood waters would not recede for seven days. No such flood within the knowledge of the oldest inhabitant had occurred before. The stock yards where the cattle were deposited had never been inundated or endangered. Floods in that river had occurred before but none so unusual, unprecedented, extraordinary or sudden as this one. (See, also, opinion

of Kansas City Court of Appeals, in *Lightfoot* v. *St. L. & S. F. Ry.*, 104 S. W. Rep., 483, hereafter quoted.) It is true that certain portions of the defendant's railway, as at Holliday and near Lawrence, as well as a part of the line between Topeka and Atchison, were submerged on May 29th, but this had occurred on other occasions of spring floods. Plaintiffs' brief would leave the impression that all portions of defendant's line to Kansas City was then inundated and dangerous, which was not at all true.

It was alleged in plaintiffs' petition, and was an uncontroverted fact, that the inundation of the Kansas City stock yards, on and after May 31st, prevented the feeding and watering of the cattle upon the viaducts, and was thus the cause of the damage complained of. This flood caused considerable loss of life and of millions of dollars worth of property. It was of such an unprecedented character that no one could have been reasonably required to have anticipated the same. It was unquestionably such an act of God as would exempt the carrier from liability in the absence of culpable negligence after the danger become apparent. It was of such an extraordinary character as to have become historical. (*Lightfoot* v. *Lightfoot* v. *St. Louis & San Francisco R. Co.*, 104 S. W., 483.)

The antecedent delay, if any, in the transportation of the cattle was but an incident, in no sense the cause, of the damage. By reason of the subsequent transportation to Kansas City it merely afforded an occasion for the shipment to be overtaken by this disaster. If the defendant had been more negligent in delaying the

transportation the damage would not have happened. In respect to various other shipments, which the defendant was more diligent in transporting, such diligence resulted in bringing many such shipments within the action of this catastrophe.

As under the written contract (see paragraph "*First*" of same), however, the defendant was not required to transport the cattle within any certain time, and as they were not intended for the market but simply for feeding pastures, it could not be held negligent in any event in holding the cattle at Strong City or Wellington. The evidence shows that the cattle were held there on account of the condition of the Burlington Railroad, and because delivery could not then be made to that company at Atchison.

Undoubtedly the direct and proximate cause of the damage complained of was this flood. It was the efficient and *dominating* cause of the damage, the *causa sine qua non.*

Insurance Co. v. *Boon*, 95 U. S., 130-131.

Liability for negligence depends on the probability of the consequences complained of, that is, its capability of being foreseen by a reasonable man. A party is usually held liable for those consequences which usually flow from his act or omission, and which as a reasonable man, in the light of the circumstances surrounding him, he may foresee as likely to result from such act or omission. The doctrine of proximate and remote cause is peculiarly applicable to and indeed constitutes a part of the definition of negligence.

Speaking of this rule, Sir Frederick Pollock, in his work on the Law of Torts, says on page 36:

> "The doctrine of 'natural and probable consequences' is most clearly illustrated, however, in the law of negligence. For there the substance of the wrong itself is failure to act with due foresight. It has been defined as 'The omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.' Now, a reasonable man can be guided only by a reasonable estimate of probabilities. *If men went about to guard themselves against every risk to themselves or others which might by ingenious conjecture be conceived as possible, no human affairs could be carried on at all.* The reasonable man, then, to whose ideal behavior, we are to look as the standard of duty, will neither neglect what he can forecast *as probable nor waste his anxiety upon events that are barely possible. He will order his precaution by the measure of what appears likely in the known course of things.* This being the standard, it appears that if in a particular case (not being within certain special and more stringent rules) the harm complained of is not such as a reasonable man in the defendant's place should have foreseen as likely to happen, there is no wrong and no liability."

The above principle was applied by the House of Lords in *Daniel* v. *Directors, &c., of the Metropolitan Railway Company*, L. R., 5 Eng. & Ir. App. (House of Lords), 45, where it was held that a railway company was not liable for injury to a passenger caused by the falling of a girder upon a passing train, the girder falling while being moved over the railway tracks by contractors doing certain work for the City of London, which was authorized to execute such works over

the railway, it being held that this was not such a mischief the occurrence of which the railway company was bound to anticipate and against which it was bound to take precautions. Lord Chancellor Hatherley said, on page 56:

> "To hold the railway company liable for an accident of that description would, I think, be extending the liability of the company for damages in consequence of supposed negligence in not taking precautions against every remote and contingent possibility of accident to an extent beyond anything that has been laid down in any case with which I am acquainted and which, indeed, common sense would not warrant."

In *Milwaukee, &c., Ry. Co.* v. *Kellogg*, 94 U. S., 475, it was said:

> "But it is generally held that, in order to warrant a finding that negligence or an act not amounting to wanton wrong is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

In *Kreigh* v. *Westinghouse, Church, Kerr & Co.*, 152 Fed., 120, it is laid down by the Circuit Court of Appeals, 8th Circuit, that an injury which could not have been foreseen or reasonably anticipated as the natural and probable result of an act of negligence is not actionable because it is not the proximate cause, but either the remote cause or no cause whatever of the damage.

To the same effect is *Cole* v. *German Savings, &c., Society*, 124 Fed.,113.

In *Stefanowski* v. *Chain Belt Co.*, 109 N. W., 532,

the Supreme Court of Wisconsin, in a recent decision, after full examination of the question, said:

> "Whenever a new cause intervenes, which is not a consequence of the first wrongful cause, which is not under the control of the wrongdoer, which could not have been foreseen by the exercise of reasonable diligence by the wrongdoer, and except for which the final injurious consequences would not have happened, then such injurious consequences must be deemed too remote to constitute the basis of a cause of action."

See, also, the well considered opinion of Judge Pollock in *Missouri Pacific Railway* v. *Columbia*, 65 Kan., 390, s. c., 69 Pac., 338. To the same effect, see, *Cleghorn, et al.*, v. *Thompson, et al.*, 62 Kan., 727; s. c., 64 Pac., 605.

1 Sutherland on Damages, 3rd Ed., Sec. 16.
1 Shear. & Red. on Negligence, 4th Ed., Sec. 28.

See, also, remarks of Judge Agnew in *Fleming* v. *Beck*, 48 Pa. St., 313.

Hoag v. *Railway Company*, 85 Pa. St., 293.

The above principle was applied in *Morrison* v. *Davis & Co.*, 20 Pa. St., 175, in which it appeared that on account of a negligent delay in the transportation of goods, they were subsequently overtaken and damaged by an act of God, and where it was said:

> "The general rule is, that a man is answerable for the consequences of a fault only so far as the same are natural and proximate, and as may, on this account, be foreseen by ordinary forecast; and *not for those which arise from a conjunction of his fault with other circumstances that are of an extraordinary nature.*"

The ruling in that case was followed and applied in *Railroad Company* v. *Reeves,* 10 Wallace, 176, and is, therefore, the rule of the Federal courts.

See, also:

C. St. P. M. & O. Ry. v. *Elliott,* 55 Fed., 949-952.

Scheffer v. *Railroad Company,* 105 U. S., 249.

Glassey v. *Worcester Con. St. Ry. Co.,* 185 Mass., 315; s. c., 70 N. E., 199.

Stone v. *B. & A. R. R. Co.,* 171 Mass., 536; s. c., 51 N. E., 1.

It may be true that a person committing a misdemeanor or felony, and, therefore, wilfully and wrongfully engaged in the commission of an illegal act, or if engaged in the commission of a mischievous act, should be held for all the consequences, whether direct or remote, yet if the wrong complained of be merely an inadvertent or thoughtless omission of duty or a mere negligent act without any wilful intent to inflict injury, a different rule should and does prevail. A defendant in such cases should only be held responsible for those results which might reasonably have been foreseen by a man of ordinary intelligence and prudence. In such a case he could not be expected to anticipate that an extraordinary, unprecedented and unexpected calamity might intervene to cause a damage which was rendered possible merely by reason of a condition or situation brought about without design on his part to inflict injury.

While there is an admitted conflict in the decisions upon this question of proximate cause, yet the rulings of the Federal courts and the weight of authority are

to the effect that even an antecedent negligent delay in transportation cannot be regarded as the proximate cause of damage where it appears that a subsequent act of God such as an extraordinary flood, intervened and was the efficient and producing cause. It might as well be contended that if a man were walking along a street and was struck by lightning and killed that the cause of his death was his walking along the street.

In case of either a breach of contract or a failure to perform a duty, the party in the wrong can only be held for such results as might be expected to ordinarily flow from the breach or the failure. Any other result would not have been in the contemplation of the parties to the contract as likely to flow from the breach thereof, or in the other case as likely to flow from a failure to perform the duty in question.

It was, therefore, held in *Railroad Company* v. *Reeves*, 10 Wallace, 176, where it was shown or admitted that the shipment involved in that case was overtaken by an extraordinary and unprecedented flood, that an antecedent negligent delay which may have resulted in bringing the goods in proximity to the flood was the remote and not the proximate cause of the damage; also that even if there had been a special agreement to forward the goods, no recovery could be had for failure to comply with such agreement on account of damages caused by an extraordinary flood since the same could not have been reasonably anticipated as likely to flow from the breach.

The ruling in *Railroad Company* v. *Reeves, supra,* was approved in *St. Louis, &c., Ry.* v. *Commercial Ins. Co.*, 139 U. S., 237.

See, also:

Volume 7, Rose's Notes to U. S. Rep., Reeves Case, pp. 297-298.

Hutchinson on Carriers, 2nd Ed. by Meachem, Secs. 193-4-5.

Vol. 5, Amer. & Eng. Ency. of Law, 2nd Ed., pp. 259 and 260.

A similar ruling was made with reference to this very flood, concerning similar losses at Kansas City, by the Supreme Court of Kansas in *Rodgers* v. *Missouri Pacific Ry.*, 88 Pac., 885, and also by the Kansas City Court of Appeals in *Moffatt Commission Company* v. *Union Pacific R. R. Co.*, 88 S. W., 117; s. c., 113 Mo. App., 544. In each of these cases it was held that the flood in question was so extraordinary and unprecedented and sudden in its appearance that the railway companies could not be held negligent in not anticipating the same and in failing to remove freight either from their cars or depots at Kansas City.

It is recklessly stated in bold italics, page 127, opponent's brief:

> "In this case, as we have seen, the flood was no sudden affair, coming like a fire or cyclone, *but had been coming on for nearly a month before its climax was reached.*"

Yet the Kansas City Court of Appeals, sitting in that vicinity and passing upon a claim for damage caused by this very flood, said in *Lightfoot* v. *St. Louis & S. F. R. Co.*, 104 S. W., 483, decided October 7, 1907, as follows:

> "The facts before us are similar in essential particulars to those considered in the case of *Moffat Commission Co.* v. *Railroad*, 113 Mo. App.,

544; 88 S. W., 117, and for the reasons expressed in that case, and in the later cases of *Pinkerton* v. *Railroad,* 117 Mo. App., 288; 93 S. W., 849, and *Lamar Mfg. Co.* v. *Railroad,* 117 Mo. App., 453; 93 S. W., 851, we find no difficulty in reaching the conclusion that the negligence, if any, of defendant in delaying the car at Kansas City, was but a remote cause of the injury; *the direct cause being the flood which appeared so suddenly and with such magnitude and force that its advent could not be anticipated nor its consequences averted by the exercise of human care and foresight.* Plaintiffs vainly endeavored to establish negligence on the part of defendant which co-operated with this act of God by drawing from its officers, who testified as witnesses the admission that they knew from newspaper reports the watershed of the Missouri and Kansas rivers had been, and was, receiving extraordinary rainfall, that both rivers were greatly swollen, and that their waters were expected to continue to rise. But, to say from these facts (as we must to sustain the judgment) that defendant, in the exercise of care, should have anticipated the suddenness and magnitude of the flood which swept down the Kansas river, and in a few hours covered its wide valley with water over 10 feet in depth, would be to hold defendant to the exercise of a degree of care with respect to this car of eggs beyond that to be expected of the most careful and prudent persons. *It is a matter of common knowledge that the people whose homes were in the path of the flood and those engaged in the numerous activities located in that area were so completely surprised by the visitation that many lives were endangered and property of enormous value destroyed. The warning was so brief that very little property was removed to places of safety before the disaster befell.* The principles applicable to the present situation have been so fully discussed in the cases to which we have referred and in other recent

cases (*Grier* v. *Railway Co.*, 108 Mo. App., 565; 84 S. W., 158; *Rodgers* v. *Railroad* (Kan.), 88 Pac., 885; *Cattle Co.* v. *Railroad* (C. C.), 135 Fed., 135; Id., 147 Fed., 457, 77 C. C. A., 601) that we deem it unnecessary to give them an extended discussion here. There was no issue of fact to submit to the jury, and the learned trial judge erred in not sustaining the demurrer to the evidence."

Prior to the morning of May 31st there was nothing unprecedented about the flood in this river. Floods had occurred before and not endangered the Stock Yards. Until the very morning of the 31st it could not have been anticipated that these Stock Yards would be endangered. Thereafter the rise in the river became unprecedented, extraordinary, and was sudden, as stated by the Kansas City Court of Appeals, and as the evidence in this case plainly proved.

The rule in *Railroad Company* v. *Reves* is also amply supported by the following among other authorities:

Morrison v. *Davis*, 20 Pa. St., 171.

Denney v. *New York Central*, 13 Gray, 481.

Hoadley v. *Northern Transportation Co.*, 115 Mass., 304.

McClary v. *Sioux City R. R.*, 3 Neb., 44; s. c., 19 Amer. Rep., 631.

Mich. Cent. R. R. v. *Burrows*, 33 Mich., 6.

Daniels v. *Ballantine*, 23 Oh. St., 532.

Clark v. *Pacific R. R.*, 39 Mo., 184.

Herring v. *Chesapeake, &c., R. R.*, 101 Va., 778; s. c., 45 S. E., 322.

Gilson v. *Delaware, &c., Canal Co.*, 65 Vt., 213; s. c., 36 Am. St. Rep., 838-9, notes.

The Startle, 115 Fed., 560.
13 Am. & Eng. Ency. of Law, 2nd Ed., page 722.

A contrary view was adopted by the New York court at an early day, which was followed by a few other courts, notably the Supreme Court of Minnesota in *Bibb Broom Corn Co.* v. *The A. T. & S. F. Ry. Co.*, 102 N. W., 709 (cited by our opponents). In the latter case the court admitted that its decision was contrary to the Federal authorities, and it refused to follow the same.

None of the acts of defendant concurred with the act of God to cause the loss in question. They all preceded the inundation of the Stock Yards and had spent their force. It was the unprecedented and unexpected inundation of the Stock Yards, caused by this unprecedented flood, that was the direct cause of the damage complained of, because it was that inundation alone which prevented the feeding and watering of the cattle upon the viaducts.

Thus in *Herr et ux* v. *City of Lebanon*, 24 Atl., 207; s. c., 149 Pa. St., 222, it was said:

> "If two distinct causes are operating at the same time to produce a given result, which *might be produced* by either, they are 'concurrent' causes. They run together, as the word signifies, to the same end. But if two distinct causes are successive and unrelated in their operation, they cannot be concurring. One of them must then be the proximate, and the other the remote, cause. When they stand in this relation to each other and the result to be considered the law regards the proximate as the efficient and responsible cause, and disregards the remote."

Also in *Baltimore, &c., R. R. Co.* v. *School District*, 96 Pa. St., 65; s. c., 42 Am. Rep., 529, it was stated:

> "We apprehend that the concurring negligence which when combined with the act of God, produces the injury, must be such as is in itself a real, producing cause of the injury, and not merely fanciful or speculative or microscopic negligence which may not have been in the least degree the cause of the injury."

Helbling v. *Cemetery Company*, 201 Pa. St., 171; s. c., 50 Atl., 970 (cited by our opponents) simply arose upon certain instructions of the court. The negligence alleged was such as might be well held to have concurred with the rainstorm in question in producing the damage. The opening of a sewer was on defendant's land from which it received surface drainage. It was surrounded by grating or crib to prevent it from becoming clogged with rubbish. The negligence alleged was that defendant allowed large quantities of brush, leaves, and cutgrass to lie along the watercourse and near to the opening of the sewer, and that these were carried by the rains to the crib and so clogged it that water did not have a free passage but was flowed back, injuring plaintiff's house. The negligence complained of still existed as an operating or producing cause and directly concurred in causing the damage. The case of *B. & O. R. R.* v. *School District*, *supra*, is quoted with approval. The storms were not unprecedented. The trial court instructed the jury that the defendant could be held liable only in case some negligent act on its part, "the natural consequences of which *should have been foreseen*, concurred with the flood in producing the loss."

It was distinctly held, however, that defendant was not liable if the extraordinary rainfall would have caused the injury notwithstanding any negligence on the part of defendant.

VII.

AS IT MUST BE ADMITTED THAT THIS FLOOD WAS AN ACT OF GOD WHICH INTERVENED TO CAUSE THE DAMAGE AND FOR THE CONSEQUENCES OF WHICH DEFENDANT COULD NOT BE HELD LIABLE, THE BURDEN WAS UPON AND WAS ASSUMED BY PLAINTIFFS, THEREFORE, TO ALLEGE AND PROVE THAT DEFENDANT WAS GUILTY OF NEGLIGENCE, WHICH PROXIMATELY CONTRIBUTED TO CAUSE THE LOSS, AS IN SOME FAILURE TO USE REASONABLE EFFORTS UNDER THE CIRCUMSTANCES TO PROTECT THE SHIPMENT IF POSSIBLE AFTER IT WAS OVERTAKEN IN THE STOCK YARDS BY THE FLOOD. BUT THE FORESIGHT REQUIRED TO BE EXERCISED BY DEFENDANT TO ANTICIPATE THE PERIL IS SUCH AS CAN BE JUDGED ONLY BY WHAT WAS GENERALLY KNOWN PRIOR TO THE DISASTER AND NOT BY WHAT THE DISASTER AND SUBSEQUENT KNOWLEDGE OR INFORMATION DISCLOSED.

In other words, when overtaken by such an extraordinary disaster as the one in question, the carrier is placed in the position of a bailee or agent for the owner or shipper and is required only to use reasonable care to protect the shipment against further damage or peril.

It was settled in the case of *Railroad Company* v. *Reeves*, 10 Wallace, 176, 189 and 190, that when the carrier shows that a shipment was damaged or de-

stroyed by an act of God, the burden of proof is then upon the plaintiff to show affirmatively that defendant was guilty of ordinary negligence which directly or proximately contributed to cause the damage complained of, and *that the carrier in case of such disaster was only required to use ordinary diligence to avoid or remedy the effects of the overpowering cause.*

This rule was applied under other circumstances in *Cau* v. *Texas and Pacific Railway Company,* 194 U. S., 427. Also in *Charnock* v. *Texas & Pacific Railway Company,* 194 U. S., 432.

See also *Washburn-Crosby Co.* v. *William Johnston Co., Limited,* 125 Fed., 273.

There can be no hardship in such a rule in the present case inasmuch as some of the plaintiffs, as well as their agents, accompanied the shipment and were in charge thereof, as the contract provided.

See 4 Elliott on Railroads, p. 2348, Sec. 1516, Note 3.

It is claimed that defendant, when it started with the shipment to Kansas City, should have known that this flood would be of such an extraordinary and unprecedented character *as to endanger the Kansas City Stock Yards,* where the stock were to be delivered for the connecting carrier, and also that after the shipment arrived at the Stock Yards at Kansas City and was assumed by defendant to have been delivered to the connecting carrier in accordance with the well established custom, yet defendant should still have anticipated the extraordinary and unprecedented character of the flood at that point and that the same was

likely to inundate the Stock Yards for six or seven days, and should, therefore, have driven the cattle out of the yards and not upon the viaducts. It is even claimed that the act of God was not the sole cause of the disaster and that the act of man contributed, as the damage was caused by inability to sufficiently feed the cattle upon the viaducts. In other words, it would seem to be contended that if defendant had left the cattle in the yards to be drowned, the act of God would have been the sole cause and there would have been no liability, but as the agents of the Stock Yards Company drove the cattle upon the viaducts to a place of apparent safety, *such act* resulted in the inability and consequent failure to feed the cattle and that, therefore, the act of God was but the remote cause of the damage. Plaintiffs forget that it was stated in their petition that by reason of the unprecedented character of the flood the cattle could not be reached and properly fed.

It is also claimed that General Superintendent Hurley and Superintendent Sharpe were devoting their attention to cars at Argentine and apparently neglecting this shipment. This is but a sample of our opponent's arguments. It might as well be contended that the president of the road was not giving his particular attention to this particular shipment. They seem to believe that this was the only shipment upon the entire railroad which required any attention. It seems to be forgotten that the agents of the railway company had to look after other shipments in more dangerous positions or places than this one. It seems also to be forgotten that the cattle were in the custody

of the Stock Yards Company and its agents were using all the diligence which anybody could be expected to use under the conditions then known.

The very fact that this flood was of an unprecedented and unexpected character in that locality is sufficient to show that defendant's agents could not be held to anticipate that it would endanger the Stock Yards inasmuch as other floods, within the experience of living witnesses in that locality, had not inundated or endangered the Stock Yards where the cattle were placed.

Plaintiffs' contention, in respect to each of the charges of negligence, when reduced to the last analysis, is necessarily that defendant's agents were negligent because not gifted with prophetic vision sufficient to know beforehand, and therefore, to anticipate, that the flood at Kansas City which finally overtook the shipment in the Stock Yards would be of such an unprecedented and unexpected character and last as long in its effects as subsequent experience proved to be the case. But the care required of defendant's agents under the circumstances is not to be judged by what was ascertained after the calamity occurred.

The court admitted a great deal of evidence which had no relevant bearing upon that question. It was not important at all to show the extent of rains several hundred miles away at the different sources of the river, and in quite a different territory, and the effect of which could only be definitely ascertained by some expert making a careful calculation after being possessed of data of which the average individual could have little or no information. The sole ques-

tion was whether at Kansas City, where the damage was done, a flood of this unprecedented character and dimensions should have been anticipated so that the defendant ought to have known that it would be dangerous at the time to transport the shipment *to the Kansas City Stock Yards* and to leave it there temporarily, to be taken farther by the connecting carrier. The fact that other portions of the railroad may have been under water was not material, for, as is well known, the grade of a railroad is not exactly level. Neither did the height of the waters at Topeka warrant the people at Kansas City, if they had known of the same in time, in believing that the flood would rise higher there over the banks of the stream than it had on other known occasions.

Railroad agents are but human and are gifted with no greater power of prophecy or foresight than ordinary individuals. One is not obliged to always take a pessimistic view and regard every approaching flood as another "Noah's Deluge."

Neither was it at all important that it was shown that a single individual drove his mules from his yards or stables a block distant from the stock yards out of the city. He had no viaducts above his yards upon which the mules could be driven. Similar evidence, however, was held irrelevant, immaterial and of no force in *Grier et al.* v. *St. Louis Merchants' Bridge Terminal Ry. Co.*, 84 S. W., 158; s. c., 108 Mo. App., 565.

Such an isolated instance was not pertinent to show that the agents of the Stock Yards Company were negligent in not driving the cattle out of the stock yards.

The evidence plainly showed the impracticability, if not the impossibility, of driving so many wild Texas cattle through the streets of Kansas City, as would be necessary if they were to be taken out of the stock yards. There was no place near by to which they could have been driven and cared for. But in driving them upon the high viaducts, where they would be out of the water and in order to prevent their drowning, the Stock Yards Company showed reasonable diligence, because *they had a right to assume that the flood would not reach the extraordinary proportions it did, or that it would subside as rapidly as it had approached. The viaducts seemed to be then as safe a place as anywhere for the cattle, and if the flood had receded as rapidly as it had approached, the cattle would not have been damaged as they could have been fed and watered in time.*

It is again asserted by our opponents that there was not a single head of cattle in any of the packing houses when the flood reached its climax and only a comparatively small number of cattle, in addition to the large bunches of plaintiffs', were in the stock yards. The inference they would have the court to draw from that statement is that other cattle had been removed on account of the approaching rise or flood, but no witness testified that any stock or meat or anything else was removed from any of the packing houses. The testimony was that there was great loss of property in these packing houses. No witness testified that there was not a single head of cattle in any of the packing houses. The reason there were not as many cattle in the stock yards at that time was fully explained by the

testimony. Witnesses stated that the run of cattle was lighter towards the end of the week, and on this occasion, Saturday, May 30th, was a holiday and, therefore, there was no market, and shippers of cattle did not want to hold cattle in the yards, which was also a general market place, over Saturday and Sunday. But Mr. Allen, a witness for the plaintiffs, testified that 1800 head of sheep and several thousand hogs were in the stock yards when the flood came (Rec., 258) and they were all or nearly all drowned. Other witnesses testified that the river was full of carcasses of animals.

The case of *Grier* v. *St. Louis Merchants' Bridge Term'l Ry. Co.*, 84 S. W., 158; s. c., 108 Mo. App., 565 (St. Louis Court of Appeals, 1904), arose out of the St. Louis flood in the same year, and the court says on page 161:

> "*It is easy to pick flaws in the conduct of persons in times of danger and excitement, and say, if this or that had been done, the result would have been different.* The appellant's servants might have moved this car of oats on Friday night or Saturday morning to where it would not have been injured, if they had known it was in danger. It would be granting a great deal to say they could have moved it at all, considering that the tracks over the bridge were filled with trains having precedence over freight trains. But looking at the situation, with its many difficulties and serious responsibilities, calling for instant attention, we think the facts of this case make a much stronger showing of loss of property by a natural disaster, unmixed with negligence on the part of the custodian of the property, than did the facts of *Am. Brewing Ass'n* v. *Talbot*, 140 Mo., 674, 42 S. W., 679, 64 Amer. St. Rep., 538, in which the defendants were exonerated from blame."

NECESSARY FORESIGHT NOT TO BE JUDGED BY HINDSIGHT.

The evidence plainly showed that even the Government officials at Kansas City did not, prior to, but only after, May 31st, have information of the last rise in the river at Topeka, and issued no warnings either to defendant or to the public generally that the flood at Kansas City would be unprecedented, as indeed such officials did not know of the rise at Topeka until after the flood had reached its height and was subsiding. It is easy to confound subsequent knowledge acquired by the happening of an event with that which was only apparent prior to the occurrence. It would not be fair to measure a man's foresight by his hindsight. The authorities fully sustain this rule in cases like the one at bar.

In *Nashville & Chattanooga R. R. Co. v. David*, 6 Heisk., 261; s. c., 19 Amer. Rept., page 594, which was cited by our opponents, it was said:

> "How could the plaintiff in error be reasonably required to use all means to obtain information of an event about approaching in the shape of a freshet, that all past experience in like matters had furnished no previous example, nor any reason on which the use of such means should be demanded? In other words, how could the company be held responsible for not anticipating and preparing for that, which human sagacity, surrounded by the precise state of facts, and with a knowledge of the past history of rises in the river, which surrounded the party here, and with the facts known to defendant's employes, could not have anticipated, unless we require in such case a prescience, such as no human being can either claim or be responsible for not exercising?"

In *American Express Company* v. *Smith,* 33 Oh. St., 511; s. c., 31 Amer. Rep., 561, it was said with reference to a similar case:

> "There is an *ex post facto* wisdom, which, after everything has been done, without success, can suggest that something else should have been attempted, but this is a sagacity much more astute than ordinary human foresight, and can hardly furnish a fair rule by which to determine the propriety of what has been done in good faith, and with judgment exercised under the best lights afforded."

So also in *Libby* v. *Main, etc., Ry. Co.,* 20 L. R. A., 812, the Supreme Court of Maine said:

> "The test of liability is not whether the company used such particular foresight as is evident *after the accident happened* might have averted it had the danger been known, but whether it used that degree of care and prudence which a very cautious and prudent person would have used under *apparent* circumstances of the case to prevent the accident without reasonable knowledge that it was likely to occur."

So also in the old case, which was cited by our opponents, *Wallace* v. *Clayton,* 42 Ga., 443, and which was based upon a provision of the Georgia code which required common carriers to "use extraordinary judgment" it was nevertheless said:

> "*There was not a moment after the flood got beyond the highest ever known before when they did not have the right to suppose that the limit of the overflow would soon be reached, and the higher it rose the more unnatural it became, the more contrary to human experience the more baffling to the prudence of the prudent.* If we add to this that on the 8th they had a telegram from Knoxville that the river was falling, it is not

at all strange they should feel quite sure they were safe at their own depot."

In that case the court held that defendant had exercised all the care required by the Georgia code.

In *American, etc., Assn.* v. *Talbot,* 141 Mo., 674; s. c., 42 S. W., 679, the court, on page 683, said:

"No such high stage of water had ever been known in that locality, consequently, no bad results therefrom to admonish defendants of approaching danger by reason thereof. Then how could the defendants be held responsible for not anticipating and preparing for that which human sagacity could not have anticipated, unless we require, under such circumstances a prescience, such as no human being can either claim or be held responsible for not exercising?

"Numerous authorities hold that it is not negligence not to take precautionary measures to prevent an injury, which, if taken, would have prevented it, when the injury could not reasonably have been anticipated, and would not, unless under exceptional circumstances, have happened.

"Ray, in his work on Negligence of Imposed Duties, pages 133, 134, says: 'Mischief which could by no reasonable possibility have been foreseen, and which no reasonable person would have anticipated, cannot be taken into account as a basis upon which to predicate a wrong. A reasonable man does not consult his imagination, but can be guided only by a reasonable estimate of probabilities. The reasonable man, then, to whose ideal behavior we are to look as the standard of duty, will neither neglect what his reason and experience will enable him to forecast as probable, nor conduct, on a basis of bare chances, a business whose success is dependent upon his accuracy in forecasting the future. He will order his precaution by the measure *of what appears likely in the usual course of things.* The proper inquiry is not whether the ac-

> cident might have been avoided if the one charged with negligence had anticipated its occurrence, but whether, taking the circumstances as they then existed, he was negligent in failing to anticipate and provide against the occurrence. The duty imposed does not require the use of every possible precaution to avoid injury to individuals, nor of any particular means which it may appear, *after the accident*, would have avoided it. The requirement is only to use such reasonable precautions to prevent accidents as would have been adopted by prudent persons prior to the accident. * * * The prudence and propriety of men's doings *are not judged by the event*, but by the circumstances under which they act. If they act with reasonable prudence and good judgment, they are not to be made responsible because the event, from causes which could not be foreseen, nor reasonably anticipated, had disappointed their expectations."

Quotation is then made by the court, with approval, from Webb's Pollock on Torts (Enlarged American Edition), pages 45 and 46, which has been heretofore quoted by us.

In *Norris* v. *Savannah, etc. R. R. Co.*, 11 Am. St. Rep., 355, 23 Florida, 182, there appeared to have been a loss of perishable freight which had been delayed by reason of delay occasioned by the flood of 1884 in the Ohio river, which flood was unprecedented, though it had been preceded by floods nearly as great. The court, however, said:

> "We do not think the rises of the Ohio river in 1882 and 1883 deprive the rise of 1884 of its character as an act of God, or required the appellee to have reconstructed its road, or provided other means of transportation across the river to meet such emergency. The testimony shows that, up to the time the witnesses in the case testified, these rises were wholly unprecedented."

In the case of *Smith* v. *Western Ry.*, 91 Ala., 455; s. c., 8 So., 754 (a dictum from which was quoted by our opponents in their brief) the court held that, under the undisputed facts the defendant was entitled to a general charge in its favor, and it also said with reference to the flood involved in that case:

> "No human power could have stayed the flood, or foresight or prudence have anticipated such an overflow. It is contended that, if the train had remained in LaGrange, Georgia, or the car had been run out on the main track, the goods would have escaped injury. It is no proof of negligence that because after an injury has resulted it can then be seen how the injury might have been aovided. The question is, what *notice or knowledge* had the defendant from which such an overflow could reasonably have been anticipated or foreseen? In this case the proof shows none. Was there any fault or negligence on the part of the defendant for not removing the goods to a safe place, after it became reasonably known that the high water would reach the goods where stored in the cars? On Monday night the goods were left in the cars, to all human knowledge in a place of safety. On Tuesday morning the water had overflowed the entire railroad track. It seems that the engineer and crew used all reasonable diligence consistent with personal safety, after daylight and information of the overflow, to procure a batteau, in order to reach the car where the goods were stored. The engineer testifies he tried to get up steam, but the water had entered the fire box of the engine. That then all was done that could be done to save the goods, but without avail, the water continuing to rise in the cars to a depth of eighteen inches above the floor. * * * Whether the court below erred in the admission or exclusion of testimony offered, or in the charges given or refused, the undisputed facts show that the defendant was entitled to a general verdict in its favor."

In *Long* v. *Pennsylvania R. R. Co.*, 147 Pa. St., 343; s. c. 23 Atl., 459, it appeared that the damage complained of was caused by the Johnstown flood, and it was said:

> "It may be possible for us, looking back coolly in the clear light of history on that terrible catastrophe, to see how property and life might have been saved if men on the ground had realized the awful magnitude of the impending calamity. It was not realized. The inhabitants of the populous valley sat in their homes, or went about their business, while the deluge was approaching."

So, in *Gulf, etc., R. R.* v. *Compton*, 38 S. W., 220 (Texas), where the damage arose out of a severe windstorm, it was said:

> "A carrier is not liable for an injury caused by an act of God, where the attending circumstances show no concurring negligence of the defendant. This rule is too well settled to need citations. It is not demanded of any person that he expect and take precaution against unprecedented and unforeseen natural events. The testimony is that no similar storm had ever occurred *in that locality*, and, if there is any want of care, or of the utmost care, on the part of the defendant in the handling of this wagon, we fail entirely to detect it."

In *International, etc., Railroad Co.* v. *Bergman*, 64 S. W. 999 (Texas), which arose out of the Galveston flood, it was decided that, in order to charge a common carrier with goods lost in an unprecedented storm, the plaintiff must show that by ordinary prudence it could have protected the goods *after becoming aware of the impending danger*. In the opinion it was said:

> "The storm in question was of such unprecedented fury, resulted in the destruction of such a vast amount of property, and in such an appalling

141

loss of human life, that it attracted the attention of the entire civilized world. The court may therefore assume judicial knowledge of the fact that it occurred, as well as its nature and extent. This being true, we may safely proceed upon the assumption that when the people of Galveston awoke to a realization of their danger they gave small thought to the danger threatening senseless chattels, and turned their attention to saving their own and other human lives. In such a situation it will be scarcely contended but that the most prudent man would have busied himself in looking to the welfare of his family and friends, and in deference to such a paramount duty he would have postponed the safety of his most precious chattels. The defendant, though a corporation, must have exercised the care demanded through human agencies. Its officers, clerks, and draymen were human beings, and all alike subject to the impending calamity."

See also *Norfolk, etc., R. R. Co.* v. *Marshall's Admr.*, 90 Va. 836; s. c., 20 S. E., 823.

In taking the stock, therefore, to Kansas City for delivery to a connecting line at the stock yards, defendant, under the circumstances then known, was using due diligence and the best judgment which could be expected. Frost, one of the shippers who accompanied the shipment, was chafing at Strong City at the delay there, and wished to have the cattle sent around the flooded district on the Burlington road. It was desirable to have the cattle forwarded to destination by any available route or line which appeared at the time to be reasonably safe. This was a character of freight which could not be held long in transit without being somewhat damaged. Frost, who made the contracts of shipment in the one case and accompanied the

same, and the agents of the other shippers in the other case, were evidently aware of all that was being done and made no objection to the course pursued.

Plaintiff's Authorities Not in Point.

In examining the various authorities cited it must be remembered that many courts hold that any action of the elements is an act of God, or what is sometimes called *vis major*, such as the effect of freezing, ordinary storms, etc. In such cases it is, of course, held that carriers should anticipate that such things are likely to occur at certain seasons of the year, as experience shows are probable. In the fall and winter the carrier should use reasonable diligence to protect certain perishable freight from the effects of cold weather. Upon the ocean storms are to be anticipated and the vessel should be seaworthy because such storms are likely to occur at such places. So the carrier should not put out in a storm in a small boat or a frail vessel. In such cases damage is likely to occur and should be anticipated as likely to happen from the ordinary or usual action of the elements. A carrier should not be expected, however, to anticipate a severe frost in midsummer in one of the southern states.

Other authorities define an act of God which will excuse the carrier as an unprecedented and unforeseen casualty and one which could not have been anticipated in the ordinary course of events. In such cases the carrier would only be guilty of negligence in failing to take care of the goods after they were overtaken by the casualty and its extent became apparent.

That is the extent of the rule laid down in Hutchinson on Carriers, 2d Edition by Meacham, Sec. 201.

In *Williams* v. *Grant*, 1 Conn., 487 (cited by our opponents), while the cause of the loss was the striking of the vessel upon a rock not generally known, yet it appeared from the evidence that the master was ignorant of navigation; that he had gone out of the usual course for vessels to take and had taken an unknown course; that he had no pilot, as was customary; that the danger was not wholly unknown, but evidently would have been known to an experienced pilot.

In *Richmond & D. R. R.* v. *White*, 88 Ga., 805 (cited at length by our opponents), the liability was founded upon a provision of the Georgia code, set out on page 100 of opponents' brief, requiring a common carrier "to use *extraordinary judgment.*" While the goods in question were damaged by a flood, yet it appears from the quotation on page 104 of opponents' brief that there had been a higher one previous thereto so that the flood there involved was not unprecedented, but might have been anticipated.

So in *Steamboat Company* v. *Tiers*, 24 N. J. L., 697 (cited by our opponents), it appeared that a severe storm caused a low tide so that the carrier's barge struck against a timber projecting from the bulkhead of the wharf, which, piercing the vessel, permitted the water to flow in and damage the goods. The ruling of the court was based upon the proposition that it was the duty of the carrier to provide good and sufficient docks, boats and other implements necessary and proper for its business, and that they must be free from defects, seen or unseen. In other words, the bulkhead

was found to be defective and that was held to be an instrumentality of the carrier. It also appeared that the master had been advised that it was dangerous to tie up at that dock; that the agent neglected to remove the boat and place her in a more secure position, although advised to do so, being warned of her danger.

In *Southern Pacific Co.* v. *Schoer,* 52 C. C. A., 269 (cited by our opponents), there was a collision during a fog between two trains which caused the disaster. It was said that there was nothing in the darkness of the night or foggy air which would have prevented the railway company from safely operating its trains if it had exercised the care, watchfulness and diligence proportionate to the circumstances in which it was placed. In other words, with the knowledge of the darkness and fog and its attendant danger, the carrier did not use the precautions which should have been taken under the circumstances then known to exist.

In *Davis* v. *Railroad Company,* 66 Vt., 297; s. c., 29 Atl., 313 (which was also cited by our opponents), the distinction which we insist upon is clearly pointed out. In that case the loss was caused by fire, for which the carrier under its bill of lading was exempt from liability. Though there was an alleged negligent prior delay in removing the grain, the court held that the fire was the proximate cause of the loss. In that case it was clearly pointed out that the carrier is only required to protect the property from dangers which are *known to exist,* and in conclusion it was said:

> "In the case at bar, if the defendant could have protected the property from the fire, *after it knew the fire existed,* by the exercise of reasonable prudence and diligence, and did not, the defendant

would have been liable, from its failure to use this measure of prudence and diligence, but not on the ground of its delay to move the grain earlier."

It was also said:

"We think it is the better conclusion that in such cases, if the proximate cause of the loss arises in such a manner that it will not support an action, neither will the remote cause, though incidental to the proximate cause. If the proximate cause occurs without the fault of the carrier,—in other words, as to him, is accidental,—he cannot forecast when or where it may fall upon the goods intrusted to him to carry, or whether it will fall upon them at all. It is as likely to fall upon them when being moved with despatch as when delay occurs. Being unconnected with it, he cannot forefend the property intrusted to him against it by the exercise of the utmost prudence and diligence. If he could forecast when or where it would occur at times, it might, be his duty to delay the movement of the property. In that way only could he protect the goods. *But inasmuch as he cannot forecast that it will occur, nor when nor where it will occur, and is himself in no respect responsible for its occurrence, he is under no duty to the consignor or owner of the goods in regard to its occurrence.*"

The case of *Michaels* v. *R. R. Co.*, 30 N. Y., 564 (cited by our opponents), which laid down a rule contrary to that adopted by the federal courts, was also cited to this court in the argument in the case of *R. R. Co.* v. *Reeves*, 10 Wallace, 176, but this court declined to follow the same.

In *Nelson* v. *Railway Co.*, 72 Pacific, 643 (cited by our opponents), it was simply held that a common carrier *receiving* property for transportation *with knowledge of the existence of an obstruction on its route*,

and without informing the shipper, could not offer the obstruction as an excuse for subsequent delay caused by such obstruction—a snow blockade.

In *McGraw* v. *R. R. Co.*, 18 W. Va., 361 (cited by our opponents), the goods were frozen, but this damage occurred at a time when the defendant should have anticipated such an occurrence, as it was not unusual, and should have protected the property against the same.

In *Strouss* v. *Ry. Co.*, 17 Fed., 209 (cited by our opponents), the court instructed the jury that they could not expect the railway company to make any extraordinary provisions such as were only required on extraordinary occasions.

In the case of *Gleeson* v. *Railroad Company*, 140 U. S., 435 (cited by opponents), the facts of which are not applicable at all to the case at bar, as the disaster was caused by the effects of an ordinary storm, causing a sliding of earth upon the railroad track, the court used the following language:

> "We know of no instance in which a rain of *not unusual violence*, and the probable results thereof, in softening the superficial earth, have been so considered"—(as an act of God).

Referring to a Minnesota case, the court continued:

> "It was held that a man is negligent if he fail *to take precautions against such rises of high waters as are usual and ordinary and reasonably to be anticipated at certain seasons of the year; and we think the same principle applies to this case.*"

In the Gleeson case it should also be noticed that there was negligence in the construction of the track

and also in failing to take proper precautions after the rain to see that the track was safe for the passage of trains.

In the case of *The Majestic,* 166 U. S., 376 (cited by opponents), baggage was flooded with water which came through a broken port hole of the steamer, and which the evidence showed was not securely covered and had not even been examined. As the carrier knew that a storm upon the sea, which was likely to occur at any time, would cause the water to flow through such defective port hole, it was held that the carrier should have taken care to see that the vessel was seaworthy in that respect.

Extracts from opinions should be read in the light of the facts involved, and the garbled extracts made by our opponents are from cases wholly inapplicable to the case at bar. Some of these cases, moreover, lay down rules contrary to those laid down by the federal courts upon the different questions involved.

Under the "sixth" paragraph of the written contracts for carriage the shipper, moreover, expressly assumed all risk of injury by reason of delay in transportation or of injury to tracks or yards, or by storms, washouts, etc.

VIII.

WITH DELIVERY OF THE CATTLE TO THE KANSAS CITY UNION STOCK YARDS FOR THE CONNECTING CARRIER, THE MISSOURI PACIFIC RAILWAY, IN ACCORDANCE WITH THE CUSTOM OR PRACTICE OBTAINING, DEFENDANT'S RESPONSIBILITY CONCERNING SAME CEASED.

The evidence showed that arrangements had been made with the Missouri Pacific Railway Company to receive the cattle at Kansas City. The usual place of delivery in case they were to be forwarded from that point was the Union Stock Yards. It further appeared that an engine of the Missouri Pacific Company had switched a number of these cars to the Missouri Pacific chutes and cattle had been unloaded therein. The evidence plainly showed that according to the custom and practice prevailing at that point the cattle were no longer under the control of the defendant as delivering company, but were only subject to the orders of the shipper or the receiving company, the connecting carrier. Arrangements had been made with a connecting carrier to receive the shipments at that place and it had been duly notified of the arrival of the different shipments before the approach of the final flood which overwhelmed the stock yards. Defendant had the right to assume, therefore, that the cattle were in the custody of the Stock Yards Company as the agent of the connecting carrier, the Missouri Pacific Railway Company.

It is contended (page 49 of opponents' brief), that as showing that the cattle were still in the custody of

defendants, it accepted a bond from plaintiffs after the flood in which it was recited that bills and charges for yardage, feed and pasturage were claimed by the railway company or *Kansas City Stock Yards Company,* which bills were denied by the Empire State Cattle Company and that as defendant was about to forward the remainder of the cattle without requiring payment of such bills and charges for feed, yardage and pasturage upon the giving of a bond, conditioned for the payment of said charges, if it should ultimately be determined that a liability or lien existed therefor, and in which the Empire State Cattle Company undertook to pay all proper expenses of feed and pasture bills which should be ultimately charged against the owners of the cattle or be a lien therefor, whether in favor of the railway company or of anyone to whose rights the railway company had succeeded. But it was also provided:

> *"It is expressly understood, however, that neither said Empire State Cattle Company or said The Atchison, Topeka and Santa Fe Railway Company, by giving and taking of this bond waive any of their respective rights under the contract of shipment of said cattle, and all of such rights on the part of the above parties shall be and remain as they may have been finally determined and agreed upon or finally adjudged by the courts."* (Rec., 128, 129.)

By the very terms of the agreement the bond was not to be taken or considered as prejudicing the rights or claims of any of the parties, and it is apparent that it was given as the result of some compromise under which the cattle were to be taken to pastures for feeding before they should be subsequently transported to

final destination. Neither does the fact that the old waybills were used by the railway company and endorsed "reloaded July 10, 1903, Lang, Kansas," tend to show that the cattle had not been delivered to The Missouri Pacific Railway Company at the Kansas City Stock Yards. The old waybills were used in pursuance of the compromise agreement for pasturing the cattle and in order to enable the plaintiffs to have the benefit of the original through rate inasmuch as The Missouri Pacific Railway Company, after agreeing to receive the cattle at Kansas City, had, after delivery to the Union Stock Yards for it, repudiated its undertaking. The defendant had the right to earn freight by having the original contract carried out by having the shipment transported to original destination.

A garbled extract from the testimony of Mr. Lathrop is set out on page 50 of opponents' brief. From the record, page 423, it seems that after the disaster there were negotiations between the railway company and the Empire State Cattle Company as to what should be done about the cattle and he appeared in the capacity of attorney for the railway company, but not as an agent who had any connection with the shipment or delivery of the cattle. He was not present during all these negotiations but stated that his understanding of them was that the cattle were to be taken to Emporia for pasturing *"under some agreement which would not alter or prejudice the rights of the parties as they stood at and prior to the time of the flood."* Immediately following the quotation made by our opponents he stated "and I do know that either at that interview or following, Mr. Combs made some arrange-

ment with your people. *My impression is that that arrangement was made after I left under which the cattle were to be shipped out without affecting the rights of either party.*" Furthermore, it appears that that deposition containing Mr. Lathrop's testimony was ruled out by the court (Rec., 415) and such ruling was assigned as error, but not according to the rules, in the Circuit Court of Appeals (Rec., 657), and was abandoned subsequently in both the brief and argument filed in that court and is abandoned in both the brief and argument filed in this court, and is, therefore, not a matter for consideration. The rules of the Circuit Court of Appeals, as well as of this court, require all assignments of error in the rejection or admission of evidence to set out the full substance of the same and such alleged error must be specified and set up in the briefs filed.

Under the terms of the written contracts of shipment which were made for and inured to the benefit of each connecting carrier receiving the shipment, the defendant was simply required to transport the cattle over its line and deliver or tender such shipment to a connecting carrier to be forwarded to the place of destination, and the carrier was not to be held liable after tender of the shipment in case such connecting carrier should refuse to receive the same.

According to the usage and custom prevailing at the Kansas City Stock Yards governing the delivery of cattle there for connecting lines, there was a delivery to The Missouri Pacific Railway Company and defendant had a right to assume that fact. (See Transcript of Record, pp. 532, 533, 541, 542, 543, 545, 547, 548, 549, 550, 551, 251, 252 and 464.)

The Kansas City Stock Yards were and are the delivering and receiving yards for cattle for a number of railroads connecting at Kansas City. A delivery of the cattle into these yards with notice to the connecting carrier which was to receive and further transport the same constituted a delivery to such connecting carrier. Indeed notice is not always required where under some custom or practice such stock yards or depot are treated as a common yard for delivery and receipt of shipments by connecting carriers.

See:

Converse v. *Norwich & N. Y. Transp. Co.* 33 Conn., 167, 181-182.

Merriam v. *Hartford & N. H. R. R.*, 20 Conn., 354, 360 and 361.

Whitworth et al. v. *Erie R. R.*, 87 N. Y., 414, last paragraph of syllabus and pages 420 and 421.

Washburn-Crosby, etc., Co. v. *Rld. Co.*, 180 Mass., 252; s. c., 62 N. E., 590.

Such is the rule established by this court.

See:

Pratt v. *Rld. Co.*, 95 U. S., 43.

Hostetter v. *Park*, 137 U. S., 40.

Also

4 Elliott on Railroads, Section 1412.

But under the "*Fifth*" paragraph of the written contracts the shippers undertook to look after and attend to the stock while in the stock yards or *at feeding* and *transfer points*. Plaintiffs' agents accom-

panied the shipments. They knew of the delivery of the cattle at the Union Stock Yards. The cattle were subject to their orders or those of the connecting carrier, The Missouri Pacific Railway Company, alone. By the contracts of carriage the defendant was released from the duty of looking after or attending to the cattle while in the stock yards or at feeding or transfer points. If anyone was negligent then after delivery of the cattle at the Union Stock Yards it was the shipper or the agents of the shipper in charge.

In any event, however, it is quite apparent that the agents of the Stock Yards Company, in whose custody the cattle were, did all that could be reasonably expected of them under the conditions then known to exist.

IX.

THERE WAS NO EXPRESS AGREEMENT TO TRANSPORT THE CATTLE BY WAY OF ATCHISON. NEITHER WERE THERE ANY INSTRUCTIONS FROM THE SHIPPERS TO TRANSPORT THE CATTLE OVER THE DEFENDANT'S LINE TO OR BY WAY OF ATCHISON. DEFENDANT, THEREFORE, NEITHER DEVIATED FROM ANY OF THE TERMS OF ITS AGREEMENT NOR FROM ANY INSTRUCTIONS OF THE SHIPPERS.

The claim now made of an alleged wrongful deviation from the route (alleged to be specified in the agreement of shipment but not therein contained) is evidently an after thought of the astute lawyers for the plaintiffs in order to fasten upon defendant a liability for damages which no one anticipated were likely to occur by taking the catle to Kansas City for

delivery to an available connecting carrier. At no time prior to or immediately after the damage did the shipper make any complaint on account of the stock going to Kansas City or feel aggrieved on account thereof. As the stock had been already detained at Strong City for several days owing to the bad condition of the railroad of the Burlington Company, which was unable to receive them at Atchison, the agents of plaintiffs in charge of the stock, as well as the agents of the defendant, were anxious to have them forwarded to destination as soon as possible by any reasonably available route or line.

There was no specific agreement between the parties to transport the cattle by way of Atchison rather than by way of Kansas City, and as the evidence showed no specific request by the shippers to have the cattle go that particular way it is difficult to understand how they can claim to be aggrieved by the exercise of a right which the defendant evidently had under the written contract to transport over any of its own available lines and deliver to a connecting carrier in the route to destination.

The three contracts in the case of the Empire State Cattle Company, which the pleadings admit to have been duly executed are between W. H. Frost and the Pecos and Northern Texas Railway Company acting for "itself and connecting carriers" which should receive the shipment. These contracts acknowledged receipt of the cattle at Hereford, in one case consigned to P. H. Kellogg at Evarts, S. D., in another to C. L. Millet at Evarts, S. D., and in another to Empire State Cattle Company at Evarts, S. D.

The initial line, the Pecos and Northern Texas Railway Company, which is one of the companies of the Atchison System, and which had authority to issue passes in favor of the parties who should go in charge of the shipments over the lines specified on the back of the stock contract, being the lines in that system, undertook to carry over its own line of railroad and deliver or tender the shipment to the connecting carrier to be forwarded to the place of destination, and each connecting carrier was to carry over its line and deliver to another connecting carrier, and the last one to the consignee at destination. Under the "*Tenth*" paragraph of these contracts, the provisions thereof inure separately in favor of each of the several connecting carriers to the point of destination, and no other contract is required to be executed by any connecting carrier receiving the shipment.

No route will be found designated in any part of the body of this contract, and therefore, there was no stipulation in the agreement which was signed by both parties which bound the carriers to transport by any particular or designated line or route. The notation or endorsement made on the backs of some of the contracts "Hereford, Texas, to Atchison, Kansas," was evidently placed thereon by the agent of the railway company solely in its own behalf and merely for the convenience of the carriers. It constitutes no part of the agreement. On other contracts the endorsement is "Kenna, New Mexico, to Evarts, S. D.," etc. It was merely in the nature of a filing notation made by some clerk of the railway company. These notations did not appear to have been put on at the instance or re-

quest of the shipper, nor does the evidence show that any such notation was made in pursuance of any instructions received from the shipper.

It is also claimed that the "waybills" found on pages 121-124 (Transcript of Record) designate the route by way of Atchison. These waybills our opponents persist in incorrectly designating in their brief as "bills of lading." Such designation must have been known by them to be incorrect, as the evidence plainly showed that they were not bills of lading issued to the shipper, but were merely *waybills* made out in accordance with a well-known practice by the station agent of the railway company and delivered by him to the conductor in charge of the train carrying the shipments for his guidance alone or for the use of connecting carriers. *It is not delivered to the shipper and is not intended for his inspection or use.* The designation of route found in the waybills was, therefore, merely a designation made, not at the request or in favor of the shipper, or plaintiffs, but for the convenience of the carriers alone and made at their own instance and in their behalf alone. Mere instructions which the carriers give to their agents in waybills and which emanate from the carriers themselves may be varied by the carriers at their option, as no rights of the shipper would be infringed by such variance.

It is further claimed (page 165, opponents' brief) that in a bond given after the disaster by the Empire State Cattle Company to the railway company to protect and indemnify the latter against expense incurred in taking care of and in pasturing the cattle after the flood had subsided, should the Cattle Company be

liable therefor, contained a recital that these cattle were routed by way of Atchison and that, such bond being accepted by the railway company, the recital became an admission against it and showed that the agreement was to carry the shipment by defendant's line via Atchison. It did not appear that the attorneys of the railway company, who were negotiating for an arrangement to make some disposition of the cattle after the flood, had their attention called to any such recital or that they knew of it at the time. They were evidently only interested in the covenants of the bond. They did not make the contract of shipment and, of course, did not know its terms. The statement quoted would at best be a selfserving one made by the Empire State Cattle Company after the disaster. Was it slipped into the bond by the astute counsel for the Cattle Company in the expectation of making some evidence on this point? The recital, however, has no such effect, as an examination plainly shows. The language is "said shipment to be transported over the line of The Atchison, Topeka and Santa Fe Railway Company, *or its connections, as shown by said contracts,* to Atchison, Kansas, and thence forwarded to Evarts, S. D., the point of destination."

In any event, therefore, we would be relegated to the contracts to see what they specify; but, according to this recital, the railway company "*or its connections*" were to transport to Atchison, and thence forward the cattle to Evarts, S. D. That would be accomplished by making delivery to the Missouri Pacific Company at Kansas City, as that company would trans-

port by way of Atchison and beyond and deliver to another connecting carrier.

When a shipper gives a carrier *specific* instructions as to lines of railroad over which he desires his goods to be transported or gives it specific directions in regard to a shipment, and the goods are so accepted, it may be admitted that the carrier ought not voluntarily to disregard such instructions without some reasonable necessity or justification therefor. If the carrier consents to receive the shipment with such specific instructions and no specific agreement is entered into, he undertakes to transport the same in accordance therewith. It is evidently altogether a matter of special agreement.

The rule is well stated by Chief Justice Shaw in an authority cited by our opponents, *Hastings* v. *Pepper,* 11 Pick. (Mass.), 41, where he says on page 43:

> "As the carriage is a *matter of contract,* as the owner has a right to judge for himself, what position is best adapted to carrying the goods of this description with safety, and to direct how they shall be carried, and as the carrier has a right to fix *his own rate for the carriage, or refuse altogether to take the goods with such directions,* the court are all of opinion that if a carrier *accepts goods for carriage, thus marked,* he is bound to carry the goods in the manner and position required by the notice."

In that case a package was marked to be carried a certain way. These instructions were disregarded and the package was damaged. It was held that it was for the carrier to prove affirmatively that the loss did not occur through disregard of the shipper's instructions. In that case it was fair to assume that the damage in

question was caused by disregard of such instructions and it was, therefore, held that the burden was upon the carrier to prove that the damage was not attributable to the breach of his contract but was occasioned *solely by the act of God,* or a public enemy, or the act or fault of the owner himself.

To the same effect see *Post* v. *Southern Ry. Co.*, 103 Tenn., 184; s. c., 52 S. W., 301.

To hold the carrier liable for departing from and disregarding special instructions of the shipper it must be shown that the carrier undertook to so carry under a special contract with the shipper in the manner designated, as such instructions or special arrangements impose upon the carrier different obligations than those imposed by the common law, which latter are merely to carry safely and deliver to the consignee at destination, or to a connecting carrier, as the case may be. It is well settled in the federal courts that a special contract on the part of the carrier, different from that imposed by the common law, cannot be inferred from doubtful expressions or loose language, but only from clear or definite evidence.

Myrick v. *M. C. R. R. Co.*, 107 U. S., 102-107.
Dixon v. *Columbus, etc., Ry.*, 4 Biss., 137; s. c., Vol. 7 Fed. Cases, p. 751, case No. 3929.

The Atchison Company, having two lines over which the cattle might be transported by it and delivery made to a connecting carrier in the route to destination, one to Atchison and the other to Kansas City, the one diverging at Topeka and the other at Emporia, it had the right to select such line of its own to fulfill its

agreement as under the circumstances during the transportation appeared to it to be reasonably safe. Indeed, under the contracts in these cases, plaintiffs would not be permitted to show that any special route was agreed upon, as that would be an attempt to add to the obligations of the contract and, therefore, to vary the same. Each carrier had the right to select and forward over any line or route controlled by it which appeared reasonably safe and expeditious.

White v. *Ashton*, 51 N. Y., 280, 284.

Hinckley v. *N. Y. C. & H. R. R. R.*, 56 N. Y., 429, 433, 434.

Snow et al. v. *Ind., etc., R. R. Co.*, 109 Ind., 422; s. c., 9 N. E., 702.

C. I. & L. R. R. v. *Woodward*, 72 N. E., 558; s. c., 164 Ind., 360.

Ind. R. R. v. *Remy*, 13 Ind., 518.

Patten v. *U. P. R. R.*, 29 Fed., 591.

Post v. *Southern Ry.*, 103 Tenn., 184; s. c., 52 S. W., 301.

Hutchinson on Carriers, 2nd Ed., Sec. 126a.

See also, generally,

Long v. *Rld. Co.*, 50 N. Y., 76.

Hudson Canal Co. v. *Coal Co.*, 8 Wallace, 276 and 288.

X.

AS DURING THE TRANSIT OVER DEFENDANT'S LINES A NECESSITY AROSE WHICH SHOWED THAT THE CATTLE COULD NOT BE DELIVERED BY IT TO THE BURLINGTON ROAD AT ATCHISON, AS IT HAD INTENDED TO DO, WITHOUT FURTHER DELAYS LIKELY TO INJURE THE SHIPMENT, IT WAS IN ANY ASPECT OF THE CASE JUSTIFIED IN ARRANGING FOR DELIVERY TO THE MISSOURI PACIFIC AT KANSAS CITY AND IN TRANSPORTING THE CATTLE TO THE UNION STOCK YARDS AT THAT PLACE. IN DOING SO THERE WOULD HAVE BEEN NO WRONGFUL DEVIATION EVEN IF THE CONTRACT HAD EXPRESSLY PROVIDED FOR CARRIAGE OVER ITS OWN LINE TO ATCHISON. IT WAS SIMPLY ACTING IN ACCORDANCE WITH A WELL ESTABLISHED CUSTOM.

As the stock had been already detained at Strong City for several days owing to the bad condition of the Burlington railroad and inability of that company to receive them at Atchison, the defendant's line between Topeka and Atchison also becoming impassable, defendant was justified in taking the cattle to Kansas City for delivery to another connecting line. Reasonable prudence under the circumstance required it to do so in respect to this shipment.

Moreover, the evidence clearly established a custom among railroad companies to detour the shipment or forward by another line where the one originally contemplated is unable or refuses to receive the shipment. (Rec., 202, 203.) *The contract of carriage is entered into in view of such custom, and indeed the railroad business of this country could not be carried on without such a reasonable custom.*

See *Hostetter* v. *Park,* 137 U. S., 31, 40, in which under the usage of the trade it was held to be no deviation to depart from the regular course of the ship.

Under the circumstances defendant should be considered as having done the best thing possible in the light of what was then known in having arranged with the Missouri Pacific to take the stock and in having transferred them to Kansas City for delivery there.

The cattle were deteriorating while in the pens at Strong City and Wellington and every one was anxious to have them sent forward. Mr. Frost, one of the shippers, was evidently chafing to have the stock go forward to destination by any available route. He wanted them sent around the flooded area on the Burlington road and even suggested their being sent by way of Superior, Neb. But the evidence showed that line was impassable and that in any event no arrangements could be made in time with succeeding connecting carriers to take them there and forward them to destination. It would have been unwise to take, and defendant would have been held negligent had it taken, the stock in the first instance to Atchison when a connecting line there had notified defendant that same could not be received there and there were no adequate facilities there for yarding such a large number of cattle. It would have been more than negligent when defendant's tracks at Valley Falls between Topeka and Atchison became flooded and the high waters at that point were rising for defendant to have attempted to take the cattle that way. To say the least, such a course would have resulted in delays, if nothing else,

which should have been anticipated and for which defendant would have been held liable.

If defendant had not used its other available line and made delivery at Kansas City to a connecting carrier as then appeared safe, it would have been held liable for damages resulting had it further delayed the shipment at Strong City.

Thus, in the case of *Receivers of M. K. & T. R. R. Co.* v. *Olive et al.*, 23 S. W., 526, it was held that where a railroad company had a way around a washout, by the use of which delay might have been avoided, it was liable to the shipper of livestock for the damage consequent upon delay. So, also, in *B. & O. R. R.* v. *O'Donnell,* 32 N. E., 476; s. c., 49 Oh. St., 489, a carrier was held liable for delay because it held a shipment of fire arms and ammunition until a tunnel on the usual way could be cleared of wreckage, when it might have sent them around by another way.

Our opponents would put the railway company "between the devil and the deep sea" and apply to it the old rhyme

> "You'll be damned if you don't;
> You'll be damned if you do."

This was a character of shipment which would not stand much delay in transportation. Defendant's agents were required to and did exercise good judgment in reference to the known conditions. It is a well settled rule in the law of agency which applies also to bailees, that where a deviation from instructions is due to necessity or unforeseen emergency not itself due to the agent's default, the agent using his best judgment to carry out the objects of the agency will not be

held responsible, although it should subsequently develop that another course would have been preferable. Acts done in a *bona fide* effort to save perishable property come within this rule. Where the instructions are obscure or ambiguous, an agent using his honest and diligent discretion in the interpretation of them will not be held responsible if he makes a mistake.

1 Am. and Eng. Ency. Law, 2d Ed., 1063 and 1064.

In the case at bar the defendant, however, had not completed the carriage over its own line when the emergency arose, and it was, therefore, at liberty to use any one of its lines which was open at the time so as to complete its contract of carriage and effect, if possible, a delivery to a connecting carrier, so that the goods might be carried to destination as expeditiously as possible, and it thus be enabled to earn its freight. By so transporting over its own lines it was not deviating from any instructions of the shipper, nor from any provisions in its agreement.

In 5 Am. & Eng. Ency. Law, 2d Ed., 424 and 425, which is in part quoted with approval on page 150 of opponents' brief, it is said:

> "The carrier may also excuse a deviation by showing that a sudden emergency required it, but the burden of showing such an emergency is on the carrier. In cases of emergencies which justify a deviation, and when the owner's consent might be fairly presumed, the carrier may act in contradiction or modification of the *letter of its instructions* but in all such cases should give notice to the owner as soon as practicable *of what has been done.*"

Frost, one of the shippers, and the agents of the other plaintiffs knew what had been done certainly on the arrival of the stock at Kansas City, but it is obvious from the above that no notice to the various owners would be necessary unless the carrier was going contrary to the specific instructions of the shippers. As the defendant was evidently pursuing the only available course at the time and that considered the best, and in accordance with established custom, there was evidently no necessity to obtain instructions from the shippers as the carrier was simply acting under the authority of its contract and was not going counter to any expressed wish of the shipper. It would have been impracticable to notify the different shippers and consignees and await instructions from each before doing anything. Again it is not at all likely that the new instructions would be harmonious or practicable.

Phelps, James & Co. v. *Hill*, L. R. (1891), 1 Q. B. Div., 605.

Questions of wrongful deviation generally arose under policies of marine insurance. Insurance was generally effected upon a cargo with reference to a known route or passage between the points designated, such route or passage being the one generally traveled by ships, and therefore considered safe—a reason having but little application to transportation by rail. It being, therefore, a matter of contract the insurance company had the right to claim that its liability did not attach if, without reasonable cause or excuse, the carrier departed from a well known and usually safe course into a course known to be circuitous or out of the usual way and apt to be more dangerous. Volun-

tary departure by the carrier from the contract without reasonable necessity would, of course, discharge the underwriter, as was held in *Insurance Company* v. *Leroy*, 7 Cranch, 26, cited by our opponents. A shipper, when taking out marine insurance, would have the same right to insist that if he lost or was likely to lose the insurance by reason of a wrongful or unreasonable deviation by the carrier, the carrier should have known that such a result would have followed from his breach of the contract of transportation, and should, therefore, be held liable for the loss sustained. Where a shipper, however, had effected no insurance in view of any route, it would seem that he would have to show that the damage claimed was one which the carrier ought to have anticipated or contemplated as likely to result if it broke its contract of carriage.

Speaking upon this point, Mr. Justice Holmes, in the *Globe Refining Company* v. *Landa Cotton Oil Co.*, 190 U. S., 544, quotes with approval the following language:

> "A person can only be held to be responsible for such consequences as may be reasonably supposed to be in the contemplation of the parties at the time of making the contract."

He cites with approval the leading case of *Hadley* v. *Baxendale*, 9 Exch., 341, 354, which lays down the above rule as to damages recoverable against a common carrier in case of a breach of its contract.

Many authorities, therefore, simply hold that where the carrier disregards the instructions of the shipper and thereby breaks his contract he assumes the obligations of a common carrier at common law or the common law liability, and cannot claim the benefit of exemptions contained in a special agreement.

See Elliott on Railroads, Sec. 1515.

But at common law the carrier would be excused for damages caused by an act of God, such as the one in question, as that is something which could not be reasonably expected or provided against.

So in voluntarily deviating *without necessity* or excuse from a route specifically designated or requested by the shipper, the carrier would also incur liability for those consequences which were likely to follow by reason of the known differences between the route designated by the shipper and the one followed by the carrier without lawful justification. If the latter be more circuitous there would be the incident delay. If more dangerous on account of known natural perils there would be the dangers of the greater perils likely to be encountered. If more dangerous on account of inadequate police protection due to an unsettled condition of the country, there would be the dangers of robbery. But all these dangers are such as are then likely to be encountered and should be anticipated as a reasonable consequence of departing from express instructions of the shipper.

The authorities, therefore, recognize that in the case of common carriers there may frequently arise either a necessity or a reasonable cause for departing even from specific instructions of the shipper, and certainly from departing from what would otherwise be the usual or ordinary route for the transportation. The established custom among railroads recognizes such necessity. With reference to railroad companies, the same reasons do not exist for requiring a strict pursuit of the ordinary route except in a few exceptional cases

where a departure therefrom would be known as likely to result in damage to the shipper.

In the case of *Hostetter* v. *Park*, 137 U. S., 30, which is cited by our opponents, it is said on page 40, citing a number of cases:

> "A deviation is defined to be 'a voluntary departure *without necessity or reasonable cause*, from the regular and usual course' of a voyage, in reference to the terms of a *policy of marine insurance;* but it is no deviation, in respect to such a voyage, to touch and stay at a port out of its course, if such departure is within the *usage of the trade.*"

After citing authorities it is then stated:

> "The same doctrine is applicable in the case of a bill of lading, even though the usage be not known to the particular shipper, if it be established as a general usage."

In the case of *Constable* v. *The National S. S. Co.*, 154 U. S., 52, also cited by our opponents, *it was held that the landing of a cargo at a different pier than that owned or controlled by the steamship company and designated as its pier in its bill of lading, was not a deviation so as to render the steamship company liable for a loss by fire at such other pier.* The only reason given for taking the cargo to such other pier was that there was no room at the pier of the defendant steamship company. It was also held that libellants, having taken no steps on the faith of the cargo being unladed at defendant's pier, were not prejudiced by the change. On page 66 it is said:

> "It is claimed, however, that the berthing of this ship *at a pier other than her own was in legal effect a deviation*, which rendered the company an in-

surer of the cargo discharged at such pier *without notice,* until its actual delivery to the consignee. In the law maritime a deviation is defined as a 'voluntary departure *without necessity, or any reasonable cause,* from the regular and usual course of the ship *insured.*"

It is true that in the opinion in the above case as stated by our opponents, the case of *Michaels* v. *N. Y. C. R. R.,* 30 N. Y., 564, in which an antecedent negligent delay was held not to excuse the carrier for damages caused by subsequent flood, is referred to, but it is referred to merely by way of argument or illustration. That case has been cited to, but disapproved by this court in the case of *Railroad Company* v. *Reeves, supra,* involving the same question.

In Ray's Negligence of Imposed Duties, page 317, it is said:

> "There is a class of cases in which an agent is justified, by an unexpected emergency, *in deviating from his instructions,* where the safety of the property requires it * * * but while a deviation cannot be made for the mere convenience of the carrier, without rendering it liable for the injury which may result; yet, such *deviation from the instructions of the shipper* may be made in the case of an unforeseen necessity, and a necessary change of route or means of transportation is justifiable—as forwarding perishable freight by rail where a storm prevents a boat from proceeding on its voyage."

In *International, etc., Ry. Co.* v. *Wentworth,* 27 S. W., 680 (Texas), a deviation from the stipulated route was held justifiable on account of floods.

In the *Propeller Niagara* v. *Cordes,* 21 Howard,

7, Mr. Justice Clifford, on pages 24 and 25, said in part:

> "A deviation from the direct route may be excusable if rendered necessary to execute repairs for the preservation of the ship, or the prosecution of the voyage, or to avoid a storm, or an enemy, or pirates. * * * As agent of the owner, the master is bound to carry the goods to their place of destination in his own ship, unless he is prevented from doing so by some cause arising from irresistible force, over which he has no control, and which cannot be guarded against by the watchful exertions of human skill and prudence. When the vessel is wrecked or otherwise disabled in the course of the voyage, and cannot be repaired without too great delays and expense, he is at liberty to tranship the goods and send them forward so as to earn the whole freight; *and if another vessel can be had in the same or a contiguous port, or at one within a reasonable distance*, it becomes his duty under such circumstances to procure it and transport the goods to their place of destination, and in that event he is entitled to charge the goods with the increased freight arising from the hire of the vessel so procured."

In *Patrick* v. *Ludlow*, 3 Johns. Cas., 10; s. c., 2 Am. Dec., 130, it appeared that the master of a vessel received information that French privateers were cruising in the windward passage and in the usual route from Surinam. He, therefore, determined to take the leeward passage, and touched at Demarara to take the protection of a British convoy then about to sail. A few hours after his arrival there the vessel was driven to sea in a gale of wind and afterwards continued her voyage without convoy and was captured by a French privateer. In an action on an insurance policy this was held not to be a deviation as the mas-

ter had acted *bona fide* and with the sole view of avoiding danger and to seek the safest course home. In the opinion it is said in part:

> "It remains to be considered whether the route to the leeward or the touching and stay at the port of Demarara, will amount to a deviation. * * * From the testimony in this case there is nothing to impeach the motives of the captain. He appears to have acted *bona fide* and for the security of all concerned. It is well known that those seas were infested with privateers at the time. * * * The resolution to take this passage, if not at all times proper, was, I think, under those circumstances justifiable, to avoid danger, and ought not to be deemed a deviation."

In the case of *Reade* v. *Comm. Ins. Co.*, 3 Johns., 352; s. c., 3 Am. Dec., 495, a vessel was insured from New York to Bordeaux. She had French passengers on board. The owners of the vessel instructed the master to proceed through the Sound so as to avoid risk of detention by British cruisers then off Sandy Hook. The master went through the Sound as directed instead of going through the Narrows and by way of Sandy Hook, the most *usual* and least dangerous route for vessels. In an action on the insurance policy this was held not to be a wrongful deviation.

The court said:

> "If there were no evidence in this case to justify the departure of the ship from the most usual and ordinary course, we are inclined to think that here would have been a deviation; but under all the circumstances, we consider that there was a just and *reasonable ground* for such departure, *though there may not have been an absolute necessity for it.*"

In *Regan* v. *Grand Trunk Ry.*, 61 New Hamp., 579, the prevalence of a severe storm prevented the goods

from going by steamer (as routed), they were sent by railroad and lost. It was held that the carrier was not liable, since the necessity warranted the deviation. The following principles were laid down:

> 1. A common carrier receiving goods to be forwarded to points beyond his route, in case of an interruption of the stipulated line of transportation, is bound to use all reasonable means such as a prudent owner would take if he were present to protect the property from unnecessary damage or loss.
>
> 2. What constitutes reasonable care in such an emergency, and whether it is the duty of the carrier to forward the goods by a different route, are questions to be determined with reference to all the circumstances.
>
> 3. Neglect to notify the consignee of a change of route does not render the carrier liable for loss or damage happening from delay in the delivery of the goods, if such notice would not have avoided the injury.

See also

Foster v. *Great Western Ry. Co.*, L. R. (1904), 2 K. B. Div., 306.

Phelps, James & Co. v. *Hill*, L. R. (1891), 1 Q. B. Div., 610, 611.

THE AUTHORITIES CITED BY PLAINTIFFS DO NOT CONTROVERT THE RULES CONTENDED FOR BY US AND MANY OF THEM ARE WHOLLY INAPPLICABLE.

A careful examination of the authorities cited in our opponents' brief on the question of wrongful deviation will show that they do not controvert the rules laid down in the foregoing cases. We shall not attempt to criticise all of them in detail.

In the case of *Davis* v. *Garrett,* 6 Bingham, 716 (cited by opponents), before Chief Justice Tyndall in the Court of Common Pleas, decided a number of years ago, and which is frequently cited on the question of wrongful deviation, there was involved the loss of a shipment of lime carried by boat. It was alleged in the declaration that defendant undertook to carry the lime from one port to another by the usual and customary passage, "perils of the sea" excepted, but that he voluntarily and *unnecessarily* deviated from such usual and customary passage and that during the alleged wrongful deviation and while the barge was out of her course, in consequence of violent and tempestuous weather, sea water communicated with the cargo of lime, which became heated, setting the barge on fire, by reason of which both lime and barge were entirely lost. These allegations were established at the trial, it appearing that defendant deviated from the customary course of the voyage mentioned in the declaration *without any justifiable cause.* There was nothing unprecedented in the condition of the weather and the storm was such as might have been anticipated. Defendant having gone out of the usual course agreed upon was bound to anticipate the peril of storms and was, therefore, not entitled to the exemption contained in the bill of lading from liability on account of "perils of the sea."

In the earlier case of *Max* v. *Roberts,* 12 East, 89, a declaration charging wrongful deviation was held to be bad which did not allege an agreement on the part of the defendant to carry by the particular route or course though the direct one from which it was

claimed that there was an unauthorized or wrongful deviation.

In *Crosby* v. *Fitch*, 12 Conn., 410; s. c., 31 Am. Dec., 745, cited by opponents, defendant started out on a voyage without apparent necessity at the time, and, instead of going through the sound, took an unusual route and one evidently not calculated to be pursued by a small boat of that character. As the court found there was no necessity to start out on the journey at the time, it was held the carrier could not take advantage of an exception in the bill of lading "against the dangers of the sea," but was to be treated as assuming the obligations of a common carrier over the new route. It appeared further that the cotton was shipped on the declaration of the master to the agent of the owner that he should sail as soon as the ice broke up in the Sound. It was usual for vessels thus situated to remain in the port of New York until the Sound broke up, as claimed by plaintiffs. An unusual route was pursued rather than the usual route through the sound. The court held the defendants responsible as common carriers, but in the opinion it is said:

> "*The distinction is a very obvious one between the present case and one in which a vessel already on her voyage and in transit departs from the usual route, by reason of obstructions of this nature, or of blockades, etc. In such cases the master must act; a necessity is thrown upon him, and if he is governed by a sound discretion, he stands justified.* But here it may as well be claimed that the master would be justified in leaving a safe port during the existence of a violent tempest, or in the face of blockading or embargo restrictions, because it might be uncertain how long these impedi-

ments would be in his way. The port of destination in this voyage was Norwich; and it is conceded that the obstruction caused by ice to the navigation of the River Thames, usually continues several days longer than the Sound continues frozen. The master, therefore, knew, that he could not complete his voyage earlier in consequence of the course he adopted."

That case involved a shipment of cotton which could not have been affected in the slightest degree by a delay in the commencement of the voyage.

In the case of *Rld. Co.* v. *Beck,* 125 Pa. St., 620; s. c., 17 Atl., 505 (cited by opponents), plaintiff shipped over defendant's road goods marked "via P. care of A. Coast Line, by fast freight," and defendant delivered the goods at "P" to a steamship company, in whose possession they were destroyed by fire. In that case, as defendant had without necessity violated positive instructions by the shipper, it would of course be held as a common carrier during the entire transportation and as such would be liable for a loss caused by fire. There was no apparent necessity for the carrier to go counter to the express instructions of the shipper.

So in *Philipps* v. *Brigham,* 26 Ga., 617, cited by opponents, defendants pursued an extraordinary and unusual route without any reasonable necessity therefor.

So in *Rld. Co.* v. *Cole,* 68 Ga., 623, cited by opponents, goods were delivered to be forwarded by a specified line and were not so forwarded by the first carrier. No reasonable necessity existed for disregarding the instructions of the shipper, or the con-

tract of the parties, was shown by the carrier. The same is true of the case of *Sager* v. *Rld. Co.*, 31 Me., 228 (cited by opponents), as there the carrier acted in disobedience of directions given by the owner and assented to by the carrier respecting the mode of conveyance.

That was true also of the case of *Cassilay* v. *Younge*, 4B. Monroe, 265 (cited by appellants).

The same was true of the case of *Rld. Co.* v. *Washburn*, 22 Oh. St., 324, cited by opponents, for in that case it was said, as appears from the quotation made therefrom by plaintiffs:

> "If these instructions" (of the shipper) "be without restriction as to the subsequent route, intermediate consignment or mode of transit of the goods, but are in general terms to forward them to a designated destination, he will have discharged his duty as forwarding agent by accompanying their delivery in good order to the carrier of the next usual route of transit, with the like general instructions in terms sufficiently explicit and unambiguous to inform him of their ultimate destination."

In the case of *Brown & Haywood Co.* v. *Pacific R. R. Co.*, 63 Minn., 546 (cited by opponents), the defendant carrier received a shipment from plaintiff to be carried to a point beyond defendant's line *with instructions from plaintiff* to deliver them to a certain connecting carrier. The shipper had made an agreement with the last connecting carrier to have the car containing the goods stopped at two intermediate points for unloading and certain portions of the goods delivered to each point. The goods being forwarded by another line than that agreed upon, the shipper was

obliged to pay extra charges for unloading and for this the initial carrier was held liable. It may be said that this case was wrongly decided for if the initial carrier was not advised of the contract between the shipper and the connecting carrier for a special privilege it could not be held liable under the rule established in *Hadley* v. *Baxendale*, 9 Exch., 341, 354, or in *Globe Refining Co.* v. *Landa Cotton Oil Co.*, 190 U. S., 544.

The case of *Hastings* v. *Pepper*, 11 Pickering, 41 (cited by opponents), has been referred to heretofore. The carrier was held liable for disregarding instructions given by the shipper upon which the goods were accepted, unless he could show that the loss was caused through the act of the shipper or an act of God. No necessity was shown for deviating from the instructions given.

In *Proctor* v. *Ry. Co.*, 105 Mass., 512 (cited by opponents), the defendant carrier agreed to convey the goods to Boston and forward them thence by a certain specified express. Instead of doing so they were forwarded by another express company at a cost greater than would have been the cost of transportation by the express company designated, and the initial carrier was properly held liable for the difference in such cost.

In *G. H. & H. R. R. Co.* v. *Allison*, 59 Tex., 193 (cited by opponents), it appears on page 195 that the general agent of the transportation company promised and agreed that the melons shipped should go through to Chicago without breaking bulk and without transfer.

This agreement was wholly disregarded and a loss ensued therefrom, for which the carrier was held liable. No reasonable excuse for deviating from the agreement was offered.

In the case of *Johnson* v. *N. Y. C. & H. R. R. R. Co.*, 33 N. Y., 610; 88 Am. Dec., 416 (cited by opponents), hemp was shipped over defendant's line under *positive instructions from the shipper* to forward it via the People's Line of steamboats to New York City. Because the shipment was refused by the boat designated, the initial carrier forwarded it by another line. As it had performed its duty when it carried to the end of its line and offered the goods to the connecting carrier, it was held that it should not have forwarded the goods by a mode *prohibited* by the owner without notice. There was no occasion or necessity to disregard the positive instructions of the shipper. In the opinion it was said:

> "There is a class of cases in which an agent is justified by an unexpected emergency in deviating from his instructions, where the safety of the property requires it. In this instance no such exigency arose. The only inconvenience which would have resulted to the owner from compliance by the carrier with his *known wishes* would have been mere delay in transmitting the hemp to market; *and he (the shipper) had notified the company that he would rather submit to this delay than to the hazard of towboat transportation at the close of the season of navigation.*"

In *Goodrich* v. *Thompson*, 44 N. Y., 324 (cited by opponents), there was an express contract to forward the goods by a particular steamer. As it appeared that this steamer was withdrawn from the service the

carrier would not have been subjected to a liability by holding the goods at its own terminus until it received further instructions, and so it was held that it should have then notified the owner and awaited instructions.

In *Maghee* v. *Rld. Co.,* 45 N. Y., 514 (cited by opponents) it was simply held that if a carrier violated its contract to carry in a particular way, or by a particular route, it could not avail itself of any exception against liability contained in such contract.

The same was true in *Robertson* v. *National Steamship Company,* 14 N. Y. Supp., 313 (cited by opponents). The damage in that case was not caused by an act of God and the decision was therefore simply to the effect that the carrier by deviating from the express terms of its contract could not claim any exemption contained therein. Having violated the agreement and thus terminated the same it could not claim the benefit thereof.

In *Seavey Co.* v. *Union Transit Co.,* 106 Wis., 394; s. c., 82 N. W., 285 (cited by opponents), the defendant, for reasons of its own convenience, disregarded its express contract as to the mode and route of transportation, and it was held liable for damages caused by freezing of the goods while upon the unauthorized route.

In *Ry. Co.* v. *Brichetto,* 72 Miss., 891 (cited by opponents), vegetables were consigned to a northern market. Because the connecting lines would not receive the same on acount of a strike, the carrier instead of sending them by another available route, without consulting with the shipper, diverted them to a

southern market, where they were sold. The mere statement of the case shows its inapplicability.

So, in *Rld. Co.* v. *Odill*, 96 Tenn., 61; s. c., 33 S. W., 611 (cited by opponents), the initial carrier unjustifiably substituted another connecting carrier for the one named in the bill of lading, and without authority from or notice to the shipper, the potatoes in question were sold.

In *Merchants Despatch Co.* v. *Kahn*, 76 Ill., 520 (cited by opponents), no necessity was shown for transporting the goods over the devious routes selected.

In *Express Co.* v. *Kountze*, 8 Wallace, 342 (cited by opponents), the carrier had two lines over which the property might have been sent. The more expeditious route was through Missouri, but which owing to unsettled conditions there prevailing on account of the rebellion then in progress was hazardous. The longer route, through Iowa, was less dangerous on that account. *Plaintiff notified defendant's agent not to send the gold dust via the Missouri route.* Notwithstanding this warning and *the known danger from such a route* the gold dust was sent by the express company over the more dangerous route and was captured by a band of armed men. It was a pure case of gross negligence in the selection of the more hazardous although more expeditious route. Under the circumstances the carrier should have selected the longer route. For this reason it was held that the express company was not entitled to the benefit of exemptions contained in its bill of lading.

In the case of *L. & N. R. R. Co.* v. *Duncan*, 137 Ala.,

446; s. c., 34 Southern, 988 (cited by opponents), livestock was transported over an initial line and when it arrived at the point for delivery to a connecting carrier *which had been designated by the shipper,* that carrier refused to receive it, and it was thereupon sent by a circuitous route to destination without any notice to shippers. The carrier was held liable for delay on the principle that it was his duty, on the refusal of the connecting line to accept the shipment, to notify the shipper, and obtain therefor further shipping or forwarding directions. But in that case it was held that where a connecting carrier over whose line a shipment was routed refused to receive and transport the same, in the absence of notice of such refusal to the consignor, the initial carrier was liable only for the exercise of ordinary care and prudence in selecting another carrier to transport the consignment, and was liable for injuries to the consignment caused by delay from the selection of a carrier having a circuitous route which might have been avoided, as there was a more direct route open.

In the last case cited by opponents, *G. C. & S. F. Ry. Co.* v. *Irvine,* 73 S. W., 540 (Texas Civil Appeals), the shippers demanded that their cattle be shipped over appellant's line from San Angelo to Brownwood, Texas, and then over the line of the Fort Worth and Rio Grande Railway Company. This the appellant refused to do and routed the cattle over its line by way of Temple and Cleburne, a distance of 115 miles further than the route desired by the shipper. In that case, however, it was held that no damages were shown

by the plaintiff as resulting from this routing, and therefore no recovery was allowed upon that ground, and that it was error to submit questions of damages on that account to the jury; but it was also held in that case that in the absence of the selection of a route by the shipper the initial carrier may choose the same, having due regard to the shipper's rights. That case is not at all pertinent.

It is obvious that in the foregoing cases, cited by opponents, where it was said that the carrier should have given notice to the shipper of the deviation from the route agreed upon, that the carrier had completed the transportation over its own line and was only acting in the capacity of a forwarding agent for the shipper.

In the case of *Constable* v. *National Steamship Co.*, 154 U. S., 52, heretofore cited by us, it was claimed that the steamship company was liable for landing a cargo at a different pier than that owned by it *without notice.* Notwithstanding such claim, it was held that the steamship company was not liable.

It is also suggested that in transporting the cattle to Kansas City the defendant used the railroad of the St. Louis and San Francisco Railroad Company from Olathe to Kansas City. This does not seem to be supported by the evidence because Mr. Frost testified that in the morning they passed through Argentine, which was on defendant's line near Kansas City. If, however, the Frisco Railroad between Olathe and Kansas City was used by defendant, it was a shorter and more direct route than defendant's line from Olathe

via Holiday to Kansas City. Such line was evidently not used unless there was some reasonable necessity therefor, as, possibly, that defendant's line at Holiday was flooded. But no loss or damage occurred while the cattle were being transported or detoured by defendant over the Frisco Railroad, and long before the disaster took place the defendant had gotten upon its own line of railroad in getting into the Union Stock Yards.

There was, however, no deviation at all from any route specified in the contract. The action of the defendant railway company in taking the cattle to Kansas City was such as common prudence dictated in view of the conditions then existing, and was in accordance with the established custom. At the time of making the contract of shipment the shippers evidently were not much concerned about the route, as long as the cattle would be transported to the point of destination with reasonable expedition. They were evidently merely concerned about the through rate, which, however, was guaranteed by the initial carrier under the contract.

But suppose the shipper had given specific directions as to the route and the defendant company had expressly agreed to transport by such route and there existed no necessity to deviate therefrom, the defendant would in such event only be regarded as having violated or broken its agreement, and, while by reason of such breach, it could not then claim the benefit of any exemptions contained in such contract, yet could it be held to any greater liability than that imposed

ne common law in the absence of an express con-
?

it had broken an express agreement (which was
he case) could it be held as having contemplated
the result of such breach would be that the cattle
d be thereafter damaged by an unexpected catas-
ne falling unquestionably within the category of
ct of God? Could the breach in such case be re-
ed as the proximate cause of the subsequent dam-

Could such damage have been reasonably con-
lated as likely to flow from the failure of the car-
to carry by the specified route?

is sometimes suggested that if the carrier chooses
isregard the positive instructions of the shipper,
oes so at his own risk, but under all the authorities
l by our opponents, it is apparent that the ques-
of routing is a matter of contract, and if the car-
breaks its contract in that respect, it is only liable
such damages as ought to have been anticipated as
y to flow from or be incurred by the breach. That
distinctly held in *R. R. Co.* v. *Reeves*, 10 Wallace,
where, referring to the claim that there was a spe-
agreement to start the tobacco on the evening be-
the casualty, the court says:

"Even if there had been such a contract, the
failure to comply would have been only the remote
cause of the loss."

CONCLUSION.

It is evident that the defendant cannot be held liable upon any of the grounds stated in the complaint. It was not negligent in detaining the cattle at Wellington or Strong City on account of refusal of the Burlington Road to receive the shipments at Atchison, or pending negotiations with the Missouri Pacific to accept the same as a connecting carrier. In any event, if such delay be regarded as negligent it was not the proximate cause of the injury.

Neither was defendant negligent in taking the cattle to the Kansas City Stock Yards for delivery to the Missouri Pacific Railway Company at the time, since at such time no one anticipated that a flood of such an extraordinary and unprecedented character would overtake or overwhelm the shipment while in the stock yards and before they could be taken out by the connecting carrier. Here again the flood was the proximate cause of the injury and not the act of the defendant in taking the cattle to Kansas City for further transportation by a connecting carrier to destination.

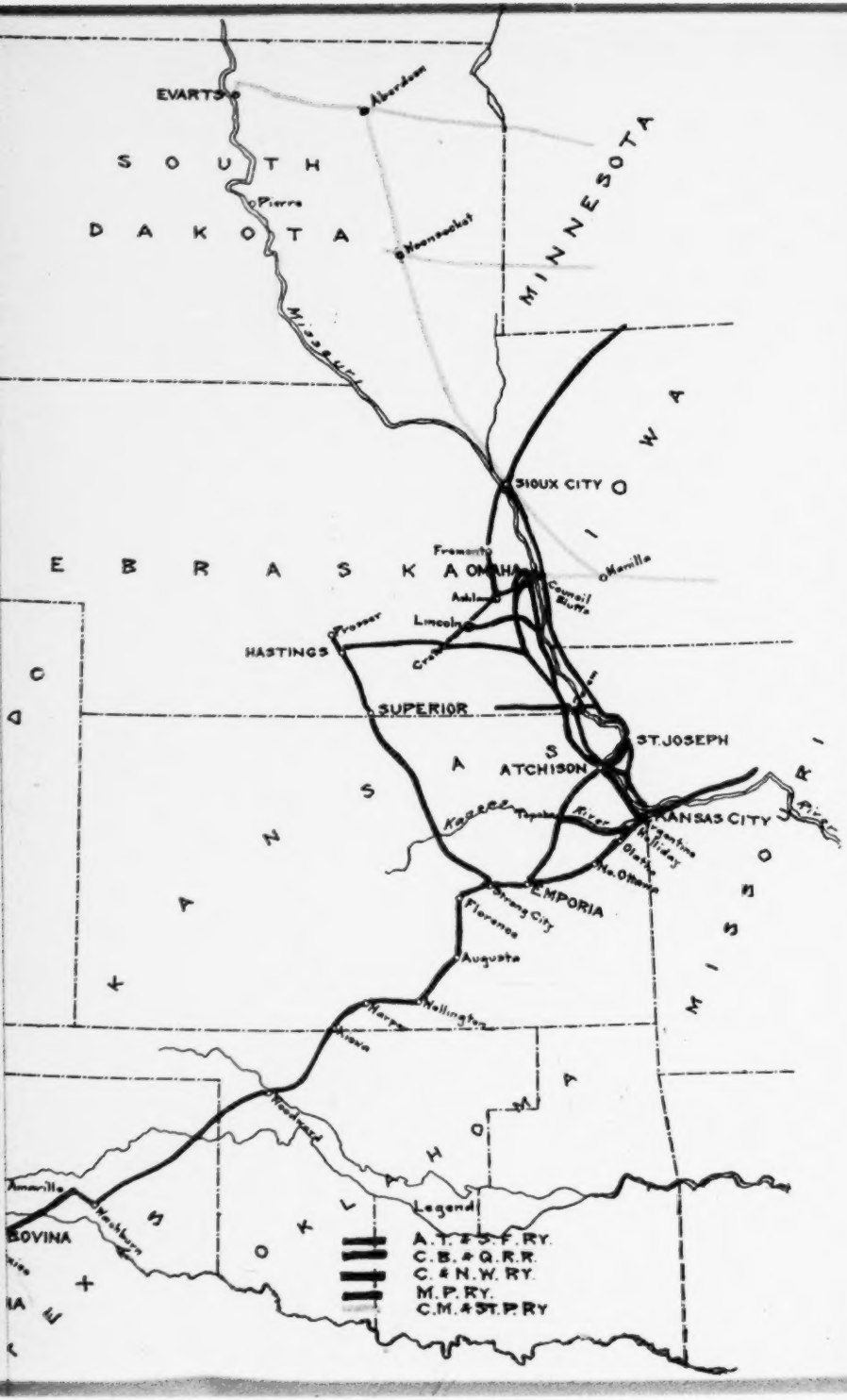
Neither was defendant guilty of negligence because the agents of the Stock Yards Company did not drive the cattle out of the yards somewhere into the country but drove them upon the viaducts above the yards, because the latter place was apparently safe and because at that time the cattle were not in the custody of the defendant.

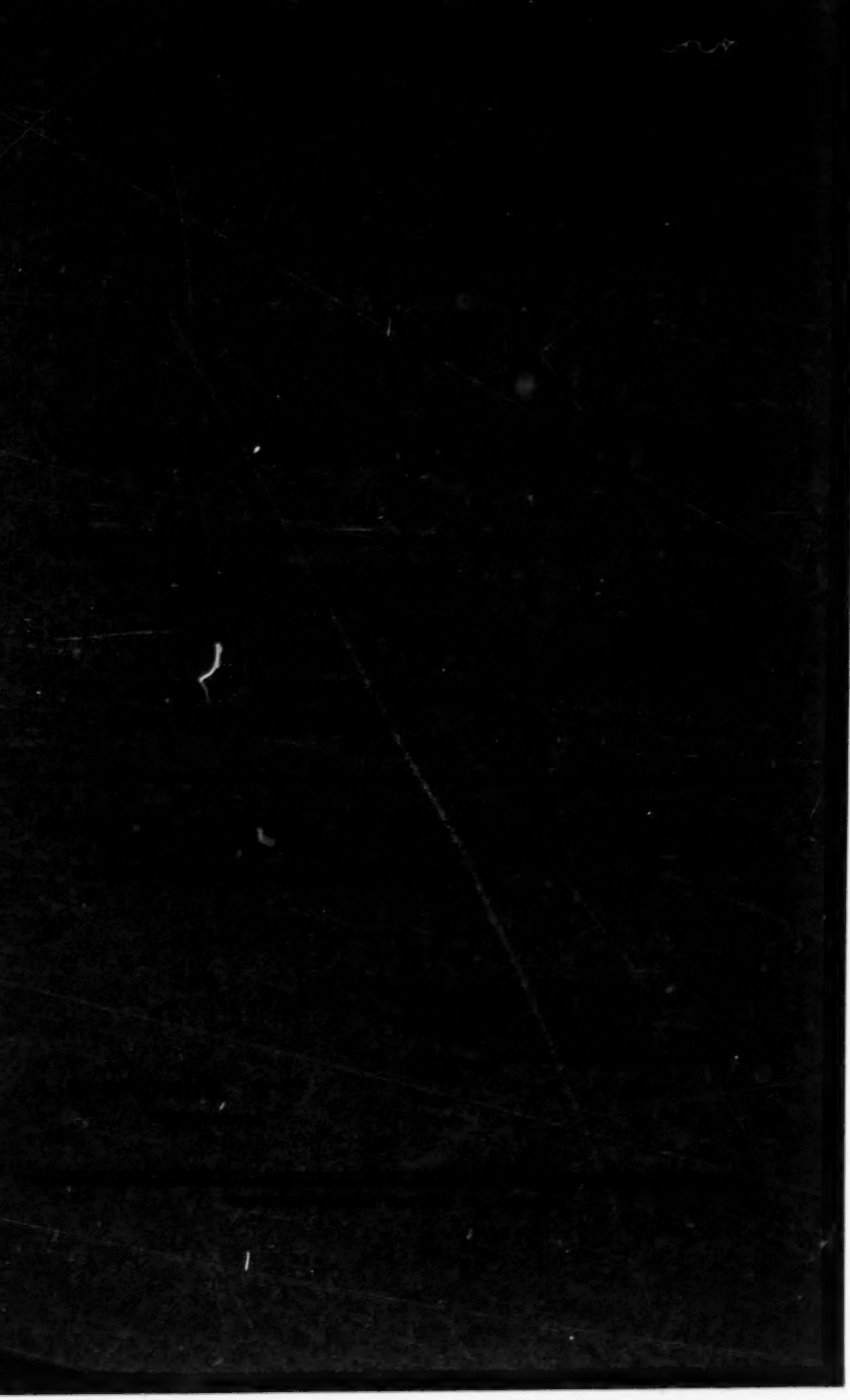
Neither was there any wrongful deviation from

the terms of the shipping contract nor from any instructions given by the shippers. Indeed there was no departure whatever from defendant's contract, which was simply to carry over its own line and deliver to a connecting carrier, to be forwarded to destination. As the Burlington Company was unable to receive the shipment at Atchison it was necessary for the defendant to arrange for delivery to a connecting line at Kansas City. The line to Atchison becoming impassable, the only route left open was that via Kansas City. Defendant was acting in good faith in accordance with the apparent wishes of one of the shippers, who was in charge of the shipment; and in arranging with the Missouri Pacific to receive the cattle at Kansas City it was pursuing the usual course or custom of forwarding such shipments on account of the prior refusal of the Burlington Road to receive that shipment at Atchison. As it disobeyed no instructions of the shipper, but was acting for the best interests of all concerned, it should not be held liable for the result of a catastrophe which no one anticipated.

We, therefore, respectfully submit that the judgment of the Circuit Court in favor of defendant was just and proper and the same should, therefore, be affirmed.

GARDINER LATHROP,
ROBERT DUNLAP,
WM. R. SMITH,
C. ANGEVINE,
Attorneys for Defendant in Error.


EVARTS
Aberdeen
SOUTH DAKOTA
Pierre
Woonsocket
MINNESOTA
Missouri
IOWA
SIOUX CITY
Fremont
EBRASKA
OMAHA
Manilla
Council Bluffs
Ashland
Lincoln
Prosser
HASTINGS
SUPERIOR
ST. JOSEPH
ATCHISON
KANSAS
KANSAS CITY
Kansas River
Topeka
Argentine
Holliday
Olathe
No. Ottawa
EMPORIA
Strong City
Florence
Augusta
Wellington
Harper
Kiowa
Woodward
OKLAHOMA
Amarillo
Wachburn
BOVINA
Legend
A.T. & S.F. RY.
C.B. & Q.R.R.
C. & N.W. RY.
M.P. RY.
C.M. & ST.P. RY



IN THE

Supreme Court of the United States.

THE MINNESOTA AND DAKOTA CATTLE COMPANY, *Petitioner,* *vs.* **THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,** *Respondent.*	No. .....

ANSWER IN OPPOSITION TO PETITION OF PETITIONERS FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

For answer to the petition of petitioners for a writ of *certiorari* proposed to be made to this Honorable Court, the respondent, The Atchison, Topeka and Santa Fe Railway Company, respectfully represents and shows as follows:

The questions involved and the facts in this case are substantially the same as those in the case of the *Empire State Cattle Company et al., Petitioners,* v. *The*

Atchison, Topeka and Santa Fe Railway Company, Respondent, in which a writ of *certiorari* is also asked. This case is based upon the same bill of exceptions as that found in the Empire State Cattle Company case. The evidence is the same, the instructions requested and the rulings of the trial court are the same, and there is the same assignment of errors.

The same points are now presented in this case as are set forth in the application of the Empire State Cattle Company case for a writ of *certiorari.* The ruling of the Circuit Court of Appeals, for the Eighth Circuit, in this case is the same as the ruling made by that court in the Empire State Cattle Company case, and, therefore, there exists no more reason for the issuance of the writ of *certiorari* in the present case than in the other case. It will not be necessary, therefore, to make any extended answer to the present application, but we shall rely very largely upon our answer to the petition in the Empire State Cattle Company case.

The shipments of cattle in this case were made in pursuance of a written live stock contract set up in the answer of the defendant (Rec., 11-12) and which, under the Kansas practice, is admitted to be the contract of the parties, there being a failure to deny the same under oath in the plaintiff's reply. This live stock contract was made by The Pecos Valley & Northeastern Railway Company on behalf of itself and connecting carriers with the Minnesota & Dakota Cattle Company, and involved shipments of cattle from Kenna, New Mexico, consigned to the Minnesota & Dakota Cattle Company at Evarts, South Dakota. No

routes or lines are specified in this contract. (Rec., 17-18.) The endorsement on the contract is "Kenna, N. M. to Evarts, S. D." (Rec., 17-18.)

In this case a portion of the cattle was held at Wellington and a portion at Strong City on account of a washout on the Burlington road whereby that company was unable to receive the cattle at Atchison, as in the other case, and a part of respondent's line of railroad between Topeka and Atchison having become submerged so as to be impassable, the cattle in this case, as in the other case, were taken to the Union Stock Yards at Kansas City for delivery to the Missouri Pacific Railway Company, which was the only way then available, in accordance with an arrangement made with that company to receive the same there, but before they could be taken out of the Union Stock Yards the unprecedented and unexpected flood of the Kansas River so submerged the stock yards on the night of May 30th and the morning of May 31st that it became necessary to drive these cattle with others upon the viaducts in the Union Stock Yards, and because the waters did not recede as rapidly as they came on it was necessary to hold the stock there for several days. Owing to inability to feed the same, on account of the dangerous character of the flood, they suffered the damage complained of.

In this case, as in the other case, the plaintiff asked for a peremptory instruction, which was refused and excepted to, and, after the court had ruled upon defendant's request and given the same and directed the jury to return a verdict for the defendant, plaintiff then requested thirteen different instructions, the same

as in the Empire case. None of these instructions was properly before the Circuit Court of Appeals, as error in respect to any particular instruction was not properly assigned. The peremptory instruction asked for by plaintiff was, as in the other case, general, not being confined to any particular question of law or fact.

There are many misleading statements in the petition in this case, as in the other case. There was no evidence in this case that the shipper directed the carriers to transport the cattle by any particular routes or lines, and there was no undertaking in this case, on the part of respondent, to carry the cattle by any particular one of its own lines. The same necessity existed for taking the cattle to Kansas City in this case as in the other case. Delivery to a connecting carrier could not have been made in any other manner or at any other place than at this terminus on its line, and the agents of petitioner in charge of the shipment were impatient at the delay at Strong City and Wellington.

The unprecedented flood in the valley of the Kaw River did not commence to rise on May 15th, 1903, as stated by petitioner; on the contrary, the unprecedented flood was caused by an unusually heavy rainfall in middle, western and northern Kansas on May 28th, and because of the saturated condition of the soil, on account of previous rains, all of the water ran off into the rivers, and the flood waters at Kansas City were not unprecedented until the night of May 30th and the morning of May 31st, 1903.

There was no wrongful deviation in this case from any route or line agreed upon, nor from any instruc-

tions given by the shipper. The routing specified in the way-bills, as stated in the other case, was the route fixed by the carriers for their own convenience, and without any agreement with the shipper. The route by way of Atchison would have been pursued if feasible at the time; but owing to the flooding of a portion of the track between Topeka and Atchison it was necessary for respondent either to move the shipment to Kansas City, to deliver to a connecting carrier, or to hold it for an indefinite period at Strong City and Wellington.

It is quite erroneous for petitioner to state that by the shipping contract of the parties the cattle were routed to go by way of Atchison.

When the shipment arrived at Olathe, it was then found that a portion of the respondent's tracks between Olathe and Kansas City was under water, so that it was necessary to use the tracks of the St. Louis & San Francisco Railroad Company to get to the Kansas City Stock Yards. The stock yards were then safe, and it was naturally supposed that they would remain safe.

The cattle were taken to the Union Stock Yards at Kansas City and left in the custody of the agents of the Union Stock Yards Company for the benefit of the Missouri Pacific Railway Company; and the agents of the Stock Yards Company took all the care of the cattle that could be expected under the circumstances.

The statement of petitioner that defendant's roads in Kansas from Topeka to Atchison, from Topeka to Kansas City and from Holliday to Kansas City were all flooded from an early hour on the morning of Fri-

day, May 29, 1903, and that all those lines of defendant, over one of which this train of cars would have to go in going to Kansas City, or northwardly, were flooded from an early hour on the morning of Friday, May 29, 1903, is not accurate. A portion only of these tracks was flooded, but the Emporia cut-off to Kansas City, which was being pursued by the defendant, was at that time open, but as the shipment approached Olathe it was then found that a portion of the tracks between Olathe and Kansas City—but a portion only—was impassable on account of water, and this rendered it necessary to haul the shipment over the tracks of the St. Louis & San Francisco Railroad Company into Kansas City. It is true that at that time a portion of the line to Atchison was under water, and that line was, therefore, impassable; and this was the occasion and necessity for taking the shipment to Kansas City.

The statements of petitioner are, in many respects, exaggerated. There is no warrant in the record for the statement of petitioner that defendant "knowingly and willfully went into the mouth of the flood at its climax." Neither is there any warrant in the record for the statement of petitioner as follows:

"It was therefore reckless, if not madness, for defendant, having detained petitioner's cattle at said Strong City and Wellington over two days, to attempt to reach or get across the Kaw River after awaiting the arrival of the very climax of the flood, especially by such attempt at the mouth of that river."

This statement is contradicted by the statement in the petition which almost immediately follows, to the effect that Mr. Kendrick, one of petitioner's witnesses, live stock agent at Kansas City of the Burlington road, testified that his company could have taken peti-

tioner's cattle out of Kansas City, north, across the Kaw River, on the afternoon of Saturday, May 30th, 1903. The latter statement, if true, would conclusively show that the stock yards were regarded as safe at that time. The reason, of course, why the shipment was not given to the Burlington road then was that the defendant had already arranged with the Missouri Pacific Railway Company to receive the shipment at the Union Stock Yards at Kansas City. This fact, however, is not stated by petitioner, although it was undisputed.

Criticisms which we have made upon statements of petitioner in the Empire State Cattle Company case are pertinent to the statements of petitioner in this case. The same authorities are applicable and as to points raised in this case they are identical with those raised in the petition of the Empire State Cattle Company. We, therefore, respectfully refer to our answer to the petition of the Empire State Cattle Company et al., for a writ of *certiorari*, as containing a complete answer to the petition in the present case. A more extended showing is not necessary here.

The judgment in favor of the defendant was right, and no occasion exists for issuing the writ of *certiorari* to review the action of the lower courts upon the evidence.

Respectfully submitted,

GARDINER LATHROP,
ROBERT DUNLAP,
Attorneys for Respondent.

A. B. BROWNE,
Of Counsel.

In the

Supreme Court of the United States

THE MINNESOTA AND DAKOTA FIRE INSURANCE COMPANY, *Petitioner*,

vs.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, *Respondent*.

No. [redacted]

PETITION

FOR THE ISSUE OF THE WRIT OF CERTIORARI HEREIN, TO THE UNITED STATES CIRCUIT COURT OF APPEALS OF THE EIGHTH CIRCUIT.

R. E. BALL and
JAMES S. BOTSFORD,
Attorneys for Petitioner.

—IN THE—

Supreme Court of the United States

THE MINNESOTA AND DAKOTA CATTLE COMPANY, *Petitioner*,

vs.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, *Respondent*.

No.

PETITION

FOR THE ISSUE OF THE WRIT OF CERTIORARI HEREIN, TO THE UNITED STATES CIRCUIT COURT OF APPEALS OF THE EIGHTH CIRCUIT.

Petitioner, for the purpose of obtaining a writ of *certiorari* herein, represents as follows, to-wit:

This suit was brought by petitioner as plaintiff against respondent as defendant, in the Circuit Court of the United States for the District of Kansas, First Division. The case is an action at law to recover about Forty-two Thousand Dollars damages, for the death of a portion and injury to the residue of 2,293 head of cattle belonging to plaintiff, which were shipped over defendant's railway through the State of Kansas. The cattle

were purchased by the plaintiff, in Texas, and were shipped over defendant's road, destined to go to the pastures of the plaintiff in South Dakota.

The action was instituted about the same time as that of the action of he Empire State Cattle Company, *et al.*, against the same defendant, in which case the plaintiffs as petitioners have also filed in this court their petition for the issuance of the writ of *certiorari*. The two cases have been and are companion cases. They were tried at the same time to the same jury, and though separate verdicts were taken, separate judgments entered and separate bills of exceptions allowed and filed in each case, the bills of exception were identical. It was on that account stipulated in the Circuit Court of Appeals (Record *Empire State Cattle Co. et al.* v. *A., T. & S. F. Ry. Co.*, p. 660), to avoid unnecessary costs, that the entire record in the last named case, including the bill of exceptions, be printed in full; that in this cause the entire record be printed, except the bill of exceptions; that said causes in said Court of Appeals might be heard and argued together; and that the court might determine both causes on said printed records the same as if the bill of exceptions had been printed in both records. All of which was done accordingly.

The petition averred and the proof at the trial showed, that the plaintiff cattle company was a corporation, created by the laws of South Dakota and a resident and citizen of said state, and that the defendant railway company was a corporation created by the laws of the State of Kansas, having its chief office at Topeka, in the First Division of the State of Kansas, in which this suit was brought.

The case was tried by the said circuit court, with a jury. The trial continued for a period of nine days, from January 16, 1905, to January 25, 1905, and the

trial was had on the petition of plaintiff, the answer of defendant, and the reply thereto, of the plaintiff.

The case of the plaintiff, both in the Circuit Court and in the Circuit Court of Appeals of the Eighth Circuit, was prosecuted by them upon the theory of the liability of the defendant to plaintiffs, on two grounds. First, that the death of and injury to plaintiffs' cattle resulted from the deviation by defendant of the shipment, without plaintiffs' consent, from the line on which the cattle were routed to go; and, second, that the death of and loss to plaintiffs' cattle resulted also from the different negligences of the defendant specified in the petition of plaintiffs.

At the conclusion of the trial, plaintiff asked the court to give, and presented to the court, fourteen different instructions to the jury. Those instructions may be found from pages 637 to 644 of the Record.

The first instruction (p. 637) was a peremptory instruction which the plaintiff prayed the court to give, instructing the jury peremptorily to return a verdict in the case for the plaintiff. This instruction was founded upon the proposition maintained by plaintiff that defendant was absolutely liable to plaintiff on the facts of the case, as a matter of law, for the death and loss of plaintiff's cattle, by reason of the deviation of the shipment from the routed line without plaintiff's consent; and the prayer in this peremptory instruction proceeded upon the theory that that branch of the case, on the undeniable and conceded facts of the case, presented a question of law for decision by the court.

The other thirteen instructions presented at the same time with said peremptory instruction and to be found from page 638 to 644 of the Record, were instructions asking the court, in the event that the peremptory instruction should be denied, to submit to the jury the is-

sues of negligence in the case. All of the thirteen instructions referred to, asked the court to submit the issues of negligence to the jury. It was, of course, understood by the court, as well as by counsel, that, if the peremptory instruction based on the unlawful and wrongful deviation, was given, it would not be necessary to consider those other instructions.

At the same time plaintiff presented those several instructions, defendant asked a peremptory instruction to the jury. The court gave the defendant's peremptory instruction to the jury, to return a verdict for the defendant, and denied each and all of plaintiff's said instructions. To those several rulings, plaintiff excepted at the time.

The jury, under the instructions of the court, gave a verdict for the defendant (p. 644, Record) and a final judgment was given for the defendant (pp. 30-31, Record, cause 2277).

Afterwards plaintiff filed a Bill of Exceptions in the case, which extends from p. 29 to p. 656 of the printed Record.

The pleadings in the case may be found from p. 5 to p. 25 of the Record proper of this cause (No. 2277).

A history of the trial of the case will be found from p. 21 to p. 28 of the Record in the other case (No. 2276) and from p. 25 to p. 31 of the Record in this case (No. 2277).

The final judgment in the case, in the Circuit Court, was given January 25, 1905.

Within due time the cause was duly removed by a writ of error, citation and by filing an assignment of errors, to the United States Circuit Court of Appeals of the Eighth Circuit.

The case was heard in the Circuit Court of Appeals in December, 1905, and was decided by that court July

9, 1906, by an affirmance of the verdict and judgment of the Circuit Court. (*Empire State Cattle Co.* v. *A., T. & S. F. Ry. Co.*, 147 Fed. Rep., 457; *Minnesota and Dakota Cottle Co.* v. *Same, id.*, 463.)

Afterwards, on August 9, 1906, said Circuit Court of Appeals made an order extending the time to November 1, 1906, within which plaintiffs could file their petition for a rehearing in said cause.

Afterwards, on September 20, 1906, plaintiff filed its petition for a rehearing in said cause, after serving the same on counsel of defendant, and said petition for a rehearing having been served and filed, in accordance with the rules of said United States Circuit Court of Appeals, was considered by that court and denied, November 17, 1906; and, by the denial of said petition for a rehearing, said judgment of affirmance of said Court of Appeals of the said judgment of the said Circuit Court in said cause became final.

Said petitioner further shows to the court, as will appear from the opinion of said Circuit Court of Appeals, (147 Fed., 457), that said judgment of affirmance by said Court of Appeals was based upon the ground adjudged in its opinion by said Circuit Court of Appeals, that, because plaintiffs, at the conclusion of the trial of said cause in said Circuit Court, presented to and requested said Circuit Court to give a peremptory instruction to the jury to return a verdict for plaintiff, plaintiff was precluded from the right to have considered said other thirteen instructions, although presented at the same time of and with said peremptory instruction in the event that said Circuit Court should deny said peremptory instruction asked by plaintiff.

Petitioner says it is advised that said ruling of the Circuit Court of Appeals in its opinion affirming the judgment in this cause, is the first and only time that

it has been adjudged by any American court, state or federal, that a party to a suit, who asks the giving of a peremptory instruction to a jury and at the same time asks the giving of other instructions to the jury submitting the issues to the jury in the event that the peremptory instruction thus asked shall be denied, is precluded, by the asking of such peremptory instruction under those circumstances, from having the other instructions considered, if the peremptory instruction is denied. Petitioner says it is advised that it is the general practice as understood by the members of the American bar, generally that where, as in this case, instructions are asked, one of which is a peremptory instruction to the jury and the others submitting the issues to the jury, for the court, in the event of the denial of the peremptory instruction, to consider the other instructions for the submission of the issues to the jury; and petitioners in that view, submit that the decision in this cause by said Circuit Court of Appeals is contrary to the general practice which prevails in the federal and state courts in like cases.

Petitioner shows to the court, as appears from the opinion of said Circuit Court of Appeals, that said opinion is contrary to a decision of this court and to the decisions in like cases of other Circuit Courts of Appeal and is also contrary to the decisions of the Court of Appeals of the State of New York, cited in said opinion in this case.

Said petitioner, in order to enable this court to see how the issues of deviation and negligence in this case arose, submits in this, its petition for a writ of *certiorari,* the following statement of facts:

On May 25, 1903, petitioner was the owner of the 2,293 head of cattle in controversy, consisting of two trainloads at Kenna, New Mexico, and one trainload at Bovina, Texas, which they shipped from said

points for transportation, by rail, from said point to Evarts, South Dakota; that said shipment was made from said points over three lines of railway, to-wit, from said points to Amarillo, Texas, over the Pecos & North Texas Railway; from Amarillo to Atchison, Kansas, over defendant company's railway, and from Atchison, Kansas, to Evarts, South Dakota, over such connecting line of railway as should receive said cattle from said defendant railway company at said Atchison, Kansas.

Said 2,293 head of cattle, in the cars in which they were shipped, were delivered to defendant at said Amarillo, Texas, for shipment over defendant's railway north to Atchison, Kansas, to be there delivered by it to said connecting railway company, and said defendant, on May 25 and 26, 1903, accepted from plaintiff said 2,293 head of cattle for shipment from said Amarillo, Texas, to said Atchison, Kansas.

Said 2,293 head of cattle were transported by defendant, as such common carrier, from Amarillo, Texas, to Wellington, Kansas, which is a station on said defendant's line of railway between said Amarillo, Texas, and Atchison, Kansas.

In said State of Kansas where said defendant's railway crosses said state, in passing from Amarillo, Texas, to Atchison, Kansas, there are three cities situate on said railway, viz: Wellington, Kansas, Emporia, Kansas, and Topeka, Kansas. The general course of defendant's railway across said State of Kansas, in passing from Amarillo, Texas, to Atchison, Kansas, is from southwest to northeast. Wellington, Kansas, is southwest, or southwesterly, from Topeka, and Emporia, Kansas, is between Wellington, Kansas, and Topeka, Kansas.

Said cattle of petitioner were unloaded by defendant into defendant's pens, at said Wellington and Strong

City, Kansas, on May 26, 1903, for the purpose of being fed and watered and of obtaining rest, as provided by the law of Congress in such cases. Petitioner's cattle were so unloaded on the night of May 26, 1903, and were ready to be reloaded and for the transportation to be continued and the transit resumed on the next morning of May 27, 1903.

During the entire month of May, 1903, there were continuous rains night and day, in the valley of the Kaw river, which flows from Eastern Colorado to Eastern Kansas, east, across the State of Kansas, and which empties into the Missouri river, at Kansas City, Missouri. The watershed of the Kaw river extends from the southern portion of Nebraska across the northern part of Kansas, to a point about ten miles south of said Kaw river.

Said rains created in the valley of said Kaw river an unprecedented flood, which commenced to rise about May 15, 1903.

Notwithstanding said 2,293 head of cattle had been fed and watered and had time to rest so that they were ready to be reloaded and were ready for the transportation and carriage thereof to be resumed and continued on the morning of May 27, 1903, defendant railway company, by reason of the rise of said flood, detained said cattle on its, the defendant's own motion, at said Wellington and Strong City, in the pens of defendant, from the said morning of May 27, 1903, until noon, May 29, 1903. Said May 27, 1903, was on Wednesday, and said flood, as we will see further on, reached its climax Saturday night, May 30, 1903. After so detaining said cattle, and after loading, unloading and reloading said cattle two or three times by defendant railway company, defendant continued the transportation and transit of said cattle Friday, May 29th, 1903, and said cattle were by defendant then hauled to Emporia, Kansas, which last city is southwest

of Topeka, Kansas, and is on the uplands some considerable distance from the valley of the Kaw river at Topeka.

As already stated, said 2,293 head of cattle were routed to go over defendant's railway northeasterly, passing through said Wellington, Kansas, and Strong City, Kansas, Emporia, Kansas, and across the Kaw river at Topeka, and thence northeasterly to Atchison, Kansas, which is situate on the Missouri river. (Opinion of trial court, Record, p. 645, 135 Fed. Rep., 135.)

On the arrival of the cattle at Emporia during the afternoon of Friday, May 29, 1903, it was and had been for six hours and more known by the defendant's officers and servants, that the line on which these cattle were routed to go to Atchison, crossing over the Kaw river at Topeka, was flooded and had been flooded from two o'clock that morning, so as to be impassable; that defendant's line from Topeka to Kansas City had been likewise flooded so as to be impassable and the transit and transportation of said cattle at said Emporia was by defendant, its officers, agents and servants, without plaintiff's consent, deviated from their route and transit over defendant's line northeast to Topeka and Atchison, to another line of defendant, known as the "Ottawa cut-off" and which cut-off extended from Emporia to Kansas City, by way of Ottawa, Olathe and Holliday, and from Holliday over its line from Topeka to Kansas City, Missouri.

In this connection, it should be stated that the defendant had and has no railway running from Kansas City to Atchison, Kansas. The only railway owned or operated by defendant, either in 1903 or since, north or east from Kansas City, is its line from Kansas City to Chicago.

The transit and transportation of said cattle which

were thus deviated at Emporia, Kansas, were so deviated for the purpose of transporting the same over said cut-off of defendant, to Kansas City, Missouri, which was sixty miles and more east of Topeka, Kansas, and distant that far from the line of defendant's railway on which, by the shipping contract of the parties, said cattle were routed to go in their passage to South Dakota.

After the deviation of said cattle at said Emporia, Kansas, over said other line, defendant ascertained that it could not get to Kansas City over its own line; and, on the arrival of the train containing the cars which carried petitioners' cattle, at Olathe, Kansas, during the night of Friday, May 29, 1903, defendant, finding that it could not get to Kansas City over its own line in consequence of the fact that all of its lines west of Kansas City, including said cut-off, were flooded, transported said train of cars containing petitioners' said cattle in a roundabout way to said Kansas City from said Olathe, over the tracks of the St. Louis & San Francisco Railway Company. In this way defendant succeeded in transporting said train of cars conveying petitioners' said cattle from the uplands over which said cattle had been transported up to that time, to the valley and mouth of the Kaw river at Kansas City, where said defendant, without obtaining petitioners' consent, unloaded said cattle in the shipping pens at the Kansas City Stock Yards, alongside of and at the mouth of said Kaw river. One trainload of said cattle were unloaded in said stock yards on the evening of Friday, May 29th, and the other two trains on the morning of Saturday, May 30, 1903. On Sunday, May 31, 1903, the said flood which had so continued during a large part of said month of May, 1903, in the valley of said Kaw river, rose to such heights as to flood said stock yards, and said cattle, having been left without any further attention by defendant railway company after the

deposit by it of said cattle in said stock yards, were, by the agents and employees of said stock yards company, driven out of the pens in said stock yards, on said Sunday, up into the overhanging viaducts and chutes which passed through and over said stock yards. This was done by the officers and employees of the Stock Yards Company, for the purpose of preventing said cattle from being drowned in said stock yards. Said cattle remained in said overhanging chutes and said viaducts several days, during which time, in consequence of the impossibility of feeding and watering said cattle, a large number of them died and the balance were very seriously damaged.

The petition of the plaintiff in the case, after fully stating the foregoing facts, and other facts, summed up therein the grounds of liability claimed against the defendant, as follows:

First. Defendant did not exercise due and reasonable care, but was negligent in its detention of said cattle at Wellington, Kansas, and at Strong City, Kansas, and by the exercise of due and proper diligence could have carried and transported said cattle to Atchison, Kansas, by way of Topeka, Kansas, and delivered the same to the connecting carrier at that point, and thus escaped the peril and destruction of the flood.

Second. That defendant was guilty of negligence, after having so long detained said cattle at Strong City and at Wellington, Kansas, in not further detaining or holding them in some place of safety until the unprecedented flood in the Kaw river, hereinbefore mentioned, had subsided, so that the transportation of said cattle might be safely resumed.

Third. That defendant was guilty of a wrongful and negligent act in diverging and deviating the shipments of said cattle to Kansas City, Missouri, off of the line of transportation over which said cattle were directed by the plaintiff to be carried.

Fourth. That the defendant negligently and carelessly and knowing that an unprecedented flood was de-

scending the Kansas river, hauled said cattle into the low lands at the mouth of said river and unloaded and left them in front of the approaching flood.

Fifth. That defendant, after having wrongfully transported said cattle to Kansas City, Missouri, as aforesaid, carelessly and negligently failed and neglected to move or cause to be moved, the same from their position of peril in the stock yards at Kansas City, Missouri, as defendant had reasonable time and opportunity to do, but the same were overtaken by the flood.

Sixth. That the defendant did not exercise due and reasonable care and diligence and was negligent in not properly or sufficiently feeding and watering said cattle, both while the same were at Strong City, Kansas, and at Wellington, Kansas, and while the same were in the yards and viaducts of the Kansas City Stock Yards Company at Kansas City, Missouri.

At the trial of the case in the Circuit Court, Mr. Connor, who has charge of the United States Weather Bureau office at Kansas City, Missouri, testified that the rainfall which produced the Kaw river flood of May, 1903, commenced in April, 1903; that there was a slight cessation of the rain early in May and another cessation from about the 15th to the 18th of May, 1903, and with that exception the rains were continuous through May, night and day. (p. 300, Record.)

The defendant, during 1903 and ever since, has had its chief offices at Topeka, Kansas, which is about sixty miles west of Kansas City, and Mr. Connor testified that a flood in the Kaw river at Topeka would, in the regular course of the flow of water, reach Kansas City in about thirty hours.

Mr. T. B. Jennings, who had charge of the United States Weather Bureau at Topeka, Kansas, testified that the rainfall the first twenty days of May, 1903, averaged about four inches, in the western part of the Kaw water shed; that from the 21st to the 28th of May, 1903, the

rainfall in that region averaged another four inches, and that on May 28, 1903, came the tremendous rainfall in that region, which was about five and one-fourth inches, at Salina, Kansas. He said, "We got a month's rainfall during the first twenty days of May, we got an average May rainfall, then during the next 7 days that was re-May rainfall, then during the next seven days that was repeated, and on the 28th we had the tremendous downpour in the central counties, extending from Saline county northeastward into Marshall." (p. 129, Record.)

Another witness in the case (p. 223, Record) was W. E. King, Assistant City Engineer of Topeka, Kansas, who testified that he took observations of the rise of the Kaw river at Topeka, and that on the morning of May 28, 1903, at 8:30 o'clock, the Kaw river was then 16.88 feet, or eleven inches, above low water mark; that the Kaw river continued to rise after that; that he kept men stationed at that point until the crest of the flood; that he had a thirty minutes continuous report from May 28, at 8:30, to June 6, at 10:30; that the crest of the flood was reached at 9 p. m. on May 30, and that between 8:30 the morning of the 28th, and 9 p. m. of May 30, the water rose ten and one-tenth feet.

The testimony of Theron S. Cafferty (p. 225, Record), and of C. T. McLellan (p. 292, Record), who were division officers of defendant company, shows that defendant's roads in Kansas, from Topeka to Atchison, from Topeka to Kansas City and from Holliday to Kansas City, were all flooded from an early hour on the morning of Friday, May 29, 1903, and that all those lines of defendant, over one of which this train of cars would have to go in going to Kansas City, or northwardly, were flooded, as already stated, from an early hour on the morning of Friday, May 29, 1903, and that those facts were well known, not only by those division officers of

defendant company, but by Superintendent Hurley and all the general officers of the defendant company; that so extraordinary and perilous were the flood conditions on all of defendant's lines in the State of Kansas on said Friday morning, May 29, 1903, that attention was given to those conditions by Superintendent Hurley and the other general officers of the defendant, and that the movements of the train in question carrying petitioners' said cattle, were directed personally by Superintendent Hurley and the other general officers of the company, and the facts show that for six hours before said Friday noon, May 29, 1903, when said transit was resumed from said Strong City, said lines were and had been so flooded as to make it impossible for the defendant to reach the valley of the Kaw river or to cross the same, or to reach said Kansas City, at the mouth of said Kaw river, over any of the said lines of defendant. The evidence at the trial, which fully sustains all the averments of the petition and shows the foregoing facts, proves that the defendant company in starting said shipment from Strong City and in deviating the same from said Emporia, knowingly and wilfully went into the mouth of the flood, at its climax.

Defendant was negligent respecting the second of the above specifications, in leaving said Strong City on said Friday noon. As already stated, all of defendant's lines in Kansas were flooded early that Friday morning, and the testimony of Assistant Engineer King, of Topeka, shows that on Friday there was a tidal wave of water passing down the Kaw, which had accumulated from the rains described by said Jennings and had reached at that time the City of Topeka and which, according to the testimony of Weather Bureau Superintendent Connor, was certain to reach Kansas City within thirty hours after its passage by Topeka on said Fri-

day. It was therefore reckless, if not madness, for defendant, having detained petitioner's cattle at said Strong City and Wellington over two days, to attempt to reach or get across the Kaw River after awaiting the arrival of the very climax of the flood, especially by such attempt at the mouth of that river.

The third specification, that defendant was negligent in endeavoring to get across the Kaw river by taking the cattle over its cut-off from Emporia, was sustained by the evidence.

The fourth specification of negligence was also sustained by the evidence.

The fifth specification of negligence, that defendant carelessly and negligently failed and neglected to move, or cause to be moved, said cattle from their position of peril in said stock yards, was sustained by the evidence.

One of the witnesses in the case was William M. Kendrick (Record, p. 283), who was the live stock agent at Kansas City of the C., B. & Q. R. R. Co., and who testified that his company could have taken petitioner's cattle out of Kansas City, north across the Kaw River, on the afternoon of Saturday, May 30, 1903; that he offered to defendant to take and transport the cattle in controversy, but that the defendant company refused and neglected to deliver the cattle to the said "Burlington" Company for that purpose; that as evidence of the fact that said Burlington Company could have taken petitioners' cattle out of and across said Kaw River, northerly, out of Kansas City on said Saturday afternoon. Mr. Kendrick testified that on said Saturday evening, May 30, 1903, 35 cars of cattle were shipped out of Kansas City north across said Kaw River by said Burlington Railroad Company (Record, pp. 227-228).

Another witness in the case was W. C. Sparks (Record, p. 345), who testified that he was a member of the

firm of Sparks Brothers, who were engaged in the mule business at Kansas City and had a mule yard a block south of the Kansas City Stock Yards, where petitioners' cattle were penned, and that on Sunday morning, May 31, 1903, Mr. Sparks' company drove out of their said mule yards, between six hundred and seven hundred head of mules, up out of the Kaw valley south, up to and on the uplands immediately south of Kansas City, and that in this way their mules were saved from the flood; and the testimony of Mr. Sparks shows that the same could have been done on that Sunday morning by defendant company, with respect to petitioners' said cattle in said stock yards, and that that was the wise and prudent course to have taken concerning petitioner's cattle instead of driving them up into said overhanging viaducts and chutes where petitioner's cattle were certain to and did suffer and die from starvation and want of water.

Another witness in the case was L. A. Allen (Record, p. 226), who testified that there were plenty of men and instrumentalities in and around the stock yards in Kansas City on that Sunday morning, by whom the cattle of petitioners could have been driven out of said stock yards.

The testimony in the case shows that said cattle of petitioner in the stock yards and the cattle of the plaintiff, Empire State Cattle Company, in the other companion case, presented also to this court for the writ of *certiorari,* constituted about all the cattle that were in the stock yards at said Kansas City on said Sunday, May 31, 1903.

Another witness in the case was one G. A. Roberts (Record, pp. 522-523), who was the live stock agent of the defendant company at Kansas City, whose testimony shows that defendant and its agents and officers gave no attention to the cattle of the petitioners

after they were thus deposited Saturday morning, May 30, 1903, in said stock yards, by the defendant railway company.

Another witness in the case was one A. W. Coombs (Record, p. 580), who was the Assistant General Live Stock Agent of defendant company at Kansas City, and who testified also that the officers of defendant company gave no attention to these cattle after they were deposited Saturday morning in said stock yards.

Another witness in the case was one Sharp, who was the superintendent of defendant's terminals at Kansas City, and whose testimony shows that he and General Superintendent Hurley were engaged Saturday and Saturday afternoon in moving from the defendant's yards at Argentine a large number of cars and engines out of danger from the rising flood, but that neither of those officers, nor any of the other officers of defendant, paid any attention to petitioner's cattle which had been by defendant thus deposited in said stock yards.

Petitioner submits that the opinion of the Circuit Court of Appeals in this case is opposed to the decisions of the New York Court of Appeals, cited in said opinion of said U. S. Court of Appeals. Thus, in *Kurtz* v. *Peck*, 113 N. Y., 222, it was adjudged that:

"Where, upon a jury trial, each party asks that a verdict be directed in his favor and neither asks to go to the jury on the questions of fact, the court is authorized to find upon the facts."

The above language clearly indicates that the court, in that case, held that if a party asks for a peremptory instruction and at the same time asks, in the event of the denial of that instruction, to go to the jury upon questions of fact, the party is not precluded by his peremptory instruction.

The same ruling was made by the same court, in *Sutter* v. *Vanderveer,* 122 N. Y., 652.

In the case of *Koehler* v. *Adler,* 78 N. Y., 287, the New York Court of Appeals, in an opinion delivered by Chief Justice Church and concurred in by the full bench of that court, used the following language:

"The action was for money loaned, and the verdict was directed by the court. The defendant alleges error in not submitting the case to the jury. At the close of the evidence the plaintiff asked the court to direct a verdict in his favor, and the defendant then requested a like direction in his favor. The court stated that he thought the plaintiff entitled to the direction. The counsel for defendant then asked to go to the jury upon the question whether the debt in suit was ever contracted at all. This was denied, and an exception taken. Upon these facts we think that the defendant was entitled to go to the jury if the case warranted it. If nothing further had been done after both parties asked a direction of a verdict, it would be assumed that they intended to waive the right of submission to the jury, and consented that the court should decide the questions of law and fact involved. But after a request, and a refusal to direct a verdict, there is no absolute inconsistency in asking to submit questions of fact to the jury. It is not proper, ordinarily, to direct a verdict if there is any material question of fact which ought to be submitted, and it is error to make the direction in such a case. Parties may consent, however, that the court may pass upon all questions both of fact and law, and if they do they will be bound, and when both parties ask a direction this court will presume such consent. In this case the presumption is repelled by an express request to go to the jury upon a question of fact."

Said opinions of the New York Court of Appeals are in harmony with the understanding of the profession and the practice which everywhere prevails, both in the state and federal courts, by which practice a party may submit a series of instructions to the court, one of which

is peremptory in its character and the others of which are asked by the party submitting the instructions, in the event that the peremptory instruction is denied.

Petitioners are advised that great surprise will be experienced on the part of the bar, if this rule contended for by them in this case is permitted to be overturned by an affirmance of the decision of the Court of Appeals in this case. The opinion of the Court of Appeals in this case is also opposed to the express decision of the Circuit Court of Appeals of the Second Circuit, in the case of *Sigua Iron Co.* v. *Greene,* 88 Fed., 207; 31 C. C. A., 477. The decision of the Circuit Court of Appeals in that case, as will be seen from the opening paragraphs of Circuit Judge Lacombe's opinion, is squarely in favor of the proposition we contend for and is decisive against the decision of the Court of Appeals in this case. Between the Circuit Court of Appeals in the Second Circuit, in that case, and the Circuit Court of Appeals in this case, there is a direct and irreconcilable conflict.

In the case of *Merwin* v. *Magone,* 70 Fed., 776; 17 C. C. A., 361, the court in its opinion by Judge Shipman, said:

"It will be observed that neither party raised a question of fact, and each asked for a direction in his favor. In such a case, the finding is conclusive if there is any evidence to sustain it."

To the same effect is *Magone* v. *Origet,* 70 Fed., 778; 17 C. C. A., 363.

So, in the decision of the Circuit Court of Appeals of the Second Circuit, in the case of *Chrystie* v. *Foster,* 61 Fed., 551; 9 C. C. A., 606, that court, in its opinion by Judge Wallace, said:

"Where the defendant excepts to the direction of a verdict for the plaintiff, but makes no request to go to the jury, he cannot be heard to assail the judgment upon

the ground that there were questions of fact for the jury. *Provost* v. *McEncroe,* 102 N. Y., 650, 5 N. E., 795. Where both parties move for the direction of a verdict, and neither requests any question of fact to be submitted to the jury, they concede that there is no question of fact, and that the case turns wholly upon the questions of law, which are to be determined as though the facts were undisputed."

The opinion of the court is also opposed to the opinion and decision of the Circuit Court of Appeals of the Sixth Circuit, in the case of *Monahan* v. *Grand Trunk Western Ry. Co.,* 138 Fed., 37.

In the opinion in that case, which was delivered by Circuit Judge Severens, the court said:

"The second question propounded by counsel is based upon the following facts: At the close of the production of evidence the counsel for the defendant preferred a request to the court that the jury be directed to return a verdict for that party. This request having been discussed by the counsel for the respective parties, the court was proceeding to give its opinion and instructions to the jury, and seemed to indicate, as plaintiff's counsel thought, a purpose to sustain the defendant's request for a positive direction in its favor. Thereupon the court permitted an interruption to allow the plaintiff's counsel to put on file certain requests to instruct the jury, and assured the counsel that he should have the benefit of them, and then, after giving its views at length, directed a verdict for defendant. The requests filed by plaintiff were eighteen in number, the first being as follows:

'(1) Under the pleadings and proofs, you are instructed that your verdict must be for the plaintiff, and the only question for you is as to the amount of damages.'

"The others related to particular matters of law and fact involved in the issue. The court did not comply with any of these requests. The plaintiff excepted to the ruling of the court upon defendant's motion for directing the verdict in its favor, and to the refusal of the

court to give the instructions requested in his behalf. Counsel for defendant now urge that the request of each of the parties for a peremptory instruction by the court had the effect of a joint withdrawal of the issues of fact from the jury and a submission of them to the court for its determination, and that, the court having decided them in favor of the defendant, both parties are concluded by the finding, citing *Beuttell* v. *Magone*, 157 U. S., 154, 15 Sup. Ct., 566, 39 L. Ed., 654. In that case there was no disputed question of fact, and it only remained for the court to state to the jury what the facts were, and what the law applicable to those facts was. And what the court there held in effect was that the court might state the facts as agreed, and not submit them to the jury. The language of Mr. Justice White, taken apart from the case before the court, might justify the conclusion which the counsel draws from it. But it would seem that the decision cannot be regarded as furnishing a rule for cases where the evidence is conflicting, and where the party whose request is refused has coupled with his request other requests directed to particular aspects of the case, which repel the implication that the party had consented to a submission of the facts to the court. And in all the cases in which the case of *Beuttell* v. *Magone* has been cited in the appellate courts the conditions were the same; there was no disputed question of fact, and there were no special requests. *Merwin* v. *Magone*, 70 Fed., 776, 17 C. C. A., 361; *Magone* v. *Origet*, 70 Fed., 778, 17 C. C. A., 363; *Bradley Timber Co.* v. *White*, 121 Fed., 779, 58 C. C. A., 55; *United States* v. *Bishop*, 125 Fed., 181, 60 C. C. A., 123; *Phoenix Ins. Co.* v. *Kerr*, 129 Fed., 723, 64 C. C. A., 251, 66 L. R. A., 569.

"In *Beuttell* v. *Magone* it is expressly stated that such request made by the respective parties is not the equivalent of a submission of the case to the court without the intervention of a jury, within the intendment of Rev. St., sections 649, 700 (U. S. Comp. St. 1901, pp. 525, 570). The rule must therefore rest upon an implication of consent. Can any implication of consent be fairly drawn when, as here, the party couples his request

for a peremptory instruction in his favor with further requests for instructions on the questions of law applicable to certain assumed facts which the jury may find? The presentation of requests for instructions in that form necessarily imports that the party expects that, if his first request is refused, the case will go to the jury, and that the court will give his other requests, or such of them as the court thinks are proper. For, if his request for a peremptory instruction is given, the others are futile. May not a party ask for a peremptory instruction in his favor, without depriving himself, if the court thinks he is not entitled to it, of the right to have the jury pass upon the evidence and determine the issue? No valid reason is perceived why he should pay the penalty of losing a constitutional right by invoking the opinion of the court *pro hac vice* upon the preliminary question. It is, we believe, a common practice of the state and federal courts in Michigan and elsewhere in this circuit, when the party wishes to obtain the opinion of the court upon the question whether there is any evidence which could fairly be relied upon to defeat his claimed right, and, if the opinion of the court should be that a question for the jury is presented, then to ask that appropriate instructions be given them to guide their deliberations, to present all his requests in a body, and the courts understand that to be the purpose, and conform to it. This was the course pursued here, and we do not think we should be justified in extending the rule stated in *Beuttell* v. *Magone* to a case thus differently circumstanced. In the case before us it is apparent that the judge did not suppose he was intrusted with the ultimate finding of facts in the case. It appears that, before the plaintiff's requests were filed, the court had already indicated to the plaintiff's counsel that it was about to give a direction in favor of the defendant, and had already determined that the plaintiff was not entitled to recover. The court also stated that it would give to the plaintiff the benefit of his requests. But these could be of no benefit if the case was to be concluded by the judge's opinion on the facts. All this indicates that the court was co-operating with the plaintiff's counsel in his effort to save the questions presented by his requests."

So far as we have been able to observe, it is true of all of the cases, state and federal, in which this question of waiver where both parties have joined in asking a peremptory instruction alone, arose that each case presented a single issue on the part of the plaintiff, and that an issue of fact triable by the jury; and, as we have seen, save and except the decision of the Court of Appeals in this case, in each of that class of cases involving a single issue alone, the rulings have been that where either party at the time of presenting a request for a peremptory instruction also presented a series of instructions to be given to the jury in the event of the denial of the peremptory instruction, the party thereby did not waive the right to go to the jury on the issues of fact.

But in the case at bar, there were and are two issues tendered by the plaintiffs. In the case at bar, from the beginning of the case as made by the petition, the plaintiff claimed a liability on the part of the defendant railway carrier upon two grounds, one on the ground of deviation, without plaintiff's consent, of the shipment from its line running to Topeka and Atchison, to Kansas City, from which point it had no line to Atchison, the other the grounds of negligence aforesaid.

We contended in the Court of Appeals, that the authorities are practically unbroken to the effect that where a shipment is deviated by the carrier, as in the case at bar, without the consent of the shipper, the carrier assumes by such deviation absolute responsibility, and the act of God is no defense in that class of cases.

In our brief in the Court of Appeals in this case, in support of the proposition of absolute liability of the defendant carrier, on the ground of deviation, we cited the following authorities:

Crosby v. *Fitch,* 12 Conn., 410, l. c. 419, 420, 423;
R. R. Co. v. *Beck,* 125 Pa. St., 620;
Phillips v. *Bingham,* 26 Ga., 617;
R. R. Co. v. *Cole,* 68 Ga., 623;
Cassilay v. *Young,* 4 B. Mon., 265;
Sager v. *R. R. Co.,* 31 Me., 228, l. c. 238;
R. R. Co. v. *Washburn,* 22 O. St., 324;
Ex. Co. v. *Smith,* 33 O. St., 511;
Brown Co. v. *R. R. Co.,* 63 Minn., 546;
Hedricks v. *Steamship Co.,* 18 La. Ann., 353;
Hastings v. *Pepper,* 11 Pick., 41;
Proctor v. *R. R. Co.,* 105 Mass., 512;
Ry. Co. v. *Allison,* 59 Tex., 193;
Johnson v. *Ry. Co.,* 33 N. Y., 610, l. c. 611;
Goodrich v. *Thompson,* 44 N. Y., 324;
Maghee v. *R. R. Co.,* 45 N. Y., 514;
Keeney v. *Ry. Co.,* 47 N. Y., 525;
Robertson v. *Nat. S. S. Co.,* 14 N. Y. Sup., 313;
Seavey Co. v. *Union Trans. Co.,* 106 Wis., 394;
Ry. Co. v. *Brichetto,* 72 Miss., 891;
R. R. Co. v. *Odil,* 96 Tenn., 61;
Mer. Dis. Tr. Co. v. *Kahn,* 76 Ill., 520;
Vol. 1. Am. & Eng. Enc. Law (2nd Ed.), 594;
Vol. 5 Am. & Eng. Enc. Law (2nd Ed.), 422, 426;
Hutchinson on Carriers, Secs. 190, 191;
Lawson on Bailments, Sec. 127;
Vol. 6 Cyc. of Law & Procedure, 383, 384;
Marsh v. *Un. Pac. R. R. Co.,* 9 Fed. Rep., 873;
Ins. Co. v. *LeRoy,* 7 Cranch., 26;
Hostetter v. *Park,* 137 U. S., 30, l. c. 40;
Constable v. *Steamship Co.,* 154 U. S., 51, l. c. 66.

In the Court of Appeals, in our brief in this case, we contended in support of the proposition that in cases like this where the act of God is claimed to be the cause of the result, the carrier is still liable if it is guilty of contributory negligence, operating in connection with the act of God to cause the injury, and in support of that proposition in our brief in the Court of Appeals, we cited the following authorities:

Sweezy v. *Philadelphia,* 64 Pa. St., 106;
Helbling v. *Cemetery Co.,* 201 Pa. St., 171;
Morrison v. *Davis,* 20 Pa. St., l. c. 176, 177;
Williams v. *Grant,* 1 Conn., 487;
Wallace v. *Clayton,* 42 Ga., 443;
R. R. Co. v. *White,* 88 Ga., 805;
Merritt v. *Earle,* 29 N. Y., 115, l. c. 116f;
Michaels v. *R. R. Co.,* 30 N. Y., 564, l. c. 570;
Bibb Broom Corn Co. v. *A. T. & S. F. Ry. Co.,* 102 N. W. Rep. (Minn. Sup. Ct..), p. 709;
R. R. Co. v. *Curtiss,* 80 Ill., 324;
Wald v. *R. R. Co.,* 162 Ill., 545;
Blodgett v. *Abbott,* 72 Wis., 516;
Nelson v. *Ry. Co.,* 72 Pac. Rep. (Mon. Sup. Ct.), 643, l. c. 651;
Steamboat Co. v. *Tiers,* 24 N. J. Law Rep., 697;
R. R. Co. v. *David,* 6 Heisk, 261;
McGraw v. *R. R. Co.,* 18 W. Va., 361;
Smith v. *Ry. Co.,* 91 Ala, 455, l. c. 456;
Coosa Steamboat Co. v. *Barclay,* 30 Ala., 12, l. c. 127;
Nugent v. *Smith,* 1 C. P. Div., 19 and 423;
Vol. 1 Am. & Eng. Enc. Law (2nd Ed.), 595;
Vol. 5 Am. & Eng. Enc. Law (2nd Ed.), 234;
Hutchinson on Carriers, Secs. 181, 187, 188;
Vol. 6 Cyc. Law & Proced., 377, 384;

Strauss v. *Ry. Co.*, 17 Fed. Rep., 209, l. c. 212;
Caldwell v. *Sou. Ex. Co.*, 4 Fed. Cas. No. 2303, p. 1036.
Thompkins v. *Duches of Ulster*, 24 Fed. Cas. No. 14087a, p. 32;
Southern Pac. Co. v. *Schoer*, 52 C. C. A., 269, l. c. 274;
Newport News Co. v. *U. S.*, 9 C. C. A., 579;
Clark v. *Barnwell*, 12 How., 272; l. c. 280;
Holladay v. *Kennard*, 12 Wall., 254;
Gleason v. *R. R. Co.*, 140 U. S., 433;
The Majestic, 166 U. S., 376, l. c. 386.

Petitioner further represents that its counsel in the Court of Appeals in this case, in their brief in support of the proposition that the question of what was the proximate cause of the loss in this case and whether it was the carrier's negligence or whether it was solely the act of God, as claimed by the carrier, were questions of fact for trial by the jury, and in support of that proposition the case of *Milwaukee & St. Paul* v. *Kellogg*, 94 U. S., 469, was cited. And in the brief of counsel of petitioners in the Court of Appeals, in support of the proposition that the questions of negligence in this case were questions of fact to be decided by the jury, the following cases were cited:

R. R. Co. v. *Stout*, 17 Wall., 657, l. c. 653;
Ry. Co. v. *McDonald*, 152 U. S., 662, l. c. 275;
Marande v. *R. R. Co.*, 184 U. S., 173.

It is thus seen that in this case two issues were involved, both in the Court of Appeals and in the trial court, which, as already stated, were the issues of the carrier's liability on the grounds of deviation and negligence. The liability of the carrier in this case on each of those grounds stands separate and wholly apart from its liability on the other ground. The carrier in this case

might be liable on the ground of deviation and not liable on the ground of negligence, or it might be liable on the grounds of negligence and not be liable on the ground of deviation. The carrier in this case might be liable on both grounds. The decision in this case of either question of liability, namely, deviation or negligence, is not in the nature of things a decision of the other question.

The question of liability on the ground of deviation was a law question, pure and simple. In this case the deviation was without plaintiffs' consent and without any consultation with plaintiffs. And the question of liability of the defendant carrier in this case on the ground of deviation, being a law question, pure and simple, there was no other way for the petitioners in the trial court to reach and obtain a proper determination of that question except to ask, as they did ask, a peremptory instruction to the jury based on that legal proposition of liability.

Since the questions of negligence were questions of fact, triable by the jury, there was no way under the law, since there was not a waiver of the jury trial in the case, for a decision of the questions of negligence except by the jury. Therefore petitioner in asking the court to give a peremptory instruction to the jury, on the basis of liability founded on deviation and at the same time asking the court to give certain instructions on the propositions of negligence, was simply asking the court to pass upon all of the law questions in the case.

As we have already seen, in the case of *Beuttell* v. *Magone*, 157 U. S. 154, and in the other Court of Appeals cases cited in the opinion of the court in this case, there was but a single issue, but if the rule adjudged by the Court of Appeals in its opinion in this case is erroneous and unjust as applied to a case where the plaintiff rests his case on a single proposition of fact, how

much more would that result be true in the case at bar, where the liability is claimed on two grounds.

It is undoubtedly true, petitioners say, that while a decision of the case in favor of the plaintiffs on the ground of deviation would absolve the court from the necessity of a decision on the question of negligence, still judgment against the plaintiffs cannot be given in this case without a decision against them of both questions of deviation and negligence. Petitioners had the right to the trial of both issues by the aforesaid tribunals of judge and jury before a final judgment could be given against them. The trial court in this case assumed to decide and did decide both issues of deviation and negligence against the petitioners.

Our contention in the Court of Appeals was, that the decision of the trial court on the question of deviation was against the unbroken authorities applicable to the question of deviation in such cases, and that the trial court, in taking the case from the jury on the questions of negligence, usurped the province of the jury. However, the Court of Appeals practically refused to decide either question of deviation or negligence, because, as held by the Court of Appeals, petitioner had lost its right as litigant in the case by asking the trial court to decide all the law questions in the case arising on both issues. If the rule sanctioned by the Court of Appeals in this case becomes the rule applicable to all such cases, it would seem that the result would follow that because a litigant in the trial court asks the court to decide all the law questions in the case, the Court of Appeals on becoming possessed of the case will be prevented from saying anything more in an opinion in the case than if without any consideration of the case the word "affirmed" only were written therein.

In view of the conflict between the decision of this

Court of Appeals in this case and the other decisions referred to, state and federal, we submit that in harmony with the decision of this court in *Forsythe* v. *Hammond*, 166 U. S., 506, the writ of *certiorari* prayed for by this petition is the proper remedy to settle the conflict made by this decision. If the decision of the Court of Appeals in this case on this question of practice is correct and is important to every litigant and lawyer in this country, this court ought, we submit, to grant this writ of *certiorari* and on the hearing of this case overrule the decisions of the other Circuit Courts of Appeals with which the decision in this case is in conflict. If, on the other hand, this court is of opinion that the decisions referred to of the other Circuit Courts of Appeals and of the Court of Appeals of New York are correct, then we submit that this court on the hearing of this case should so decide, in order to settle the conflict. A duly certified copy of the entire record in this cause in said Court of Appeals, and the number of uncertified copies required by the rules of this court, accompany this petition and are filed herewith as a part of this petition.

Petitioner prays this court to grant the writ of *certiorari* herein to said Circuit Court of Appeals of the Eighth Circuit and on the hearing and decision of this case by this court that this court will reverse the decisions and judgments of the said Circuit Court and of the said Circuit Court of Appeals herein and remand this case to the Circuit Court for a new trial on both the issues of deviation and negligence.

R. E. Ball

James S. Botsford

Attorneys for Petitioners.

State of Missouri, County of Jackson, ss.

Robert E. Ball, being duly sworn, on his oath states, that he is one of the attorneys of petitioner in this case, and has been in both the Circuit Court and the Court of Appeals; that he has read the foregoing petition and that the matters set forth therein are true, as he verily believes.

Robt E Ball

Sworn to and subscribed before me this 18th day of December, 1906.

My commission expires Jan 27th 1910

Woodson Beason

Notary Public.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1907.

EMPIRE STATE CATTLE COMPANY *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY.

MINNESOTA AND DAKOTA CATTLE COMPANY *v.* SAME.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Nos. 178, 179. Argued March 13, 16, 1908.—Decided May 4, 1908.

The fact that each party asks for a peremptory instruction to find in his favor does not submit the issues of fact to the court so as to deprive either party of the right to ask other instructions and to except to the refusal to give them, or to deprive him of the right to have questions of fact submitted to the jury where the evidence on the issues joined is conflicting or divergent inferences may be drawn therefrom. *Beuttell* v. *Magone*, 157 U. S. 154, distinguished.

Although a peremptory instruction of the trial court cannot be sustained on the ground that both parties having asked a peremptory instruction the case was taken from the jury notwithstanding special instructions had been asked by the defeated party, the verdict will be sustained if the evidence was of such a conclusive character that it would have been the duty of the court to set aside the verdict had it been for the other party.

The Kansas City flood of 1903 was so unexpected and of such an unprecedented character that a railroad company was not, under the circumstances of this case, chargeable with negligence in sending cattle trains *via* Kansas City or for failing to move the cattle from the stock yards before the climax of the flood.

The duty that may rest on a carrier under normal conditions to transport merchandise by a particular, and the most advantageous, route is re-

strained and limited by the right of the carrier, in case of necessity, to resort to such other reasonable direct route as may be available under the existing conditions to carry the freight to its destination, and if such necessity exists, in the absence of negligence in selecting the changed route, the carrier is not responsible for damages resulting from the change even if such change may be, in law, a concurring and proximate cause of such damages.

147 Fed. Rep. 457.

THE facts are stated in the opinion.

Mr. James S. Botsford, with whom *Mr. Buckner F. Deatherage*, *Mr. Odus G. Young* and *Mr. R. E. Ball* were on the brief, for petitioners:

The court should have submitted the question of negligence to the jury, it being the settled law of the Federal appellate courts that it is the province of the jury to determine that question. *Railroad Co.* v. *Stout*, 17 Wall. 657; *Union Pacific Ry. Co.* v. *McDonald*, 152 U. S. 262, 275; *Marande* v. *R. R. Co.*, 184 U. S. 173.

The question of proximate cause was also a question for the jury, and should have been submitted to them. *Milwaukee & St. Paul Ry. Co.* v. *Kellogg*, 94 U. S. 469; *Webb* v. *Rome, Watertown & Ogdensburg R. R. Co.*, 49 N. Y. 420; *Pennsylvania R. R. Co.* v. *Hope*, 80 Pa. St. 373; *Kellogg* v. *The Chicago & Northwestern R. R. Co.*, 26 Wisconsin, 224; *Perley* v. *The Eastern R. R. Co.*, 98 Massachusetts, 414; *Higgins* v. *Dewey*, 107 Massachusetts, 404; *Tent* v. *The Toledo, Peoria & Warsaw R. R. Co.*, 49 Illinois, 349.

Contributory negligence of the carrier renders it liable, notwithstanding the act of God relied on by it as the cause. *Sweezey* v. *Philadelphia*, 64 Pa. St. 106; *Helbling* v. *Cemetery Co.*, 201 Pa. St. 171; *Morrison* v. *Davis*, 20 Pa. St. 176; *Williams* v. *Grant*, 1 Connecticut, 487; *Wallace* v. *Clayton*, 42 Georgia, 443; *Railroad Co.* v. *White*, 88 Georgia, 805; *Merritt* v. *Earle*, 29 N. Y. 115, 116*f*; *Michaels* v. *Railroad Co.*, 30 N. Y. 564, 570; *Bibb Broom Corn Co.* v. *A., T. & S. F. Ry. Co.*, 102 N. W. Rep. (Minn.) 709; *Railroad Co.* v. *Curtiss*, 80 Illinois, 324; *Wald* v.

Railroad Co., 162 Illinois, 545; *Blodgett* v. *Abbott*, 72 Wisconsin, 516; *Nelson* v. *Railway Co.*, 72 Pac. Rep. (Mont.) 643, 651; *Steamboat Co.* v. *Tiers*, 24 N. J. L. 697; *Railroad Co.* v. *David*, 6 Heisk, 261; *McGraw* v. *Railroad Co.*, 18 W. Va. 361; *Smith* v. *Railway Co.*, 91 Alabama, 455; *Coosa Steamboat Co.* v. *Barclay*, 30 Alabama, 12, 127; *Nugent* v. *Smith*, 1 C. P. Div. 19, 423; 1 Am. & Eng. Enc. of Law (2d ed.), 595; 5 Am. & Eng. Enc. of Law (2d ed.), 234; Hutchinson on Carriers, §§ 181, 187, 188; 6 Enc. of L. & P., 377–384; *Strouss* v. *Railway Co.*, 17 Fed. Rep. 209, 212; *Caldwell* v. *Southern Exp. Co.*, 4 Fed. Cas. 1036, No. 2,303; *Thompkins* v. *Duchess of Ulster*, 24 Fed. Cas. 32, No. 14,087*a*; *Southern Pac. Co.* v. *Schoer*, 52 C. C. A. 269, 274; *Newport News Co.* v. *United States*, 9 C. C. A. 579; *Clark* v. *Barnwell*, 12 How. 272, 280; *Holladay* v. *Kennard*, 12 Wall. 254; *Gleason* v. *Railroad Co.*, 140 U. S. 433; *The Majestic*, 166 U. S. 376, 386; *Gratiot W. H. Co.* v. *Railway Co.*, 102 S. W. Rep. 11.

By the deviation of the cattle from Strong City they were taken from a safe place into what was then known to be a hazardous place. If the deviation from Strong City to Kansas City was made without the consent of the shippers, then, according to all the authorities, it was wrongful, and the company is liable on that ground alone. *Crosby* v. *Fitch*, 12 Connecticut, 410, 420, 423; *Railroad Co.* v. *Beck*, 125 Pa. St. 620; *Phillips* v. *Bingham*, 26 Georgia, 617; *Railroad Co.* v. *Cole*, 68 Georgia, 623; *Cassilay* v. *Young*, 4 B. Mon. 265; *Sager* v. *Railroad Co.*, 31 Maine, 228, 238; *Railroad Co.* v. *Washburn*, 22 Ohio St. 324; *Express Co.* v. *Smith*, 33 O. St. 511; *Brown Co.* v. *Railroad Co.*, 63 Minnesota, 546; *Hendricks* v. *Steamship Co.*, 18 La. Ann. 353; *Hastings* v. *Pepper*, 11 Pick. 41; *Proctor* v. *Railroad Co.*, 105 Massachusetts, 512; *Railway Co.* v. *Allison*, 59 Texas, 193; *Johnson* v. *Railway Co.*, 33 N. Y. 610; *Goodrich* v. *Thompson*, 44 N. Y. 324; *Maghee* v. *Railroad Co.*, 45 N. Y. 514; *Keeney* v. *Railway Co.*, 47 N. Y. 525; *Robertson* v. *Nat. S. S. Co.*, 14 N. Y. Supp. 313; *Seavey Co.* v. *Union Trans. Co.*, 106 Wisconsin, 394; *Railway Co.* v. *Brichetto*, 72 Mississippi, 891; *Railroad Co.*

v. *Odil*, 96 Tennessee, 61; *Mer. Dis. Tr. Co.* v. *Kahn*, 76 Illinois, 520; 1 Am. & Eng. Enc. of Law (2d ed.), 594; 5 Am. & Eng. Enc. of Law (2d ed.), 422, 426; Hutchinson on Carriers, §§ 190, 191; Lawson on Bailments, § 127; 6 Cyc. of Law & Pro. 383; *Marsh* v. *Union Pac. R. R. Co.*, 9 Fed. Rep. 873; *Insurance Co.* v. *LeRoy*, 7 Cranch, 26; *Hostetter* v. *Park*, 137 U. S. 30, 40; *Constable* v. *Steamship Co.*, 154 U. S. 51, 61; *Texas & P. Ry. Co.* v. *Eastin* (Texas), 102 S. W. Rep. 105.

Mr. Gardiner Lathrop and *Mr. Robert Dunlap*, with whom *Mr. William R. Smith* and *Mr. C. Angevine* were on the brief, for respondent:

As each party asked for a peremptory instruction in its favor and argued and submitted such instructions together to the court, and the court determined the same, it must be assumed that they both submitted the case to the court to find the facts upon the assumption that under the evidence there was only involved a question of law as to liability or nonliability. *Beuttell* v. *Magone*, 157 U. S. 154; *Bankers' Mutual Casualty Co.* v. *State Bank of Goffs*, 150 Fed. Rep. 78; *City of Defiance* v. *McGonigale*, 150 Fed. Rep. 689; *Johnson's Admr.* v. *C. & O. Ry. Co.*, 21 S. E. Rep. 238; *S. C.*, 91 Virginia, 171; *Insurance Co.* v. *Wisconsin Central Ry.*, 134 Fed. Rep. 794, 798; *Empire State Cattle Co.* v. *A., T. & S. F. Ry. Co.*, 147 Fed. Rep. 459; *Nashville, C. & St. L. Ry. Co.* v. *Sansom*, 84 S. W. Rep. 615, 616; *S. C.*, 113 Tennessee, 683.

Nevertheless, as the evidence was of such a conclusive character in favor of the defendant that the trial court would have been obliged to set aside a verdict in favor of plaintiffs, it therefore properly directed a verdict for the defendant. This is true not only in respect to any question of alleged negligence, but also in respect to the question whether such alleged negligence was the proximate cause of the damage and also whether there was any wrongful deviation from instructions, if any, of the shipper, or from any alleged agreement of defendant. *West* v. *Camden*, 135 U. S. 508; *Southern Pacific Co.* v. *Pool*, 160

U. S. 440; *Goodlander Mill Co.* v. *Standard Oil Co.*, 63 Fed. Rep. 400; *Christenson* v. *Metropolitan Street Ry. Co.*, 137 Fed. Rep. 708; *Bowditch* v. *Boston*, 101 U. S. 18; *Patton* v. *Texas & Pacific Ry. Co.*, 179 U. S. 658.

The overflowing of the Kansas City stock yards by this flood being sudden, extraordinary and unprecedented, defendant cannot be held liable for damages caused in consequence thereof as it could not be expected to anticipate the unusual character of the same. The antecedent delay at Strong City and Wellington, as well as the taking of the cattle to and depositing the same in the Union stock yards for the connecting carrier was not culpable negligence, as it could not be anticipated at the time that the disaster complained of was likely to result from any of the preceding acts of the defendant. Such a disaster was not then probable. *Lightfoot* v. *St. Louis & San Francisco Ry. Co.*, 104 S. W. Rep. 483; *Insurance Co.* v. *Boon*, 95 U. S. 130, 131; *Daniel* v. *Directors &c. of Metropolitan Ry. Co.*, L. R., 5 Eng. & Ir. App. (House of Lords) 45; *Milwaukee &c. Ry. Co.* v. *Kellogg*, 94 U. S. 475; *Kreigh* v. *Westinghouse, Church, Kerr & Co.*, 152 Fed. Rep. 120; *Cole* v. *German Savings &c. Society*, 124 Fed. Rep. 113; *Stetanowski* v. *Chain Belt Co.*, 109 N. W. Rep. 532; *Mo. Pac. Ry.* v. *Columbia*, 65 Kansas, 390; *S. C.*, 69 Pac. Rep. 338; *Morrison* v. *Davis*, 20 Pa. St. 175; *Railroad Company* v. *Reeves*, 10 Wallace, 176; *C., St. P. M. & O. Ry.* v. *Elliott*, 55 Fed. Rep. 949–952; *Scheffer* v. *Railroad Company*, 105 U. S. 249; *Glassey* v. *Worcester Con. St. Ry. Co.*, 185 Massachusetts, 315; *S. C.*, 70 N. E. Rep. 199; *Stone* v. *B. & A. R. R. Co.*, 171 Massachusetts, 536; *S. C.*, 51 N. E. Rep. 1; Vol. 7, Rose's Notes to U. S. Rep., Reeves Case, pp. 297, 298; Hutchinson on Carriers, 2d ed. by Meachem, §§ 193–195; 5 Am. & Eng. Enc. of Law (2d ed.), 259, 260.

As during the transit over defendant's lines a necessity arose which showed that the cattle could not be delivered by it to the Burlington road at Atchison, as it had intended to do, without further delays likely to injure the shipment, it was in any aspect of the case justified in arranging for delivery to

the Missouri Pacific at Kansas City and in transporting the cattle to the Union stock yards at that place. In doing so there would have been no wrongful deviation even if the contract had expressly provided for carriage over its own line to Atchison. It was simply acting in accordance with a well-established custom. *Hostetter* v. *Park*, 137 U. S. 31, 40; *M., K. & T. R. R. Co.* v. *Olive*, 23 S. W. Rep. 526; 1 Am. & Eng. Enc. of Law (2d ed.), 1063; Ray's Negligence of Imposed Duties, 317; *International &c. Ry. Co.* v. *Wentworth*, 27 S. W. Rep. 680; *Propeller Niagara* v. *Cordes*, 21 How. 7; *Reade* v. *Comm. Ins. Co.*, 3 Johns. 352; *Foster* v. *Great Western Ry. Co.*, L. R. (1904), 2 K. B. Div. 306.

MR. JUSTICE WHITE delivered the opinion of the court.

With the object of saving them from destruction by the flood which engulfed portions of Kansas City on May 31 and the first week of June, 1903, more than three thousand head of cattle belonging to the petitioners, which were in the Kansas City stock yards, were driven and crowded upon certain overhead viaducts in those yards. For about seven days, until the subsidence of the flood, they were there detained and could not be properly fed and watered. Many of them died and the remainder were greatly lessened in value. These actions were brought by the petitioners to recover for the loss so sustained upon the ground that the cattle were in the control of the defendant railway company as a common carrier, and that the loss sustained was occasioned by its negligence.

The railway company defended in each case upon the ground that before the loss happened it had delivered the cattle to a connecting carrier, but that if the cattle were in its custody it was without fault, and the damage was solely the result of an act of God, that is, the flood above referred to.

As the cases depended upon substantially similar facts and involved identical questions of law, they were tried together, and at the close of the evidence the trial court denied a peremp-

tory instruction asked on behalf of the plaintiffs, and gave one asked on behalf of the railway company. 135 Fed. Rep. 135.

While there was some contention in the argument as to what took place concerning the requests for peremptory instructions, we think the bill of exceptions establishes that at the close of the evidence the plaintiffs requested a peremptory instruction in their favor, and on its being refused duly excepted and asked a number of special instructions, which were each in turn refused, and exceptions were separately reserved, and the court then granted a request for a peremptory instruction in favor of the railway company, to which the plaintiffs excepted.

On the writs of error which were prosecuted from the Circuit Court of Appeals for the Eighth Circuit that court affirmed the judgment on the ground that as both parties had asked a peremptory instruction the facts were thereby submitted to the trial judge, and hence the only inquiry open was whether any evidence had been introduced which tended to support the inferences of fact drawn by the trial judge from the evidence. One of the members of the Circuit Court of Appeals (Circuit Judge Sandborn) did not concur in the opinion of the court, because he deemed that as the request for peremptory instruction made on behalf of plaintiffs was followed by special requests seeking to have the jury determine the facts, the asking for a peremptory instruction did not amount to a submission of the facts to the court so as to exclude the right to have the case go to the jury in accordance with the subsequent special requests. He, nevertheless, concurred in the judgment of affirmance, because, after examining the entire case, he was of opinion that prejudicial error had not been committed, as the evidence was insufficient to have justified the submission of the issues to the jury. 147 Fed. Rep. 457.

The cases are here because of the allowance of writs of certiorari. They present similar questions of fact and law, were argued together and are, therefore, embraced in one opinion. The scope of the inquiry before us needs, at the outset, to be accurately fixed. To do so requires us to consider the question

which gave rise to a division of opinion in the Circuit Court of Appeals. If it be that the request by both parties for a peremptory instruction is to be treated as a submission of the cause to the court, despite the fact that the plaintiffs asked special instructions upon the effect of the evidence then, as said in *Beuttell* v. *Magone*, 157 U. S. 154, "the facts having been thus submitted to the court, we are limited in reviewing its action, to a consideration of the correctness of the finding on the law and must affirm if there be any evidence in support thereof." If, on the other hand, it be that, although the plaintiffs had requested a peremptory instruction, the right to go to the jury was not waived in view of the other requested instructions, then our inquiry has a wider scope, that is, extends to determining whether the special instructions asked were rightly refused, either because of their inherent unsoundness or because, in any event, the evidence was not such as would have justified the court in submitting the case to the jury. It was settled in *Beuttell* v. *Magone*, *supra*, that where both parties request a peremptory instruction and do nothing more, they thereby assume the facts to be undisputed and in effect submit to the trial judge the determination of the inferences proper to be drawn from them. But nothing in that ruling sustains the view that a party may not request a peremptory instruction, and yet, upon the refusal of the court to give it, insist, by appropriate requests, upon the submission of the case to the jury, where the evidence is conflicting or the inferences to be drawn from the testimony are divergent. To hold the contrary would unduly extend the doctrine of *Beuttell* v. *Magone*, by causing it to embrace a case not within the ruling in that case made. The distinction between a case like the one before us and that which was under consideration in *Beuttell* v. *Magone* has been pointed out in several recent decisions of Circuit Courts of Appeals. It was accurately noted in an opinion delivered by Circuit Judge Severens, speaking for the Circuit Court of Appeals for the Sixth Circuit, in *Minahan* v. *Grand Trunk Ry. Co.*, 138 Fed. Rep. 37, 41, and was also lucidly stated in the concurring opinion of

Shelby, Circuit Judge, in *McCormack* v. *National City Bank of Waco*, 142 Fed. Rep. 132, where, referring to *Beuttell* v. *Magone*, he said (p. 133):

"A party may believe that a certain fact which is proved without conflict or dispute entitles him to a verdict. But there may be evidence of other, but controverted facts, which, if proved to the satisfaction of the jury, entitles him to a verdict, regardless of the evidence on which he relies in the first place. It cannot be that the practice would not permit him to ask for peremptory instructions, and, if the court refuses, to then ask for instructions submitting the other question to the jury. And if he has the right to do this, no request for instructions that his opponent may ask can deprive him of the right. There is nothing in *Beuttell* v. *Magone*, *supra*, that conflicts with this view when the announcement of the court is applied to the facts of the case as stated in the opinion.

"In New York there are many cases showing conformity to the practice announced in *Beuttell* v. *Magone*, but they clearly recognize the right of a party who has asked for peremptory instructions to go to the jury on controverted questions of fact if he asks the court to submit such questions to the jury. *Kirtz* v. *Peck*, 113 N. Y. 226; *S. C.*, 21 N. E. 130; *Sutter* v. *Vanderveer*, 122 N. Y. 652; *S. C.*, 25 N. E. 907.

"The fact that each party asks for a peremptory instruction to find in his favor does not submit the issues of fact to the court so as to deprive the party of the right to ask other instructions, and to except to the refusal to give them, nor does it deprive him of the right to have questions of fact submitted to the jury if issues are joined on which conflicting evidence has been offered. *Minahan* v. *G. T. W. Ry. Co.* (C. C. A.), 138 Fed. Rep. 37."

From this it follows that the action of the trial court in giving the peremptory instruction to return a verdict for the railway company cannot be sustained merely because of the request made by both parties for a peremptory instruction in view of the special requests asked on behalf of the plaintiffs. The

correctness, therefore, of the action of the court in giving the peremptory instruction depends, not upon the mere requests which were made on that subject, but upon whether the state of the proof was such as to have authorized the court, in the exercise of a sound discretion, to decline to submit the cause to the jury. That is to say, the validity of the peremptory instruction must depend upon whether the evidence was so undisputed or was of such a conclusive character as would have made it the duty of the court to set aside the verdicts if the cases had been given to the jury and verdicts returned in favor of the plaintiff. *McGuire* v. *Blount*, 199 U. S. 142, 148, and cases cited; *Marande* v. *Texas & P. R. Co.*, 184 U. S. 191, and cases cited; *Southern Pacific Co.* v. *Pool*, 160 U. S. 440, and cases cited.

To dispose of this question requires us to consider somewhat in detail the origin of the controversy, the contracts of shipment from which the controversy arose and the proof which is embodied in the bill of exceptions relied on to justify the inference of liability on the part of the railway company.

The action brought by the Minnesota and Dakota Cattle Company concerned 1,635 head of cattle, shipped from Kenna, in the Territory of New Mexico, and 659 head, shipped from Bovina, Texas, both in the latter part of May, 1903, to Evarts, South Dakota, over the line of the Pecos Valley and Northeastern Railway Company, to be transported by that company "and connecting carriers." The other action concerned 798 head of cattle, shipped about the same time, at Hereford, Texas, by the Pecos and Northern Texas Railway Company, "and connecting carriers," to the same place in South Dakota.

There were written contracts of shipment, which it was declared embodied the entire agreement of the parties, and which contained stipulations restricting the liability of each carrier to his own line. In none of the contracts was there a specification as to the several lines of railroad over which the cattle should be transported. The station agent of the initial carrier, however, delivered way bills to the train conductors, routing the

cattle by the Atchison, Topeka and Santa Fé Railway to Atchison, thence by the Burlington Railroad from Atchison to Council Bluffs, and thence by the Milwaukee road from Council Bluffs to destination in South Dakota. Such station agent also made a memorandum on the back of some of the contracts, "Hereford to Atchison;" on others the endorsement was "Kenna, N. M., to Evarts, S. D.;" on others the endorsement was "Kenna, N. M., to Atchison, Kan.;" on others the endorsement was "Bovina, Tex., to Atchison, Kan." It was stipulated that the stock was not to be transported in any specified time nor delivered at destination at any particular date, nor in season for any particular market. The shipper also expressly assumed the risk of and released the company from any loss which might be sustained by reason of any delay in the transportation of the stock or injury thereto caused by damage to tracks or yards from storms and washouts. There was also an express agreement on the part of the shipper to care for the stock at feeding points. The company on its part agreed as follows:

"The company agrees to stop cars at any of its stations for watering and feeding, where it has facilities for so doing, whenever requested to do so in writing by the owner or attendant in charge, and the party of the second part agrees not to confine his stock for longer period than twenty-eight consecutive hours without unloading the same for rest, feeding and water for a period of at least five consecutive hours, provided he is not prevented from doing so by storm or other accidental causes."

The Pecos Valley and Northeastern Railway was the more southerly of the initial carriers. It connected at its northern terminus with the Pecos and Northern Texas road, and this latter road connected with the Atchison, Topeka and Santa Fé. This latter road, from its point of connection with the Pecos and Northern Texas Railway Company (at Amarillo or Higgins, Texas), extends in a generally northeasterly direction through Oklahoma and Kansas. The main line extends by way of Topeka to Kansas City, but at Emporia, south of To-

peka, there is a branch line or cut-off extending towards Kansas City, and which joins the main line running from Topeka to Kansas City at a place called Holliday, thirteen miles west of Kansas City. From Topeka, where the main line veers eastwardly to Kansas City, there is a branch line running to Atchison, which is about fifty miles north or northwest of Kansas City, on the Missouri River. At Kansas City both the Burlington and the Missouri Pacific systems connect with the Atchison, the two roads named operating lines which run in a northwesterly direction, on opposite banks of the Missouri River, to Council Bluffs and Omaha, respectively, and the two roads in question also connect at Atchison with the Achison road, which reaches that point by the branch from Topeka. The Missouri Pacific and Burlington systems connect, respectively, at Omaha and Council Bluffs with the Chicago, Milwaukee and St. Paul Railway, and the latter road extends to Evarts, South Dakota.

The Atchison company had feeding yards at Wellington and Strong City, these places being on the line of its road and situated to the south of Emporia. The road also had feeding yards at Emporia. There was no yard for such purposes, however, between Emporia and Atchison, or at Atchison itself, nor did the Burlington road have feeding yards at Atchison. The proof also was that to unload and reload an ordinary trainload of cattle required from four to five hours. There were in 1903, when the shipments in question were made, as there are at the present time, large public stock yards at Kansas City, where stock in transit could be unloaded for feeding and rest, and to enable it to be transferred from one road to another.

The cattle in controversy were conveyed from the starting points in four trains, and the order in which they arrived at feeding stations was as follows: Empire Company train (21 cars), arrived at Strong City (north of and run of five hours from Wellington) on Wednesday, May 27, 1903, 12:10 A. M.; First Minnesota Company train (20 cars), arrived at Wellington on Tuesday, May 26, 1903, between 10 and 11 P. M.; Second Minnesota Company train (19 cars), arrived at Wellington on Wed-

nesday, May 27, 1903, 5:30 P. M.; Third Minnesota Company train (20 cars), arrived at Wellington on Wednesday, May 27, 1903, between 6 and 7 P. M.

About six or seven hours before the arrival at Strong City of the train containing the Empire company cattle, above referred to, a shipment of cattle made by the same company to the same destination, but which is not here involved, had reached Strong City, and had been there unloaded for feeding and rest. Early on the next morning (Wednesday, May 27), the reloading of these cattle was commenced, but was stopped because of a notice to the Atchison of a washout on the Burlington road, north of Atchison. Notice, however, having been received by the Atchison from the Burlington on the afternoon of the same day that the washout had been repaired, the cattle were again reloaded and the train left Strong City at about 8:30 o'clock that night (Wednesday, May 27). In ordinary course the train would have been delivered to the Burlington at Atchison at about daylight the next (Thursday) morning, but about one o'clock on that morning the Burlington sent the following message to the Atchison company: "We cannot now accept Evarts stock. Our line washed out again. Will inform you when we can transmit stock." The chief clerk of the general superintendent of the Atchison, in communicating this message to him, also informed him that the track at Valley Falls, a station on the Atchison road between Topeka and Atchison, was in very bad condition, and that there was "no certainty as to how long it will be passable." We shall trace the further movement of this train hereafter.

Promptly after its arrival at Wellington the cattle in the first train of the Minnesota company were unloaded for food and rest. They were reloaded at about five o'clock on Wednesday morning, May 27. When information as to the washout on the Burlington came early on that morning the cattle were again unloaded, but when the notification was received that the tracks of the Burlington had been repaired the cattle were a second time reloaded, and the train left Wellington that even-

ing at about eight o'clock for Atchison. When the train was a few miles east of Strong City, very early on Thursday morning, it was ordered to return as far as Strong City and there unload. This order was given in consequence of the second message from the Burlington road above referred to. From this situation it resulted that all the cattle in controversy were in the yards of the Atchison at Wellington or Strong City, that road being uncertain as to the condition of its own tracks on the branch road from Topeka to Atchison, and knowing to a certainty that the Burlington had declined to receive the cattle at Atchison, on account of the condition of its tracks. Under these circumstances, promptly, on Thursday morning, negotiations were commenced by the Atchison with the Missouri Pacific road and by noon that road had agreed to receive the cattle at Kansas City, and soon afterward instructions were given to load the stock then at Wellington and Strong City, preparatory to being forwarded to Kansas City.

The first Empire company train, which was on its way to Atchison when the information of the break came, on Thursday morning, and whose movements we have said we would hereafter trace, along with a train of twenty-two cars which had preceded it with cattle destined to Sioux City, were ordered to proceed to Kansas City, and did so. One of the Minnesota company trains, of nineteen cars, at the Wellington yards was also directed to depart for Kansas City on Thursday. Before, however, it was practicable to move the other cattle trains which remained at Wellington and Strong City, uncertainty arose as to the ability of the Missouri Pacific to take the cattle forward from Kansas City, caused by a telegram on that subject, received from the general superintendent of the Missouri Pacific road. By about nine o'clock on that (Thursday) evening, however, this uncertainty was dispelled, and about the same time the Atchison company was notified by the Burlington that it also was in condition to receive and forward cattle at Kansas City. On the next (Friday) morning the first Minnesota company train of twenty cars, which was at Strong City,

to which point it had been turned back on the advice of the washout on the Burlington road, and the Empire train of twenty-one cars originally unloaded at Strong City were reloaded, and the two trains were consolidated into one and started about noon on Friday for Kansas City. So, also, the third Minnesota company train of twenty cars, which had been held at Wellington waiting for an opportunity to send it forward, left there early Friday morning.

The three trainloads of cattle previously referred to, which had been ordered to Kansas City and started for that point during Thursday before the uncertainty arose as to the ability of the Missouri Pacific to receive and forward the cattle from Kansas City, reached that place as follows: forty-two cars, consisting of the Sioux City and first Empire train, arrived on the morning of Friday, and were delivered to the Burlington and went forward. The nineteen cars belonging to the Minnesota company, which had left Wellington also on Thursday, arrived about three o'clock on the afternoon of Friday, and because of the length of the journey from Wellington did not go forward, but were unloaded at the stock yards for food and rest. The trains which did not get away from Wellington and Strong City on Thursday before the uncertainty arose, but which left those places on Friday after the uncertainty had been dispelled, reached Kansas City early on Saturday morning. The first of these latter trainloads, the twenty cars from Wellington, arrived at about six o'clock, and the cars were placed on the transfer track of the Missouri Pacific at the stock yards and were taken in charge by the switching crew of that company and were unloaded at its chutes at the stock yards. The second—that is, the consolidated train from Strong City—arrived an hour or two afterwards, and was unloaded at the stock yards, the delivery there being claimed to be a delivery to the Missouri Pacific Company.

In the early part of the forenoon of Saturday some of the local officers of the Missouri Pacific, asserting that they had not been notified by the general officers of that road of an arrangement

to take the cattle, hesitated to do so. By noon, however, the doubt was dispelled, since the local officers of the Missouri Pacific applied to the Atchison for cars to move the cattle. Steps were taken by the Atchison to at once furnish the cars, but before midday the Atchison company was notified that the cars would not be required, as the Missouri Pacific would be unable, because of the condition of its tracks, to move the cattle forward on that day.

Prior to the shipments of the cattle in question and at the time of the movement of the trains to which we have referred, there had been copious rainfalls in the valley of the Kaw, or Kansas, River, a tributary of the Missouri River, emptying into the same at Kansas City, and the interruptions and washouts, to which we have referred, were the results of flood conditions created by such rains. The Kansas, or Kaw, River and the Missouri River north of Kansas City, and the Kaw River, especially at Kansas City, were undoubtedly in a more or less accentuated flood condition. On Saturday morning the stage of the Kansas River at Kansas City was slightly below, and certainly was not higher, than that of the previous highest flood recorded at that point, viz., the flood of 1881. The stage of the 1881 rise, however, was not considered dangerous in the yards in 1903, as in the prior flood the water only came upon a small portion of the yard and afterwards the yards were filled and graded, so that in 1903 a rise equalling that of 1881 would not have come into any of the pens. The reports on Saturday from the weather observer at Topeka, Kansas City, and from other sources, were not alarming. Between the time, on Saturday morning, when the cattle were put in the stock yards, and Sunday morning the river rose four feet. Indeed, on Sunday morning, the water was one to four feet deep over one-half to three-fourths of the yard. On that morning all the live stock were put on the viaducts, which were about ten feet above the level of the yards. During daylight Sunday the water rose another four feet, and during Sunday night and Monday morning five feet more, and when the rise ceased on June 1 the river

was thirteen and one-half feet above the high-water mark of 1881.

The stock yards were entirely submerged, and the entire bottoms, east and west of the river, clear to the bluffs, were flooded—the water in that territory being from five and six to fourteen feet deep. Situated within this district was the live stock exchange building, containing a bank and numerous offices, including those used by the live stock officials of the different roads. There was also within the flood area a number of other banks, numerous hotels, stores and lumber yards; all the packing houses of Kansas City, railroad shops and yards, and the union depot; nearly all the large factories, warehouses, implement houses and wholesale grocery stores. So unexpected to all concerned was the rise of the river that not a dollar's worth of property was removed in anticipation of the flood. Many thousands of homes in Kansas City were submerged, and the inhabitants fled to the hills and other places of safety, with nothing saved from destruction but the clothing they had on. An illustration of the suddenness of the disaster is afforded by the following: During the morning of Sunday the finest passenger train of the Atchison road, its California limited from Chicago, arrived at the union depot with passengers. The engine was uncoupled from the train and moved to the coal chute, and after coaling, on account of the rapid rise of the water and floating driftwood, was unable to get back to the depot. When the flood came on Sunday morning, May 31, it swept fifteen or sixteen bridges from their piers, about two thousand houses from their foundations, hundreds of freight cars from the tracks, and every lumber yard in the bottom lands, and the lumber was swept away. Houses, lumber, cars and other wreckage were piled in the streets, completely blocking them, and drifted upon the wrecked bridges. The one bridge which stood was the Missouri Pacific bridge, upon which for safety there had been stationed seventeen locomotives. The debris carried against that bridge completely damned the river, so that the water ran over the top of the locomotives on the bridge.

The vast accumulation of debris in the streets and against the bridges obstructed the flow of the water, so that the river rose higher than it otherwise would have done, it being ten feet and five inches higher at the mouth of Turkey Creek, near the stock yards, than it was at Hannibal bridge over the Missouri River, at about a mile below.

For a period of seven or eight days, whilst these appalling conditions continued, the cattle remained upon the viaducts, as we have said, could not be properly fed and watered, and over five hundred perished, and the remainder were greatly injured. After the subsidence of the flood, owing to the fact that the cattle were in such a starved and weakened condition as to be unfit to be carried forward to the point of destination, the railway company, seeking to minimize the loss, and with the consent of the plaintiffs, and after they had refused to receive the cattle, carried the remainder of the herd to pastures in Lyon County, Kansas, where they were held until about the tenth of July following, when they were forwarded by the railway company on the original billing to Atchison, Kansas, and from thence to the place of destination over the Burlington and St. Paul roads.

With these undisputed facts in mind let us briefly consider the contentions relied upon to establish the liability of the railway company, in order to determine whether there was any evidence of negligence adequate to have justified the submission of the case to the jury.

1. It is urged that the company was negligent in detaining the cattle at Wellington and Strong City, and in not carrying them promptly by way of Topeka to Atchison and there delivering them to the Burlington. The undisputed facts which we have stated concerning the prompt arrival of the cattle at Wellington and Strong City, the early initiation of their movement forward as routed, the information as to the washouts on the Burlington line and of the bad condition of the track of the Atchison company, the unloading and reloading, and the final impossibility of sending the cattle forward by way of

Topeka to Atchison, we think completely answers the proposition, and leaves room for no other conclusion than that it would have been the duty of the court to set aside any verdict which had been rendered upon the contrary hypothesis.

2. It is insisted that, even if there was no proof of negligence on the part of the company because of its failure to move the cattle by way of Topeka to Atchison, they should have been detained at the Strong City and Wellington feeding stations "until the flood, which had been on in the Kaw River, had subsided." And, although argued as a separate proposition, involved in and connected with the contention just stated, it is urged that the railway company was negligent in deviating the shipments to Kansas City, thereby taking the cattle into the lowlands at the mouth of the river in front of the approaching flood. But we think these contentions are disposed of by the statement of the undisputed facts which we have heretofore made. Whether, irrespective of negligence, the railway company, as a matter of law, was without the lawful power when the break in the lines occurred to seek to discharge its duty to forward promptly, by sending the cattle via Kansas City, is a subject which we shall hereafter separately consider. The propositions we are now considering are, therefore, to be tested solely by considering whether there was any proof tending to show negligence in sending the cattle via Kansas City. That the stock yards at Kansas City under ordinary conditions were a fit connecting point to send the cattle, in view of the break in the line of connection to Atchison via Topeka, cannot be disputed. The propositions therefore reduce themselves to the contention that the flood conditions were such that it was negligence on the part of the carrier to send the cattle to Kansas City, because the railroad officials knew, or should have known, that it would be unsafe to send them to that point. We are of opinion, however, that the undisputed facts which we have recited, concerning the eligibility and safety of the stock yards at Kansas City under normal conditions, and the unexpected and unprecedented character of the flood which subsequently

engulfed those parts, entirely dispose of the contention. But the want of merit in the proposition does not alone depend upon these general considerations, as we think that the record abundantly shows that there was no reasonable ground whatever for the contention that the officers of the Atchison company were in any way lacking in diligence in endeavoring to ascertain the flood conditions and the probability as to a further rise in the river, which might render it hazardous to take the cattle to Kansas City. This is also indisputably shown by the negotiations with the Burlington and Missouri Pacific roads in respect to receiving the cattle at Kansas City as it is manifest that those officials, like all others concerned in the vast interests which were destroyed by the flood in question, had not the slightest suspicion, or reason to indulge in the suspicion, that a flood of such unprecedented and injurious proportions would come upon Kansas City. These considerations and those which we have previously stated effectually also dispose of the last contention as to acts of alleged negligence on the part of the railway company, viz., that the railway company was negligent in failing to move or cause to be moved the cattle from their position of peril in the stock yards at Kansas City before the arrival of the climax of the flood.

It remains only to consider the proposition that, irrespective of the absence of all negligence, the railway company was as a matter of law responsible, because of an alleged wrongful deviation, caused by carrying the cattle via Kansas City instead of via Topeka to Atchison, for delivery there to the Burlington road. No express agreement was shown to carry the cattle to Atchison via Topeka. But as that route was the usual and most direct one for such shipments, and as the owners were to be subjected to the expense of feeding en route, we shall assume, for the sake of argument the best possible view for the plaintiffs, viz., that the duty of the railway company, under normal conditions, was to transport the cattle by that route. But this general duty, assumed though it be, was in the very nature of things restrained and limited by the right

of the carrier, in case of necessity, especially in order that it might carry on the operations of its road, to resort to such other reasonably direct route as was available under existing conditions to carry freight of this character to destination. By the admiralty law, a departure from the regular course of a shipment when done under the usage of trade is no deviation. *Hostetter* v. *Park*, 137 U. S. 31, 40. So, also, in *Constable* v. *National S. S. Co.*, 154 U. S. 52, it was said: "In the law maritime a deviation is defined as a 'voluntary departure without necessity or any reasonable cause, from the regular and usual course of the ship insured.'" As we think the undisputed proof to which we have referred not only established the existence of the necessity for the change of route, but also, beyond dispute, demonstrated that there was an entire absence of all negligence in selecting that route, we are clearly of opinion that no liability was entailed simply by reason of the change, even if that change could in law be treated as a concurring and proximate cause of the damages which subsequently resulted.

Affirmed.